APPEAL COURT, HIGH COURT OF JUSTICIARY

[2015] HCJAC 128
HCA/2015/818/XC

Lord Justice Clerk
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

MARK WILLIAM PATRICK MACLENNAN

Appellant;

against

HER MAJESTY'S ADVOCATE

Respondent:

Appellant: Alonzi, D Hughes; John Pryde & Co (for Jim Friel, Glasgow)
Respondent: KM Harper AD; the Crown Agent

23 December 2015

Background

[1] On 23 May 2013 a boy, namely RO, aged just 3, reported certain matters of concern to his parents. These involved the appellant, whom he knew as "Mark" and who was a manager at the Nevis Nursery, Fort William. The police were informed and a joint investigative interview (JII) took place on the following day. This was described as a "negative" interview by the advocate depute. The appellant was detained and interviewed on the same day.

[2] On 29 May, a questionnaire was sent out to other parents of children attending the nursery. As a result, a JII was conducted with a girl, ML, aged 5. She spoke to an occasion when the appellant had tickled her between her legs using what the trial judge describes as a fleeting touch. On 31 May, the appellant was interviewed about this. He was then arrested. The matter was reported to the procurator fiscal. The appellant appeared on petition on 4 June 2013. He was charged only with a sexual assault on ML, contrary to section 20 of the Sexual Offences (Scotland) Act 2009.

[3] On 11 June, RO was re-interviewed. He was asked certain pointed questions, such as "you don't like Mark, what does he do that you don't like" and repeatedly "what does Mark do that's scary". He was able to say that he and his father had "willies" but that he hadn't seen anyone else's. However, he went on to say that he had told his parents that Mark had put his willie in his mouth and hurt his teeth. He placed his fingers in his own mouth and made choking noises to demonstrate what had happened. It is fair to say that the interviewers had considerable difficulty in focusing RO's attention. His conversation naturally wandered into other areas more immediately relevant to him.

[4] Following a degree of publicity, AG, then aged 17, came forward. She gave an account of being involved with a youth music theatre group for which the appellant did voluntary work as a "chaperone" for some of the children, including AG. When she was 12, in 2007, the appellant had persuaded her to remove all her lower clothing to assist in measurements for her pantomime costume. He had touched her in the area

of the vagina. A similar incident of a more lasting duration occurred during the following year and yet more episodes happened at various locations subsequently. The final one was in 2010.

[5] Another boy from the nursery, namely CK, was interviewed on 9 July 2013. The trial judge reports that this JII was not well conducted. The child asked on 9 occasions whether he could go and see his mother in the next room. He was then questioned after having been wrongly told that he would only be kept for another minute or so. The questioning was "leading in the extreme". The judge describes it as of "dubious evidential value". He was, for example, asked if the appellant had "touched his bum". He had agreed with this.

[6] All the JIIs were sent to a psychologist, who was asked to report on their quality and to recommend how best to take the young children's evidence. On 21 October 2013, the psychologist reported that the interviews were of reasonably high quality. The best way of taking their evidence would be on commission.

[7] It was only on 18 February 2014 that the case was reported to Crown Office. The report did not advise on the state of the young children's memories by this time; now at least 9 months after the alleged incidents. On 26 February, Crown counsel instructed an indictment in respect of all 4 complainers, with the JIIs being used as part of the examination-in-chief. Transcripts of the JIIs had all been disclosed to the appellant on 14 August 2013, notwithstanding that he had still only appeared on a petition regarding the incident with ML.

[8] An indictment was served on the appellant on 17 March 2014. It contained 6 charges, the first 4 being statutory sexual offences (Criminal Law (Consolidation) Act 1995 s 6, 2009 Act ss 20, 18 and 19) involving respectively the complainers AG, ML, RO and CK. The remaining charges concerned the appellant's collection of child pornography (Civic Government (Scotland) Act 1982, s 52A(1) and 52(1)(a)).

[9] On 4 April 2014, the Crown lodged applications in respect of each of the young child complainers ML, RO and CK for non-standard special measures; in particular for their respective JIIs to be taken as their evidence-in-chief (Criminal Procedure (Scotland) Act 1995, s 271M), with their cross-examination and re-examination to take place on commission (s 271I). These applications were continued to the Preliminary Hearing set for 24 April. The defence had by then instructed their own psychologist and a report on the methodology used at the JIIs was anticipated. It was minuted that the defence might lodge a preliminary issue minute challenging the admissibility of the JIIs, but this was never done. At a PH on 10 June, the court granted the Crown's applications for special measures. There had been no objection to this.

