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IN THE COURT OF APPEAL  
CRIMINAL DIVISION



Neutral Citation No: [2023] EWCA Crim 777

CASE NO: 202202093/B2

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Friday 23 June 2023

Before:

LORD JUSTICE LEWIS  
MR JUSTICE JAY  
SIR NIGEL DAVIS

REX  
V  
BEN MASON

Computer Aided Transcript of Epiq Europe Ltd,  
Lower Ground, 18-22 Furnival Street, London EC4A 1JS  
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR F KAZANTZIS appeared on behalf of the Applicant

J U D G M E N T

**LORD JUSTICE LEWIS:**

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences.

Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. On 19 June 2021 in the Crown Court at Guildford, the applicant Ben Mason, now aged

37, was convicted by a jury of five offences. Two were offences of causing or inciting a child under the age of 13 to engage in sexual activity, one was an offence of raping a child under the age of 13 by penetrating the child's mouth with his penis, two offences were offences of rape of a child under 13 by penetrating the child's anus.

3. The applicant was refused leave to appeal against conviction. He now applies to renew that application for leave to appeal against conviction and for an extension of time for doing so.

4. The facts can be stated relatively shortly. The child, whom we shall refer to as A, was a boy aged nine years old at the material time. The applicant was a man then aged 28 or 29. The applicant used to take two of A's friends on fishing trips. A's mother gave permission for A to go on fishing trips with the applicant. As a result in 2015 and 2016 A went away on many weekends on fishing trips with the applicant when they stayed in a tent or a caravan. In October 2020, A told his grandmother that he had been raped by the applicant and the matter was reported to the police.

5. The case against the applicant was that on those fishing trips he caused A to engage in sexual activity by inserting A's penis into his (the applicant's) mouth when A was

nine years old. On other occasions it was alleged that the applicant raped A by putting his penis into A's mouth or by putting his penis into A's anus.

6. The evidence before the court included the following. First, the interview between A and the police officer which took place on 22 October 2020 was played to the jury. Secondly, a video recording of the cross-examination of A by the applicant's trial counsel was played to the jury. That cross-examination had taken place earlier in accordance with the rules governing the giving of evidence by children. The cross-examination took place in the courtroom. It was carried out by the applicant's trial counsel. It took place in front of a judge. In accordance with the standard practice recommended by the Court of Appeal, there had been a hearing, referred to as a Ground Rules Hearing, to determine the scope of the cross-examination in advance of the recorded cross-examination itself. Initially trial counsel had drafted 123 potential questions but these were reduced to 44. However, a number of matters upon which the applicant's then trial counsel wanted to cross-examine to obtain evidence were in fact the subject of admissions by the prosecution and they were included in a document recording the admissions and agreed facts which was put before the jury. In particular, those facts included reports from social services and teachers that A had lied and fabricated stories, that he lied and wanted sympathy and that he was attention seeking. These were matters that the applicant wanted to establish as they were relevant to his defence that the events had never happened and A had invented or fabricated them.
7. Thirdly, evidence was given or statements read by A's grandmother, mother and father. Fourthly, the applicant himself gave evidence.
8. Fifthly, the applicant had pleaded guilty in 2017 to an offence of making indecent images of a child; that is making 26 indecent images of A that he took on one of the fishing trips

when A was asleep. The applicant had also been convicted of one offence of sexual assault of a male child under the age of 13 by putting his finger in that child's anus. That offence was committed when the applicant had taken that child, who was not A, on a fishing trip. The trial judge carefully explained how the jury should consider that evidence. He directed them that they should consider whether those offences demonstrated that the applicant had a tendency to commit offences with a sexual element with a child. If the jury were sure of that, the judge explained the limited use that the jury could make of that evidence.

9. Sixthly, there was one matter that the applicant was concerned the jury knew about, namely that when A was asked in 2017 about the indecent images that the applicant had taken of him, A had not mentioned then anything about being raped or being involved in sexual activity with the applicant. The jury were explicitly told and reminded by the trial judge in his summing-up that the applicant said that if A had been sexually abused in the way that he was now describing, then he would have said something about that when he was questioned in 2017 about the taking of the photographs.
10. There is a transcript of the careful summing-up of the law and the evidence that the trial judge gave to the jury. Counsel today for the applicant accepted that that was a thorough and clear set of directions on the law.
11. The trial judge emphasised earlier on that it was for the prosecution to prove that the applicant was guilty and the prosecution had to prove each element of the offences. He repeated that at the end of his summing-up. The trial judge set out what the prosecution case was and set out the applicant's response. He told the jury that the applicant's case was this:
  - i. "Mr Mason's case is that none of the allegations are true. He

accepts that he was convicted in 2017 of taking indecent photographs of [A] but has told you that that was as far as it went. He says, in his defence, and you have the evidence in your admissions document, that social workers and teachers over time have recorded [A] as a person who tells lies, is a fantasist, an attention seeker and someone who's tried to get others into trouble. Mr Mason submits through his counsel then that you cannot believe anything said by [A] given his record of telling lies and making things up. That, in a nutshell, ladies and gentlemen, is what you have to decide in this case, whether the Crown has made you sure that what [A] was saying is something that you can rely on."

