[COURT OF APPEAL]

*REGINA v. MAKANJUOLA

REGINA v. E.

1995 May 9; 16

Lord Taylor of Gosforth C.J., Tucker and Forbes JJ.

Crime—Evidence—Corroboration—Indecent assault—No warning to jury about acting on uncorroborated evidence of complaint—Abrogation of corroboration warning requirement—Whether procedural—Whether operative retrospectively—Whether judge retaining discretion to warn jury about acting on uncorroborated evidence of complainant or accomplice—Whether admission of recent complaint evidence without corroboration warning unfair—Criminal Justice and Public Order Act 1994 (c. 33), s. 32(1)(4)

The applicants were each tried on a count charging indecent assault on a female. Evidence of recent complaint was admitted. In each case the assault charged occurred before, but the trial began after, the coming into operation of section 32 of the Criminal Justice and Public Order Act 1994,[1] which abrogated the mandatory requirement to warn the jury about convicting on the uncorroborated evidence of, inter alia, the complainant of a sexual offence. The trial judge in each case rejected a submission that the jury should be given a full corroboration warning about the danger of convicting on uncorroborated evidence of the complainant. The applicants were convicted.

On their application for leave to appeal:—

Held, refusing the applications, (1) that the general rule against the retrospective operation of statutes did not apply to procedural provisions, which would generally be presumed to apply to pending as well as future proceedings; that the change effected by section 32(1) was clearly procedural, so that the general rule respecting retrospectivity did not apply; and that, since the section had been in force before the trial of either applicant began, section 32(4) did not apply to exclude the application of section 32(1) and the judge had not therefore been obliged to give a corroboration warning (post, p. 1351B–C).

But (2) that the judge had a residual discretion to warn the jury in regard to a particular witness and, where there was an evidential basis for suggesting that the evidence of a witness might be unreliable, which went beyond mere suggestions by cross-examining counsel, it might be appropriate for the judge to warn the jury to exercise caution before acting on his uncorroborated evidence; that if such a warning were to be given it should be in such strength as the judge determined after discussion with counsel in the jury's absence and form part of his review of the evidence, and did not have to be invested with the whole regime of the old corroboration rules; that the court on appeal would be disinclined to interfere with a trial judge's exercise of his discretion unless it was unreasonable; and that, since the fact that the offences had been committed before section 32 had come into force did not make it unfair for the judge to exercise his discretion not to give a warning and since there was no evidential basis for regarding either complainant as inherently unreliable, the judge's decision in each case not to give a warning could not be faulted (post, pp. 1351G–1352D, 1353E–F, 1355B).

[1] Criminal Justice and Public Order Act 1994, s. 32: see post, p. 1350B–C.

(3) That since recent complaint evidence, admitted as an exception to the hearsay role in order to show consistency, was not capable of affording corroboration, it was not unfair or inappropriate for the judge to admit such evidence but not to give a corroboration warning (post, p. 1355E–G).

The following case is referred to in the judgment:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

No additional cases were cited in argument:

APPLICATIONS for leave to appeal against conviction.

REGINA v. MAKANJUOLA

On 23 February 1995 in the Crown Court at Isleworth before Judge David Miller and a jury the applicant, Oluwanfunso Makanjuola, was unanimously convicted of indecent assault on 28 March 1993 on a female person (aged 17), contrary to section 14(1) of the Sexual Offences Act 1956, and on 23 March 1995 he was sentenced to six months' imprisonment. He applied for leave to appeal against conviction on the ground, inter alia, that the judge had erred in failing to exercise discretion to give a corroboration warning, the offence having been committed 22 months before the coming into force of section 32 of the Criminal Justice and Public Order Act 1994. The application for leave to appeal was refused by the single judge but renewed to the full court. However, the single judge granted his application for leave to appeal against sentence. On 9 May 1995 the court refused the application for leave to appeal against conviction but allowed the appeal against sentence and substituted a community service order of 50 hours for reasons to be given later.

The facts are stated in the judgment.

REGINA v. E.