[10] The commissions were fixed for 1 and 2 July 2014 at Inverness. They took an interesting, if predictable, course. They were being held over a year after the children's first reports. ML was cross-examined by senior counsel. He began by asking a series of questions about ML's family, friends and school. ML confirmed that she had been at nursery, but said that the teachers had all been female. She had only been at one nursery. She did not know what it was called. It was not in Fort William, but in Upper Achintore (which is in Fort William). No men had worked at the nursery. Although asked a number of other questions in cross and re-examination, ML was not asked about the incident involving "Mark", which she had spoken about in her JII.

[11] RO's commission involved a prolonged exchange with other persons, with the judge only managing to get a look in on page 14 of the transcript and counsel asking his first question thereafter. After sundry pleasantries, RO was asked about his, and his father's, "willies". Eventually (p 32), there is this passage:

> "Q … Do you remember going to nursery in Fort William?
>
> A Ding! Eh, eh.
>
> Q Don't remember going to nursery in Fort William.
>
> A No.
>
> …
>
> Q … Do you remember anything about Fort William?
>
> A Nope …".

Once again there was no direct questioning by either party about the facts in the libel.

[12] CK's commission was not very different. He did remember going to nursery, but a different one from that in the libel. He recalled a teacher called "Jack". Again the alleged incident was not mentioned.
[13] On 18 August 2014, the defence lodged a minute raising a compatibility issue under section 288ZA(2), of the 1995 Act. This complained that the appellant had "not had an adequate and proper opportunity to challenge the key witnesses against him in breach of the [appellant's] Convention rights under Article 6, Article 6(3) …". It was said that the appellant had had no opportunity to question the children "shortly" after the JIIs. He was thus deprived of an opportunity "to effectively participate in the cross-examination process". He did not have an equality of access to the witnesses. The judge who heard the initial argument rejected these contentions. She did not consider that it was inevitable that any trial would be unfair in a Convention sense.
[14] The trial commenced on 26 January and concluded on 30 January 2015. The Crown withdrew charge (4), involving CK. The appellant's guilt on the child pornography charges (5 and 6) was not disputed. The jury found the appellant guilty of charges (1) and (3), relating to AG and RO. They found charge (2), involving ML, not proven.

Submissions

Appellant

[15] The appellant contended that there had been unjustified delay in initiating the commission process. Though the appellant had been given the opportunity to cross-examine the witnesses at the commission, the process had been inherently unfair. The Crown had chosen not to refer to the JIIs at the Commission. The practical result of that was that the defence had been faced with the prospect of reminding the children of what they had said at their JII in order to conduct any meaningful cross-examination. The defence would have had to have reminded the children of their incriminating statements before seeking to challenge them.
[16] The appellant had a Convention right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (Art 6(3)(d)). It was clear that the children's memories had been severely affected by the passage of time. Either the children had not understood the questions put to them at the commission or they had had no recollection of any of the matters they had previously spoken about at the JIIs. The attempts to cross-examine the children had been futile. A comparison was made with the test for the competence of a child witness in England (*R* v *Powell* [2006] 1 Cr App R 468; *R* v *B* [2010] EWCA Crim at 38; *R* v *M* [2008] EWCA Crim 2751; *R* v *Maliki* [2009] EWCA Crim 365).
[17] The evidence upon which the appellant had been convicted had been based solely or decisively on the statements of the young child complainers. Charge (1), in respect of AG, required mutual corroboration from the evidence on either charges (2) or (3) in respect of ML or RO. The jury had heard, and would have been entitled to take into account, the testimony of CK on Charge (4), even although it had been withdrawn by the Crown.
[18] There was no equality of arms, in terms of the Crown's reliance on the JII statements, since contemporaneous cross-examination had not been possible. There was no pre-trial confrontation hearing in Scotland as there was in other legal systems. Whilst special measures may be appropriate in some cases, they could not be allowed to prejudice the fundamental right to a fair trial.

