



Neutral Citation Number: [2019] EWCA Civ 845

Case No: B4/2018/3097

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT SITTING AT COVENTRY
(HER HONOUR JUDGE WATSON)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 4 April 2019

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE BAKER

IN THE MATTER OF W-C-T (CHILDREN)

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(Official Shorthand Writers to the Court)

Ms J Steele (instructed by Wilson Solicitors) appeared on behalf of the **Appellant** father
Ms V Edmonds (instructed by Coventry City Council) appeared on behalf of the **First Respondent** local authority
Mr C Watson (instructed by Kundert Solicitors) appeared on behalf of the **Second Respondent** mother
Ms A Paris (instructed by Alsters Kelly Solicitors) appeared on behalf of the **Third Respondent**

Judgment
(Approved)

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LORD JUSTICE PETER JACKSON:

Introduction

1. This is an appeal from a finding of fact made by HHJ Watson sitting in the Family Court at Coventry and recorded in an order of 16 November 2018. The proceedings were care proceedings brought by the local authority in relation to four children and an application issued at an earlier point by the father of the eldest three for contact with them.
2. The finding of fact from which the father appeals with permission of my Lord, Moylan LJ, hinged on statements first made in November 2015 by his eldest child, who I shall call Matilda. She was five years old at the time. The judge found that the father had inappropriately touched her on the vaginal area on one occasion, that the touch was fleeting and that it had occurred at the home of the paternal grandmother not long before. The judge also found that Matilda had told her grandmother about it before she told her mother, but that her grandmother had lied by saying that Matilda had made the allegation against her mother's boyfriend, who I will call Mr R. He is the father of the fourth child. In fact the judge found Matilda had made the allegation against her father.

The background

3. The background is that then parents separated in 2014 after a six-year relationship, with the father moving to his parents' home. The mother then formed a relationship with Mr R, who moved in with her. He was and remained a friend of the father, and the father saw a lot of the children, who also came to stay with him from time to time. Matilda would regularly stay overnight at her paternal grandparents' home without her sisters. She had a

particularly good relationship with her grandmother. The chronology as found by the judge was that on 20 November 2015 Matilda told her mother, in answer to a question about whether anyone had touched her on her "boobs" or her "fairy", "that the father had touched her". When asked to show where, the mother says Matilda pulled her tights and pants down and pointed to her vagina.

4. The mother's evidence was that she had instigated this conversation because she had overheard Matilda asking her younger sister, "Is your fairy hurting? Shall I kiss it better?", when they were playing together. The mother was shocked by this, and it played on her mind. In later accounts she said that the conversation was prompted by a storyline in the television programme Hollyoaks about child sex abuse. Nonetheless, the following day on 21 November 2015 the mother took Matilda to the police station where, in the presence of her mother, she repeated the allegation to the police officers, namely that the father had touched or hurt her "fairy" while she was staying at the grandmother's home. Two officers spoke to the child in her mother's presence but no contemporaneous note became available. The police log provided a similar account to the one given by the mother in her police statement later the same day. In addition the mother said that Matilda had said "no" when asked whether Mr R had ever touched her there.
5. On 21 November the father was himself in police custody, having been arrested on a drink-drive charge, and he was further arrested because of Matilda's allegation. He denied it, saying that Matilda had "an imaginary mind". He was charged with sexual assault. On 26 November the grandmother gave a police statement in which she described having given Matilda a shower on 14 November, Matilda pointing to her vagina and saying, "[Mr R] touched me there, nanny". So this account was the same as the other

accounts except as to the identity of the person accused. As a result of the grandmother's statement, on 27 November a police officer asked Matilda about Mr R, and the child said that she liked going to the park with him and did not suggest anything untoward. The officer then asked, "Have you told nanny anything?", to which Matilda immediately replied by saying, "Daddy hurt my fairy".

6. Because arrangements needed to be made for an intermediary to assist with an ABE interview, this did not take place until 21 January 2016. Meanwhile Matilda continued to live with her mother and, as a five-year-old, would have been aware of conversations about her and of the mother repeating the allegation to others. When the ABE interview took place, Matilda was giggly and not very cooperative, refusing to sit on the sofa in front of the camera. The only relevant information she gave was that she was made sad by daddy touching her and by not seeing him and that he had hurt her fairy at her nan's house "last night", as she put it.

7. Contact moved to supervised contact, and the recordings are of a happy relationship between Matilda and her father, although the mother described some worrying behaviour at home, and Matilda was said to have drawn a red cross on the paving slabs outside the house to stop the father and other bad people coming in. Matilda also made unrelated allegations later in 2016 about an incident when her mother threw a plate at her and punched her in the face. After a section 47 investigation the decision was taken to provide support to the family through a Child in Need plan. Social care remained involved. On 9 November 2016 a child protection plan was put in place due to domestic violence, mental health and drugs issues involving the mother and Mr R. The Crown Prosecution Service dropped the charges against the father in April 2017. After that, the

mother allowed unsupervised contact between the father and the children, including overnight contact. She said she did this because the father and grandmother were badgering her and not because she disbelieved Matilda. This contact stopped after the local authority advised the parents that it should not be happening.