On 24 February 1995 in the Crown Court at Isleworth before Judge David Miller and a jury, the applicant, E., was convicted of indecent assault on a female person (aged 16) contrary to section 14(1) of the Sexual Offences Act 1956 on 24 July 1994, and on 25 April 1995 he was sentenced to a probation order for two years and ordered to pay prosecution costs of £886. He applied for leave to appeal against conviction on the ground, inter alia, that, despite the abolition by Parliament of the obligation on the judge to give a corroboration warning, a discretion remained which the judge should have exercised in favour of the applicant and have given a full corroboration direction.

The application was referred by the Registrar of Criminal Appeals to the full court to be heard on the same day as the application in *Reg. v. Makanjuola.* On 9 May 1995 the court refused the applications for reasons to be given later.

The facts are stated in the judgment.

Ian C. Bridge (assigned by the Registrar of Criminal Appeals) for the applicant Makanjuola.

Alan Kent (assigned by the Registrar of Criminal Appeals) for the applicant E.

Nicola Merrick for the Crown.

Cur. adv. vult.

16 May. LORD TAYLOR OF GOSFORTH C.J. read the following judgment of the court. These two applications for leave to appeal raise important issues about the effect of section 32 of the Criminal Justice and Public Order Act 1994. In each case the applicant was convicted of an indecent assault on a young girl. In each it has been argued that the trial judge should have given the jury a full direction in accordance with established corroboration rules notwithstanding the provisions of section 32. On 9 May, having heard both applications together, we refused them. We now give our reasons.

Section 32 so far as is relevant provides:

> "(1) Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on an uncorroborated evidence of a person merely because that person is—(*a*) an alleged accomplice of the accused, or (*b*) where the offence charged is a sexual offence, the person in respect of whom it is alleged to have been committed, is hereby abrogated. . . . (4) Nothing in this section applies in relation to—(*a*) any trial, or (*b*) any proceedings before a magistrates' court as examining justices, which began before the commencement of this section."

It was argued for both applicants that although the requirement to do so is abrogated by subsection (1), the judge should still in his discretion warn the jury it is dangerous to convict on the uncorroborated evidence of a complainant in a sexual case or of an accomplice. The underlying rationale of the corroboration rules developed in case law was that accomplices may well have purposes of their own to serve and complainants about sexual offences may lie or fantasise for unascertainable reasons or no reason at all. That rationale, it is argued, cannot evaporate overnight. So the traditional warnings to juries should continue. The statute removes the requirement to give them but the judge is still free to do so and he should.

If that were right, Parliament would have enacted section 32(1) in vain: practice would continue unchanged. It is clear that the judge does have a discretion to warn the jury if he thinks it necessary, but the use of the word "merely" in the subsection shows that Parliament does not envisage such a warning being given just because a witness complains of a sexual offence or is an alleged accomplice.

It is further submitted that if the judge does decide a warning is necessary, he should give the jury the full old-style direction on corroboration. That means using the phrase "dangerous to convict on the uncorroborated evidence," explaining the meaning of corroboration, identifying what evidence under the old rules is capable of being corroboration, what evidence is not so capable, and the respective roles of judge and jury in this bipartite quest. In support of this submission a reference was made to *Archbold, Criminal Pleading, Evidence & Practice* (1995 ed.), vol. 1, pp. 1911–1912, para. 16.36 where the editors say:

> "Furthermore, if a judge does give a warning, it seems likely that the [pre-1994 Act] law as to what evidence is capable of corroborating a witness will continue to apply. It seems to follow also that if the judge does give a warning, he will still need to tell the jury what corroboration is and identify the evidence capable of being corroborative."

A It was, in our judgment, partly to escape from this tortuous exercise, which juries must have found more bewildering than illuminating, that Parliament enacted section 32.

A further submission was made as to retrospectivity. In the present cases, the applicants had each been charged and committed for trial before section 32 came into force on 3 February 1995. It was submitted that, in those circumstances, to apply the section and dispense with giving a B corroboration direction was unfair. The judge ought to have exercised his discretion to give a full corroboration direction. Otherwise, section 32 was being given retrospective effect. We disagree. The general rule against the retrospective operation of statutes does not apply to procedural provisions: see *Bennion on Statutory Interpretation,* 2nd ed. (1992), p. 218 and the cases there cited. Indeed, the general presumption is that a statutory C change in procedure applies to pending as well as future proceedings. Here, the change effected by section 32(1) was clearly procedural. However, subsection (4) excludes the application of subsection (1) to any trial or any committal proceedings which began before 3 February 1995. Its application is not otherwise excluded. Subsection (4) expresses the clear intention of Parliament. Accordingly, since the section was in force before either of these two trials began, it clearly applied to them.