Respondent

[19] Mutual corroboration must have been applied by the jury in order to convict the appellant on charges (1) and (3). The trial judge had directed the jury to exercise extreme caution with the evidence of the child witnesses at the JIIs and on commission. He had also emphasised the length of time between the JIIs and the commissions. Such directions accorded with *N* v *HMA* 2003 JC 140 (LJC (Gill) at para 37). There were adequate safeguards in place, including: judicial oversight of the commissions; appropriate directions to the jury; and the opportunity to cross-examine during the commission. Such measures ensured that the appellant's Article 6 right had not been violated (*Al Khawaja* v *United Kingdom* (2012) 54 EHRR 23; *Horncastle* v *United Kingdom* (2015) 60 EHRR 31). The jury had been properly directed on how to consider the evidence.

That evidence did not stand alone. It was corroborated by that of AG on charge (1). The cross-examination at the commission had proceeded under judicial control and oversight. It had been skilful and fruitful. It had founded cogent submissions to the jury about the children's reliability. There had been no miscarriage of justice.

Decision

[20] It is important at the outset to define the limits of this appeal. It is based exclusively on a contention that the appellant's Article 6 right to a fair trial, especially his subsidiary Article 6(3) right to examine witnesses, had been breached because he did not have "an adequate and proper opportunity to challenge the key witnesses against him". There is no challenge to the convictions based on the domestic right, or privilege, to cross-examine witnesses. There is no appeal based upon the court's decision to allow the JIIs to be used as evidence-in-chief under section 271M of the Criminal Procedure (Scotland) Act 1995. There was no opposition to that course, which converted what might otherwise have been regarded as hearsay, under domestic rules of evidence, into admissible testimony. There is also no appeal based on delay, even if lapse of time features in the principal argument. There is no appeal based upon the application of mutual corroboration between charges (1) and (3).

[21] It is equally important to recognise the general problem which arises with the examination of very young children. It has long been recognised that "in criminal cases, where the facts are usually simple, and justice requires a full investigation, children, however young, may ... be examined on facts within their comprehension" (Dickson: *Evidence* (Grierson ed) para 1544 citing *Buchan* (1833) Bell's Notes 246, which involved an alleged sexual offence against a complainer aged 4). The problem in the modern era, especially, but not exclusively, with very young witnesses is the time which it takes before their formal evidence is taken. There is also an increasing recognition of the psychological effect of prolonged criminal proceedings on witnesses in general and those of a vulnerable nature, including children, in particular.

[22] The guarantees in Article 6(3) of the Convention are specific aspects of the Article 6 right to a fair trial; the two provisions require to be examined together (*Asch* v *Austria* (1993) 15 EHRR 597, at para [25]). The European Court has repeatedly emphasised that the admissibility of evidence is primarily governed by domestic law. As a rule, it is for the national courts to assess that evidence (*SN* v *Sweden* (2004) 39 EHRR 304, at para 44).

[23] The task, in determining whether a criminal trial has been Article 6 compliant, is to ascertain whether the proceedings in their entirety, including the way in which the evidence was taken, were fair (*Asch*, *(supra*), para 26; *SN* (*supra*) at para 44). The starting point is the principle that all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. "As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when the witness made his or her statements or at a later stage of the proceedings" (*Saidi* v *France* (1994) 17 EHRR 251, at para 43; *SN* (*supra*), at para 44). However, they do not provide an accused with an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable for the court to hear oral testimony (*Bricmont* v *Belgium* (1990) EHRR 217, para [89]; *SN* (*supra*) at para 44). The use in evidence of statements obtained at the stage of the police investigation is not inconsistent with Article 6, provided that the rights of the accused have been respected (*Saidi* v *France* (*supra*) at para 43; *Kostovski* v *Netherlands* (1989) EHRR 434, at para 41).

[24] In *SN* v *Sweden* ((*supra*), the European Court recognised (at para 47) the special features of criminal proceedings involving sexual offences, which are often conceived of as an ordeal by the victim, particularly in the case of child complainers. In assessing a complaint under Article 6, regard has to be had to the right to respect for the private life of the complainer. Against that background, the Court accepted that, provided that they could be reconciled with an adequate and effective exercise of the rights of the defence, certain measures may be taken for the purpose of protecting the alleged victim (*ibid*).

[25] In *SN* v *Sweden* (*supra*) there was no violation where the decisive evidence came in the form of police interviews of the only child complainer; the first being conducted during the investigative phase with no defence representative present; and the second taking place, by agreement, in the absence of a defence representative but with written questions prepared by the defence being put to the child. There was no

violation where there was no oral testimony at all; only the playing of the video of the interviews. The latter had enabled a challenge to the child's credibility. The court was conscious that some of the detail in the child's evidence had been vague, uncertain and lacking in detail. It also had regard to the leading nature of some of the questions. The court was nevertheless satisfied that the necessary care had been applied by the domestic court in the evaluation of the child's evidence.

