Regina v Michael Crombie

No: 201100035 B2

Court of Appeal Criminal Division

26 May 2011

[2011] EWCA Crim 1404

2011 WL 844014

Before: Lord Justice Richards Mr Justice Eady Mr Justice Lindblom

Thursday, 26th May 2011

Representation

Mr D Keating & Ms M Stevenson appeared on behalf of the Applicant.

Miss S Canavan appeared on behalf of the Crown.

Judgment

Mr Justice Eady:

1 On 26th November 2010, in the Crown Court at Snaresbrook before His Honour Judge Bing, the applicant was convicted unanimously of 27 counts of indecent assault contrary to section 14 of the Sexual Offences Act 1956 (counts 2–7 inclusive and 17–36 inclusive). He was also convicted of seven counts of making indecent photographs contrary to section 1 of the Protection of Children Act 1978 , (counts 8–14). There was also one count in respect of which he was convicted of possessing indecent photographs contrary to section 160 of the Criminal Justice Act 1988 (count 15). The applicant was acquitted of two further counts of indecent assault (counts 1 and 16 on the indictment) on the direction of the judge.

2 On 21st December he was sentenced by the learned judge concurrently on each count as follows: counts 2–4 and 17–36, indecent assault, one year six months' imprisonment; counts 5–7, indecent assault, seven years' imprisonment; counts 8–14, making indecent photographs, three years; and on count 15, possessing the indecent photographs, three years. Thus there was a total sentence of seven years' imprisonment imposed with a direction under section 240 of the 2003 Act that time served on remand was to count towards sentence. A Sexual Offences Prevention Order was made until further order under sections 104 and 106 of the 2003 Sexual Offences Act and a forfeiture order under section 143 of the Powers of Criminal Courts (Sentencing) Act 2000 was made in respect of the video recordings. Of course, having been convicted of an offence listed in Schedule 3 to the Sexual Offences Act 2003 , the applicant was required to comply with the notification requirements of Part 2 of the Act.

3 The Registrar has referred his applications for leave to appeal against conviction and sentence to the full court. At the moment we are concerned with the application in respect of conviction.

4 The provisions of the Sexual Offences (Amendment) Act 1992 apply and there should be no identification of any of the victims. They will be referred to in this judgment by various initials.

5 The applicant, now aged 74, had a long career as a music teacher. Following his retirement in 1990 he began to teach music on a private basis at his home. In 2007 police investigated three complaints of indecent assault from “S”, “E” and “N”, but a decision was taken not to pursue a prosecution through lack of evidence. In 2009 a second police investigation began following a complaint by “L”. She reported that during the course of her lessons many years earlier she had been required to undergo breathing exercises in the applicant's bath. During the course of the

investigation a number of former pupils came forward with allegations of inappropriate touching. A recurring theme of many of the complaints was the applicant's apparent interest in breath holding exercises.

6 On 12th January 2010 the applicant's home was searched and eight video cassettes were seized. These contained footage of L when younger, believed to be when she was aged 11 to 13, in the applicant's bath. During some of the filmed exercises she was naked, with her hands and legs tied, whilst submerged under water. A search of the applicant's computer showed numerous searches for and visits to websites with a focus on women holding their breath under water.

7 The applicant was interviewed twice. At the first interview, without a solicitor, he was asked about some of the complaints including those made by L. He denied any improper touching and denied any sexual interest in girls under the age of 18. At the second, this time with a solicitor present, he made no comment.

8 The sole ground relied upon for the purpose of challenging the conviction relates to an allegation of jury misconduct. At the end of the third day of the trial, following L's evidence-in-chief and the viewing of the video material, the jury left the jury box. A male juror (number 3) was heard to say the word “wanker” as he walked past the applicant in the dock. The following day, on 11th November, the matter was raised in open court. The judge heard submissions. It was agreed that the individual juror should be spoken to by the judge in court in the absence of other jurors. The juror was not asked to confirm or deny what he had allegedly said, but he was asked a single question put by the judge, namely whether he felt that he could fairly and conscientiously try the case, to which he replied “Yes”. The judge thereafter rejected a defence application to discharge the juror.

9 It so happened that on day six of the trial a second juror was discharged with the agreement of both parties because she had discussed the case on the internet on 11th November. This was a separate incident and only falls to be considered because it is argued on the applicant's behalf that there was inconsistency in the judge's approach between these two events. The second juror was discharged, however, because of a manifest unwillingness or inability to comply with judicial directions. We can therefore see no inconsistency of approach as such: they were quite different situations.

10 Turning to the background circumstances, the prosecution case was that the applicant was a man with a sexual fetish centred upon breathing and underwater breath holding. He had abused his position of trust and indecently assaulted girls in his care. In one case, that of L, whom he had groomed, he made indecent images which he had kept.