D Given that the requirement of a corroboration direction is abrogated in the terms of section 32(1), we have been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge ought in summing up to a jury to urge caution in regard to a particular witness and the terms in which that should be done. The circumstances and evidence in criminal cases are infinitely variable and it is impossible to E categorise how a judge should deal with them. But it is clear that to carry on giving "discretionary" warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the Act. Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is F required at all. Where, however the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative G of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's H evidence as well as its content.

To summarise. (1) Section 32(1) abrogated the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories. (2) It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the

circumstances of the case, the issues raised and the content and quality of the witness's evidence. (3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestion by cross-examining counsel. (4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches. (5) Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction. (6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules. (7) It follows that we emphatically disagree with the tentative submission made by the editors of *Archbold, Criminal Pleading, Evidence & Practice*, vol. 1 in the passage at paragraph 16.36 quoted above. Attempts to re-impose the straitjacket of the old corroboration rules are strongly to be deprecated. (8) Finally, this court will be disinclined to interfere with a trial judge's exercise of his discretion save in a case where that exercise is unreasonable in the *Wednesbury* sense: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223.

We now proceed to consider these two applications individually.

Reg. v. Makanjuola

This applicant, aged 29, was unanimously convicted on 23 February 1995 in the Crown Court at Isleworth of indecent assault. After adjournment for preparation of reports, he was sentenced on 23 March 1995 to six months' imprisonment.

He renews his application for leave to appeal against conviction following refusal by the single judge.

The case for the Crown was that the applicant indecently assaulted the complainant by squeezing her breasts when they were alone together in the store room of a restaurant where they both worked. The defence put to the complainant was that she had made up the allegation because she was angry with the applicant over an incident a couple of days earlier.

The complainant aged 17, said that on 28 March 1993, she was working in the evening. At about 8.30 she went to the staff room and the applicant followed her asking for her help in finding some boxes in the store room. She went with him. The store room was small and dimly lit. The applicant put one arm on her waist and the other on the shelf in front of her. He asked her to take him for a drink but she said no. He pulled her towards him and mimicked her voice. She told him to let go and he did. She moved towards the door but the applicant came up behind her put his hands over her clothes on to her breasts and squeezed them pulling her away from the door as she tried to reach it. She managed to escape and return to the staff room where she made a complaint to Mr. Dixon, a fellow employee. In cross-examination she said she had an ordinary working relationship with the applicant and denied that there had been

any row between them a couple of days earlier or that she was angry at the time of the alleged assault. The applicant had not hurt her and she had no bruising.

Mr. Dixon confirmed that the complainant had gone to help the applicant find some boxes in the store room and that they were away about 15 minutes. When they returned, the complainant was red in the face and asked Mr. Dixon to go and find the boxes for the applicant. He did so and on his return to the staff room asked the complainant what was wrong. When he pressed her on the subject she told him that the applicant had touched her breasts and mimicked her voice. He thought she had also said that he had touched her "on the bum." Mr. Dixon said to her to tell the manager.

The applicant was arrested on 16 January. When interviewed he denied the offence. He did not give evidence on his own behalf.

Mr. Bridge on behalf of the applicant conceded that there was nothing in the circumstances as summarised above to take this case out of the ordinary run of indecent assault cases. Although the complainant was challenged on the basis that there had been no assault and that she was making up the allegations because she was angry with the applicant, he did not give evidence to that effect. Accordingly, there was no evidential basis as opposed merely to counsel's suggestions to throw doubt upon the story told by the complainant.