8. On 5 July 2017 the father issued an application for a child arrangements order to spend time with the children. Those proceedings were however overtaken by the care proceedings that were issued on 2 May 2018. On 22 May the eldest three children were placed with maternal great-aunts, and the fourth child was placed in foster care.
9. The fact-finding hearing before HHJ Watson took place at the end of October 2018. The judge heard two days of oral evidence from a police officer, the mother, the father, the father's brother and the grandmother, and submissions on the morning of the third day. No one suggested that Matilda should give evidence, but her ABE interview was viewed. The judge gave an *ex tempore* judgment two weeks later on 16 November and provided some clarification requested on behalf of the father on 27 November.

The judgment

10. I turn now to the judge's decision. She gave herself comprehensive legal directions in terms that had been agreed between the parties. They of course included clear statements of principle about the burden and standard of proof and about lies in accordance with the case of *R v Lucas* [1981] QB 720. As relevant to this case, it also referred to the authorities that reminded the court that no case of alleged sexual abuse without physical evidence can be regarded as straightforward and that the greatest care must be taken to minimise the effect of unreliable evidence, that children are often poor historians and

many are suggestible. It affirmed that the 2011 revision of the Achieving Best Evidence Guidance applies to the interviewing of children and that the court must acknowledge and carefully analyse material where there are numerous and substantial deviations from good practice and must consider whether or not flaws in the process are so fundamental as to render the resulting interviews wholly unreliable.

11. The judge then described the background. She found that, somewhat unusually, the relation between the three adults (mother, father and Mr R) remained, as she put it, very good and that there was on the face of it no hostility between them. She accepted that on 20 November 2015 Matilda had told her mother that her father had touched her and that she had repeated it at the police station the next day and during the interview in January. She referred to the father's description of Matilda as being an imaginative child and to her quite uncooperative behaviour during the interview. She also reminded herself of the intermediary's assessment of Matilda as being highly suggestible and acquiescent and the fact that she had in the meantime been living with her mother and would have been aware of conversations in the household. She then said, "with those clear warning flags, I review the ABE evidence which is Matilda's own account to the court". She then scanned the interview, commenting upon it as she went along, before noting:

"I must look at the totality of the evidence and assess the credibility of each witness. I remind myself that it is for the applicant local authority to satisfy the court on the balance of probabilities that the father has touched Matilda's vagina, thus causing sexual harm and emotional distress. I am looking for cogent evidence which satisfies the test. The father does not have to prove anything. His case is simply that Matilda is wrong and that she is mistaken when she says that her daddy hurt or touched her fairy. He did not behave in this way. Matilda was imagining this or had been put up to it."

12. The judge then reviewed the police investigation. As to that and the ABE interview, she said that she had very much in mind that the mother could have been rehearsing the child. She then considered this possibility over the course of the next ten paragraphs. She said that she had listened carefully to the mother being questioned about Matilda's first account and that she had been struck by her response:

"It is her response which in my judgment gives credibility to her account. She is describing shock, disbelief, double-checking before taking the formal step of going to the police station. If she were coaching her daughter or fabricating an account, she would have no need to do this, and it is the detail which adds veracity to her initial account."

13. As part of her evaluation of the evidence, the judge considered no fewer than eight occasions upon which the mother had described how Matilda's account had come about, and she brought out some of the variance or inconsistencies between them. She also addressed the question of why the mother had allowed contact and noted that the mother had been clear in her oral evidence that she had been wrong to do it. She also recorded the mother's simple denial that she had put ideas into her daughter's head.

14. The judge accepted that Mr R was a truthful but conflicted witness and that Matilda had made the same statement to him about her father despite this being something that Mr R had not previously described. She found that this account bore "remarkable similarity" to the account given by Matilda to the police and to her mother. The judge also drew attention to an occasion in around October 2015, when Mr R said he had seen the father put his hands down the side of Matilda's pants, and told the mother about it because he felt it was inappropriate. She noted that the mother's evidence on this had been contradictory. She also noted that she, the mother, had not told the truth about smacking

her daughter, commenting: "A witness who lies must work harder to satisfy the court that she is not giving a further lying account". Taking all these matters together, the judge gave her assessment of the mother's credibility:

"Her evidence was delivered in an angry and pressured tone, but she was resolute in her account and what she had been told. She did not expect people to believe what she was saying ... I am quite satisfied that she has elaborated and embellished some of the details in her account, but what has never changed throughout are the words reported. Matilda has said her daddy hurt her. It is touching, and it is on her vagina. This only happened at her nanny's house. Nanny was not there, and it was daddy. Matilda, if asked, will point to her vagina. Matilda calls this her fairy ... In my judgment the mother was an honest witness who was doing her best. She has thought about this, and her account has become embellished with detail about why the questions were asked of Matilda, but the words used by Matilda have not changed."