11 The defence case, on the other hand, was as follows. The applicant gave evidence himself. He said that there was no improper or sexual touching of any of his pupils, and whilst he accepted that the computer internet searches reflected the true position, he did not have a sexual fetish in respect of females holding their breath underwater. He had filmed L in the bath, but he claimed this was not indecent and that the bath sessions formed a legitimate part of his teaching technique and were intended to be “fun” with no sexual motive.

12 The issues for the jury were thus as follows. First of all, as to indecent assault, whether the applicant intended to commit an assault which was by the standards of ordinary members of society indecent, or whether there was an innocent explanation for any of the touching. Secondly, as to the indecent images, the jury had to decide whether the applicant made images of children which were indecent.

13 It is only necessary to summarise briefly the facts relating to each complainant.

14 First of all, as to L. From the age of seven she attended music lessons at the applicant's home. This would have been in the early 1990s. After a few weeks the applicant started to kiss her forehead and to place his hand on her stomach over her clothing. She was also required to sit on his lap as she was doing what he characterised as “breathing exercises”. As time passed he kissed her on the lips, stroked her chest and stomach, rubbed her legs and put his hand up her skirt. On one occasion he placed his finger down the front of her knickers and on her clitoris. When she was about ten he picked her up and lowered her in such a way that she rubbed against his body. As part of the breathing exercises the applicant put a fish tank in the music room. L had to put her face into the tank and blow bubbles into the water. Soon after, the applicant suggested that they practise this in the bath. At first L would wear a bikini. On one

occasion, having forgotten her costume, she undressed down to her knickers. The applicant tried to persuade her that she would be happier if she was naked. He then kissed her and pulled her kickers down and she got into the bath. Videos seized from the applicant's house revealed L in various stages of undress in the bath. The applicant had also tied her up and held her down as she struggled for breath.

15 I turn to the complainant whom I shall call “X”. To her counts 28–30 are relevant. Between the ages of 13 and 16, X, L's sister, attended lessons with the applicant. The applicant made her sit on his lap. From an early stage he would kiss her, a quick peck when she arrived, and sometimes during the lesson, but as time passed the kisses would get longer until he was eventually kissing her with an open mouth.

16 The next complainant is “A”, to whom count 27 relates. She attended music lessons with the applicant for about a year. She would sit on his lap and during breathing exercises he would kiss her and would linger when kissing her on the mouth. He would feel her chest, place his hand on her breasts for a couple of minutes, and as she sang he moved his fingers up the back or side of her leg.

17 The complainant “Y” I shall consider next, to whom counts 16–20 relate. In 1991 she started music lessons with the applicant. A large part of the lessons would involve “breathing techniques”. The applicant would get her to put her head into a bowl of water and make bubbles into the bowl. Whilst doing the breathing exercises the applicant would tell her to undo her blouse. He would place his hand above her breasts, put his hand on her upper thigh as she sang and kiss her on the lips.

18 “M” was the complainant to whom counts 21–24 related. She started having private lessons with the applicant when she was 12. They lasted for three to four years. During breathing exercises he would put his hand up her top and he would get her to hold her breath until she felt dizzy.

19 Then there were the three complainants whose counts related to the original complaints from 2007.

20 “N” in particular was concerned with counts 25–26. She attended music lessons and during the breathing exercises he would put his hand on her chest, and sometimes her bare chest. After a few lessons the applicant suggested that she bring her bikini so that she could lie in the bath and he could watch her breathing technique. This did not happen. The applicant kissed her once as she was leaving one of the lessons and once gave her a longer kiss whilst in the music room.

21 The complainant “S” was the one to whom counts 33–34 related. She started having music lessons with the applicant in 2002. The applicant put his hand on her thigh or knee and on about four occasions ran his fingers up and down her thigh. One day he felt the logo on her T-shirt across her chest while asking about the material.

22 Counts 31–32 concerned the complainant “E”. Whilst she was doing the breathing exercises he would sit close by. He would put his hands on her back and on a couple of occasions on her knee. He also told hold of her temple with both his hands and kissed her on the forehead.

23 As the judge's ruling has been criticised, we think it right to set out the substance of what he actually said. It was in these terms:

> “The principal and main witness is a witness called [L] who complains of various incidents of sexual assault. But in addition she was asked by the defendant to submerge her face and body and, in many instances, her head under water.
>
> [L] had little memory of precisely what happened, but what is important is that the incidents were filmed by the defendant and he kept copies of his film on video tape. They happened in the early 1990s and so there was no DVD but there were video tapes.
>
> Yesterday [L] gave her evidence in chief and was confronted by the films. She had seen them before and so the shock was not very great on her. But the jury therefore had a young woman who is now twenty-six giving evidence in chief about being sexually abused by the defendant and seeing that twenty-six year old woman look at herself

when prepubescent and going through puberty, naked or in a bikini in a bath with her face submerged in water. To put it mildly, that was vivid evidence on a very sensitive subject.