12. In accordance with usual practice the trial judge summarised for the jury the recorded evidence of A, including the recorded interview and the cross-examination of A (which the jury had already seen). The judge also reminded the jury that because of A's age the cross-examination was taking place at an early stage in the process and that the applicant's trial counsel was not permitted to question and challenge A in the same way or for the same amount of time that an older witness would have been questioned. But the judge made it clear that A's evidence was disputed and the jury had to bear in mind the limitations on questioning when they were assessing A's evidence.
13. Mr Kazantzis applies for permission to appeal against the conviction. He was not counsel at the trial and he did not represent the applicant in the Ground Rules Hearing before trial. He did not carry out the cross-examination of A which was video recorded. He advances four grounds of appeal. The first three grounds concern the arrangements in place for dealing with the evidence of children. The first ground is that the restrictions imposed by section 28 of the Youth Justice and Criminal Evidence Act 1999 meant the defence were unable to question the complainant in a fair and proportionate manner so as to properly test the truthfulness and reliability of the evidence, thereby rendering the trial process unfair. Second, he submitted that, the legal direction to the jury dealing with the limited questioning of the complainant was inadequate and would not have countered the

prejudicial impact of not being permitted to properly test the evidence. Third, he submitted that the complainant's evidence in this case, as in many section 28 Youth Justice and Criminal Evidence Act proceedings was the sole or decisive evidence. That being the case there were insufficient counter-balancing factors and extremely weak procedural safeguards were put in place, resulting in there being no way for the jury to make a proper and fair assessment of the reliability of that evidence. The evidence of the complainant was not sufficiently reliable to support a conviction in this case.

14. The fourth ground of appeal was that the legal directions conflated the burden of proof rather than making it clear that the burden of proof was on the prosecution.
15. Dealing with the first three grounds of appeal together, as A was a young child the provisions of section 28 of the Youth Justice and Criminal Evidence Act 1999 applied. That permits the evidence and the cross-examination of children to be video recorded and the recording played to the jury rather than having the child come to court to give evidence and be cross-examined in front of the jury. As the Court of Appeal (Criminal Division) has said on a number of occasions, the arrangements do not undermine the right of a defendant to a fair trial. The rules are there to ensure that a proper balance is maintained between a vulnerable witness such as a child and the rights of a defendant: see for example *R v YGM* [2018] EWCA Crim 2458, [2019] 2 Cr.App.R 5 at [5] and *R v PMH* [2018] EWCA Crim 2452 at [16].
16. In the present case, having considered very carefully all the material, including the transcripts, we are satisfied that the defendant did have a fair trial in this case. First, the jury saw the video recording of the police interview of A in October 2021 when he made the allegations. They also saw the video recording of A being cross-examined by trial counsel in front of the judge. Furthermore, matters that were important to the applicant's

defence were dealt with by admissions by the prosecution and were also put before the jury and did not therefore need to be elicited in cross-examination. In particular, the applicant's case was that A had invented or fabricated the allegations. The admissions, the agreed facts, which were put before the jury and which they had with them during their deliberations included that social workers and teachers had said that A had lied and fabricated stories and was an attention seeker. The jury were also told and reminded by the judge in the summing-up that A had not said anything about sexual activity when he was asked in 2017 about the photographs that the applicant had taken of A.

17. The applicant has not identified any particular questions or any particular topics that he wanted covered in cross-examination that either were not the subject of cross-examination or were not dealt with by other means, such as the admissions. We are satisfied that in the circumstances of this case the trial judge did ensure that the applicant had a fair trial. The jury were able to assess the evidence of A from the video recording and the cross-examination and they were able to determine from that and all the other evidence, including the admissions of what the school teachers and social workers said, whether they were sure that A was telling the truth and whether the prosecution had proved that each of the offences had been committed.
18. In terms of ground 1, therefore, we do not consider on the facts of this case that the restrictions imposed by section 28 meant that the defence was unable to have a fair trial. Rather, on the facts the applicant did have a fair trial.
19. In relation to ground 2, the direction to the jury to bear in mind the limits on cross-examination because of A's age when assessing his evidence was a proper and adequate direction.
20. In relation to ground 3 the premise underlying this ground is that there were weak

procedural safeguards in place so that the jury could not make a proper assessment of the evidence and, if that was the sole and decisive evidence, the evidence was not reliable. The premise underlying the ground is not correct on the facts of this case. The jury heard the recorded interview with A. They also heard the recorded cross-examination of A carried out by the applicant's lawyer under the supervision of a judge. In addition the jury had other evidence, notably the admissions that the social workers and teachers considered that A had lied and fabricated stories in the past. The jury were also told that A had not said anything about the offences when first asked about the applicant's behaviour in 2017. Further, however, there was also the evidence that the applicant made indecent images, comprising 26 indecent images of A, and he also put his finger in the anus of another boy when on a fishing trip. The jury were entitled to consider whether that evidence demonstrated that the applicant had a sexual interest in young boys and if they were sure that he did, to treat that evidence as some support for the prosecution case. There is no arguable basis for ground 3 on the facts of this case.

21. Finally, there is no basis whatsoever for suggesting that the judge misdirected the jury in relation to the burden of proof. Early in the summing-up the judge emphasised that the burden of proof was on the prosecution and that they must prove each and every element of each of the offences. When dealing with the individual counts the judge said the prosecution had to make the jury sure of all the relevant elements of the offence.
22. For all those reasons we are satisfied that the applicant did have a fair trial. There is simply no arguable basis on the facts of this case upon which it could be asserted that the applicant did not have a fair trial. For that reason, we refuse leave to appeal against conviction. As no purpose therefore will be served by granting an extension of time to renew the application, we also refuse that application.



**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: [rcj@epiqglobal.co.uk](mailto:rcj@epiqglobal.co.uk)