15. The judge said that she believed the mother when she described the conversation. The mother had acted appropriately and protectively by going to the police. The delay before the interview gave rise to a risk of contamination through repetition. As to the interview itself, there were elements where Matilda demonstrated a desire to be accurate and to be understood. She is a little girl, the judge found, careful to tell the truth.

16. The judge then considered the grandmother's evidence. She said that she was quite satisfied that she had lied in an attempt to divert attention away from her son. Based upon Matilda's conversation with the police officer on 27 November, she found that there had been a conversation between the child and her grandmother on 14 November, that the grandmother had not taken action to protect the child but that she had substituted Mr R's name for that of her son. The judge said, "This evidence is key because it is independent of the child's mother".

17. The judge described the father's evidence as straightforward and noted that he agreed that his mother had not told the truth. She recorded the amounts that the father was drinking around the end of 2015 and that he accepted in evidence that it was possible that he had put his hands down Matilda's pants as seen by Mr R but that it was not sexual. She did not accept the father's denial of touching Matilda at his mother's home. She found Matilda's account to her grandmother, her mother, the police and in interview to be credible, consistent and, on the balance of probabilities, true. The father, said the judge, knows that Matilda is telling the truth and has chosen to deny his own behaviour.

The grounds of appeal and submissions

18. I turn next to the grounds of appeal. These are in summary that the judge erred in her treatment of Matilda's statements and of the evidence of the adults; that she had not engaged with many of the father's submissions; and that she effectively reversed the burden of proof. Overall, in her capable submissions, Ms Steele argues that the judge, having directed herself correctly, did not adequately engage with and analyse the difficulties that existed in this case, firstly as to the treatment of Matilda's statements. Ms Steele contends that the judge did not sufficiently caution herself about the circumstances in which they were made and about the lack of any real detail and clarity. She says that the judge barely analysed the ABE interview, picking out short phrases without context. Nor did she analyse the impact of Matilda's suggestibility and age. She did not give sufficient weight to the fact that Matilda's first statement to her mother, if it was made at all, arose as a result of a direct question.

19. Next, the stage before the interview was unsatisfactory. Matilda's account to the police on 21 November was given in the presence of her mother. Any contemporaneous note has not been produced. The only record of the conversation is in the log that was written up the following day. On 27 November, when the local authority and the police did a joint visit to speak to Matilda at school, the police officer's log was not entered for some three days following the visit, and the officer was not called to give evidence.

20. Then the judge failed to give adequate consideration to the multiple significant breaches of the ABE guidelines:

(1) The interview did not take place until two months later.

(2) In the intervening months Matilda was living with her mother, who the judge accepted would have been discussing the allegation while she was present.

(3) The interview was of very poor quality, and Matilda's refusal to sit in the appropriate chair meant nothing could be gleaned from her expression and demeanour.

(4) Matilda said little but, in response to a question about her mother, repeated that her father had hurt her fairy. There was little free recall.

(5) In the later stages of the short interview there are a number of leading questions and an absence of free narrative which the judge failed adequately to consider.

(6) In these circumstances the judge was far too ready to place weight on the interview.

21. Ms Steele then argues that in the absence of any direct corroborating evidence, the judge insufficiently weighed the various factors against the truth of the allegations. Those include the absence of any real detail, the positive way Matilda described her father, the mother's willingness for the father to have contact, even overnight contact. The "express consideration" which McFarlane LJ in *Re J* [2014] EWCA Civ 875 said should be given

to factors which detracted from an unsupported testimony of a complainant was lacking in this case. The judge also failed to give adequate consideration to the fact that Matilda did not by agreement give evidence, and so there was no cross-examination.

22. Turning to the treatment of the mother's evidence, Ms Steele argues that the judge went wrong by one hand by relying on it in some respects and accepting it in others even though the mother had exaggerated or lied. During the course of her submissions, she charted in helpful detail the shifts and inconsistencies in the mother's evidence about what had led her to question Matilda and what the context of the conversation had been. As to the treatment of the grandmother's evidence, Ms Steele says that the judge should not have accepted parts of it as supporting Matilda's allegation while at the same time finding that the grandmother was a dishonest witness. The evidence of the grandmother should, she says, have been disregarded altogether. The judge should not have relied upon Mr R's evidence that Matilda had made an allegation to him. She should instead have considered inconsistencies, lateness and the fact that this statement was made for the first time at trial. Overall, says Ms Steele, the judge failed to engage at all with the significant, weighty issues that needed to be considered. The effect of the judge's approach was in practice to reverse the burden of proof by requiring the father to give an explanation as to why Matilda may have made an allegation.