The day concluded with her evidence in chief and therefore the jury has not heard any matters to undermine that evidence. That is yet to come. But when proceedings finished yesterday a juror was heard to say to the defendant as he walked past the dock on the way out of court, because the exit to the court goes quite close to the dock, "Wanker", to the defendant. I accept for the purposes of this application that that word was said and it was said by juror number 3.

I heard submissions from counsel and the decision that I made was to ask juror number 3 to come into court and to say that we had had a difficult and somewhat emotional day of evidence which was vivid and that he was overheard to say something. I didn't repeat what was overheard and nor did I actually ask him whether he said it.

What I did ask was the open question as to whether he felt that he could fairly and conscientiously continue to try this case impartially. The answer unequivocally was, "Yes".

The stage has been reached as to whether I should discharge that juror. In all the circumstances I consider that I should not discharge that juror and that his answer must be accepted at its face value, but that when the jury as a body return then they will be given a further robust direction by me and then I hope the trial can continue."

It is not in dispute that the learned judge did give a further robust direction to that effect.

24 Mr Keating, for the applicant, who has presented his submissions with considerable skill, made the following points in his written submissions about the juror's conduct which he has developed before us orally this morning:

"17. Reliance was placed on the following points:

i. The comment was explicit and calculated;

ii. It was made in close proximity to a number of persons in court, including several members of the defendant's legal team and the officer in the case;

iii. The comment demonstrated overt hostility towards the defendant;

iv. The timing of the comment came after a strongly worded direction from the trial judge on the importance of keeping an open mind before hearing all the evidence;

v. The comment was made at an early stage in the proceedings (and when reducing to eleven in number would not be fatal);

vi. The comment was made within the ear shot of other jurors and therefore had the potential to contaminate the integrity of the jury as a whole;

vii. There was a real concern, if a juror was making explicit comments in public, what behaviour was taking place in the privacy of the jury room.

18. The juror having chosen to act in the manner he did — demonstrated that he was incapable of discharging his duties in accordance with his oath. His answer in the affirmative to the judge's direct question was perhaps not surprising in the circumstances and should not have been determinative of the issue."

25 The appropriate test to apply on such an application is whether a fair-minded and informed observer would conclude that there was a real possibility that the jury would be biased. Reference was made to the decision of the House of Lords in *Re Medicaments (No 2) [2001] 1 WLR 700* .

26 It is quite understandable that anyone watching the compilation video in question would feel

troubled by what the applicant appeared to be doing. One cannot expect jurors in distressing circumstances to be wholly impervious to emotional reactions; that is a normal human response. What juror number 3 did, albeit obviously inappropriately, was to vocalise his feelings about the applicant's conduct. The judge asked him whether he would be able to discharge his responsibilities nonetheless and accepted what he said at face value. It is true that he said that “his answer must be accepted at face value”. Of course, taken literally, that would not be an accurate statement of the law, but we do not believe that this off-the-cuff form of words was intended to state the law, as opposed to recording the judge's own evaluation of what the juror had said, whom he saw and heard; we, of course, did not have that advantage.

27 Another authority to which reference was made was that of Kellard [1995] 2 Cr App R 134. It was there emphasised that it is not established that a defendant cannot receive a fair trial on the jury issues merely by reason of the fact that one juror has formed a provisional adverse view on some aspects of the evidence.

28 We have decided that the judge was fully entitled to come to the conclusion he did. No reasonable onlooker would conclude, merely from an emotional reaction to distressing evidence, that the jury would be biased or that the applicant could not receive a fair trial. Moreover, we do not think that there is anything in the point that the juror should have been given further time for reflection. That was peculiarly a matter for the judge's judgment and discretion. Accordingly, the application in relation to the conviction is rejected.

(Submissions on appeal against sentence followed)

29 MR JUSTICE EADY: The learned judge was entitled to treat these offences as serious. Although there have been a significant number of statements from character witnesses, which we have read, these have consistently tended to understate the seriousness of the applicant's abuse of power over his victims.

30 The first question is whether this court should, by way of mercy, reduce the sentence on account of the applicant's age and ailing health. The applicant has a deteriorating eye condition and needs a walking stick to get about following a spinal operation. Neither of these factors was expressly referred to in the sentencing remarks and we are not sure how much weight was actually attached to them. It is well-established that sometimes this court will make a reduction in the case of elderly or infirm offenders with health problems. This sometimes is explained by reference to “mercy”, although it is also important to recognise that sometimes such people find the rigours of a prison environment correspondingly more difficult to tolerate than those who are stronger physically and fitter. We think it right to make some reduction to take account of these factors.

31 It is also said that the seven year term was out of proportion to the sentences imposed in respect of the other victims. We think there is some merit in this argument also.

32 Accordingly, we grant leave on the application relating to sentence. So far as the appeal is concerned, we propose to substitute a sentence in respect of counts 5–7 of five years' imprisonment and the original sentence of seven years will accordingly be quashed. To that extent the appeal succeeds.

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