[26] In this case, the appellant had the opportunity, through his senior counsel, to question the child witnesses directly in a judicial setting. He was not restricted to pre-prepared written questions. In short, the appellant had a full opportunity to cross-examine, in a domestic sense, the children. He took that opportunity. At the trial diet, he was able to challenge the reliability of the children's accounts at the JIIs having regard both to the content of the JIIs themselves and the answers obtained at commission. The fact that it appeared, on a somewhat limited probing of the children, that they could not immediately recall the alleged offences, does not carry with it any implication that the cross-examination was not effective. On the contrary, the appellant's counsel must have been reasonably content with the responses he obtained. He did not, no doubt advisedly, seek to delve any deeper, which he could have done by referring, for example, specifically to the incidents libelled. He could have questioned the witnesses much more closely, had that course been advised. This may, or may not, have prompted a recall of memory.

[27] The appellant could have objected to the JIIs being treated as the child complainers' evidence in chief (s 271C(4A)). He did not do so. The grant of this measure unopposed, as already noted, converted the JIIs into testimony. There can be little force in a general objection which seeks to prevent a recorded interview taken in the initial stages of a police investigation being used as proof of fact in the case of a very young child complainer. That material is likely to be the most accurate account of events, at least if the questioning is such that does not suggest the answers. The loss of memory, if that is what occurred, does not render the consideration of such material unfair in Convention terms. There are other aspects of the system which protect the accused's right. These include the very fact that the JIIs are recorded electronically and capable of scrutiny by the jury in light of the cross-examination at commission. There are also what were in this case directions from the trial judge on the degree of care required when analysing this sort of evidence. There was also the mutual corroboration, which it was accepted could apply between charges (1) and (3), even if the criminal acts libelled in each charge had some dissimilarities. In all these circumstances, it is not possible to classify this trial as unfair in a Convention sense. The appeal must accordingly be refused.

[28] There is nevertheless an obvious concern about the delay which took place between the JIIs and the commissions. Whether a more rapid strategy by the Crown would have altered the position is doubtful, given that such commissions can only take place after an indictment has been served (see *infra*). Had the Crown actually treated the case as if the time bar in custody cases had applied, there would still have been a substantial gap in time before the defence were able to enter the fray in any judicial setting.

[29] For the future, it may be that two expedients might be considered. The first uses the existing commission procedure. At common law, evidence on commission in criminal cases was not competent (*HM Advocate* v *Hunter* (1905) 7F 73), being contrary to the Act of 1587 which requires all the proceedings to be in the presence of the accused. This was substantially modified in relation to witnesses who were abroad, ill or infirm by section 32 of the Criminal Justice (Scotland) Act 1980. This provision, which was the precursor to section 272 of the 1995 Act, allowed evidence on commission "in any criminal proceedings" on the application of either the prosecutor or the defence. It appears, from its reference to applications where the trial court is not yet known, that a commission can be requested by either party in advance of service of the indictment.

[30] Sections 271 and 271A of the 1995 Act, which authorise the use of a commission to take the evidence of children, only apply once an indictment or a complaint has been served (see s 271(3)). That, in solemn proceedings, will have the effect of substantially delaying any formal examination or cross-examination. This problem could be solved, however, by introducing a relatively simple provision permitting the evidence of young children to be taken on commission at any time after the appearance on petition. That may be a matter which the Government might consider in the relatively short term.

[31] The second expedient would be to move away from the traditional approach and adopt one more akin to the Scandinavian model, seen in *SN* v *Sweden* (*supra*). This would see defence involvement, if an accused so wished, very soon after, or even at, the JII. This may be seen as a more radical step, but it may be

the most appropriate in the modern era. Such a move would herald an end to seeing young children being questioned in a court or commission setting with the legal formalities of examination in chief and cross. It seems plain, however, that, for such a system to be regarded as acceptable in domestic terms, far greater controls and training would need to be devised to ensure the fairness of the interview process. This may be something to which consideration can be given in the longer term.

[32] It is worth adding that, given the extensive material now available to lawyers on what constitutes a fair interview of a young child, the assessment of fairness is for the lawyers, and ultimately the judge, to determine, and not for expert opinion from a psychologist.