23. In response, Ms Edmonds for the local authority, Mr Watson for the mother and Ms Paris for Mr R oppose the appeal through an equally detailed analysis of the evidence and the judgment. They emphasise the care with which the judge considered the evidence and the directions that she gave herself about the shortcomings in the process and the interview. They argue that her analysis of the mother's evidence was balanced, as it was for the other

witnesses. They point out that the judge took account of all the evidence. The question of whether there was a motive for the child to make an allegation, whether she was being deliberately or inadvertently coached through malice or suggestibility, needed to be considered. By considering it, the judge did not reverse the burden of proof.

24. Ms Edmonds points out that there was clear evidence on which the judge could find that Matilda's first allegation was in fact made not to her mother but to her grandmother given that Matilda had confirmed this to the police officer. She had submitted to the judge that this evidence was the key to the case. Mr Watson argues that the judge's eyes were open to all the points raised on this appeal. Indeed, they had all been made during Ms Steele's closing submissions at trial, and he references how and where they were dealt with in the judgment.

Conclusion

25. I come now to my conclusion. This court will only rarely even contemplate reversing a trial judge's findings of primary fact (*In Re B (A Child)* [2013] UKSC 33 at paragraph 52). As Lord Neuberger said in the following paragraph, this is because:

"... the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it."

26. Approaching matters in that way, I have reached the conclusion that, despite the valiant efforts of Ms Steele, this appeal must be dismissed. In the first place, while the child's

statements were undoubtedly lacking in detail, the judge was in my view entitled to find that they were made and that Matilda is a child who is careful to tell the truth and that the touching occurred as she described. In reaching that conclusion, the judge clearly had in mind that this child had been assessed as being highly suggestible and acquiescent. I also consider that the judge was entitled to make the findings that she did about Matilda's first complaint having been made to her grandmother. The only alternative would have been to find that no conversation had taken place at all, but that would conflict with Matilda's own statement that she had spoken to her grandmother. I would certainly not accept the submission that the judge was obliged to disregard the grandmother's evidence altogether simply because she found her to be an untruthful witness. It was instead open to the judge to find that the curious circumstances of the lie shed light upon the truth. The real question in this case was whether the child's statements were contaminated by coaching or pressure or by shortcomings in the investigation and whether the judge dealt sufficiently with all the matters raised by the grounds of appeal that are described above.

27. As to the issue of coaching, during her submissions to the judge Ms Steele had submitted that "credibility is of course the key to this case", and in that she was very largely right. In the circumstances of this family there were good reasons to question the dependability of each of the four adult witnesses. Having reviewed the transcript of the trial and the judgment, it is clear to me that the judge fully appreciated this and that she grappled with the uneven and sometimes conflicting range of evidence before her in a meaningful way. Having done so, she made a careful assessment of the witnesses, one that was clearly open to her. Indeed, it was her job to do just that.

28. As to the ABE interview, this gathered little or no further information. It was on any view the fourth or fifth occasion on which Matilda had been questioned. The leading questions about which Ms Steele rightly complains come towards the end of it. Even so, I accept that there is some substance in her wider complaint that the judge, having recognised deficiencies in the investigation, took a somewhat broad and perhaps even benign view of them. It is not uncommon for a court, as happened here, to be faced with deficiencies in the recording and investigation of allegations which it nonetheless has to go on to determine to the best of its ability. However, in such cases it is of particular importance that the court is true to guidance and authority that has been built up as a result of bitter experience of cases of mistaken or malicious allegations.

29. Having said all that, my conclusion on the particular facts of this case is that the judge's decision is not compromised by her treatment of the investigations or of the interview and that her credibility assessments are unassailable. Her judgment shows a shrewd understanding of this family's situation. A full and fair reading shows that she engaged with the evidence and arguments both in favour of the local authority's case and against it and that it led her to a finding of fact that this court should not disturb. Her ultimate conclusion rested on her assessment that the child's statement was credible, that the mother had not implanted or encouraged it and that the child was concerned to tell the truth. I would not go so far as to say that the judge was bound to find that the child's statements were sufficiently cogent to support the finding that she made, but I consider that it was a conclusion that was properly open to her. There were many reasons for the judge to have been cautious, but she was alive to all of them and none of them was in my view fatal to the conclusion that she reached. I would dismiss this appeal.

LORD JUSTICE MOYLAN:

30. I agree.

LORD JUSTICE BAKER:

31. I also agree.

Order: Appeal dismissed