Nevertheless, Mr. Bridge contended that the trial judge erred in failing to give a corroboration direction. Apart from the contention, rejected above, that notwithstanding section 32, judges should continue to give such directions as a matter of discretion, Mr. Bridge relies upon the history of this case. The alleged offence was committed 22 months before section 32 came into force. Mr. Bridge submits that the delay was not caused by the applicant and that it is unfair to deprive him of a corroboration direction to which he would have been entitled had the case come on before 3 February 1995. We have already considered the retrospectivity argument above. In our judgment, the judge's discretion to decline to give any warning cannot be faulted. This was a perfectly straightforward case in which there was no evidential basis for regarding the 17-year-old complainant as inherently unreliable. Beyond referring, as the trial judge did, to points made in cross-examination but unsupported by any evidence there was no basis for giving a special warning. Accordingly that ground of appeal is rejected.

Mr. Bridge made other criticisms of the summing up. He complained that the judge overstepped the mark (his phrase) in suggesting a possible clue as to whether the complainant was telling the truth. He pointed out that when asked whether the assault had hurt her she answered in the negative. She might well, he suggested, if she was acting from anger or a grudge, have said "Yes." The judge prefaced that passage by reminding the jury that he was making a comment which they could either accept or reject. The actual passage was hedged round with qualifying words. He said "Sometimes, in my experience, one does have an answer to a question that perhaps does provide a clue to the reality of the situation." Exception is taken by Mr. Bridge to the phrase "in my experience." He suggests that the judge was thereby expressing his own opinion and seeking to impose it on the jury. We have read the whole passage with care and are quite satisfied that Mr. Bridge's argument is untenable. The judge took the greatest care to avoid imposing any view on the jury. The comment he made was wholly unexceptionable.

Again, complaint is made as to the direction the judge gave about the applicant's failure to give evidence. We have read that passage with care. It amounts to a classic direction on this topic and there is no possible basis for criticising it. All in all, the judge's summing up was in our view fair and balanced. This application must therefore be refused.

The applicant Makanjuola also appealed with leave of the single judge against his sentence of six months' imprisonment. As indicated in a separate judgment delivered on 9 May, we allowed that appeal and substituted a community service order of 50 hours for the sentence of six months' imprisonment imposed by the trial judge.

Reg. v. E.

On 24 February 1995, in the Crown Court at Isleworth, this applicant, now aged 41, was convicted of indecent assault upon a female. On 25 April before the same court, he was sentenced to a probation order for two years and ordered to pay prosecution costs of £886 at the rate of £100 per month. He applied for leave to appeal against conviction, the registrar having referred the application to this court to be heard in conjunction with the application of Makanjuola.

The complainant was aged 16 at the time of the alleged offence. She is the daughter of the sister of the applicant's ex-wife, S., with whom the applicant was still living, despite their divorce 18 years ago. They had three children, two living at home, namely H. aged 8 and R. aged 15. The complainant was effectively the applicant's niece. She stayed at the applicant's home from time to time. On 28 July 1994 she arrived unannounced. The applicant was at a public house with her father. Since R. was away, H. was sleeping in R.'s bed and the complainant in H.'s bed. Although they were in the same room there was a partition in the middle. It was common ground that when the applicant came home at 11.45 p.m. both H. and the complainant were awake. The applicant came into their bedroom and spoke to both of them. He then made a cup of tea for himself and brought a drink for H. It was his evidence that he then went to bed and had no further contact with the complainant. She, however, gave evidence that as she was dozing, the applicant returned to the bedroom a third time. She was awoken by his touching her breast and her genitals. She was distressed and asked him to stop. He said "Relax." He forced himself upon her pulling her knickers away and putting his hand under her T-shirt on to her breasts. He said "Don't tell anyone." She asked if he would leave her alone providing she did not tell anyone. He said she had beautiful breasts. He then stopped touching her, said "Better luck next time" and left the room. The complainant said that she waited 10 minutes, got up and went home. She told her mother on arrival at about 1.30 a.m. that the applicant had been touching her. The mother confirmed this and said the complainant looked shocked and upset. The police were called and the complainant gave an account of what occurred. Later that day she made a formal statement.

The applicant went to the police station with his solicitor by appointment on 9 August. He had been away on holiday from 2 to 7 August and only learnt of the accusation on his return. He was arrested and he denied the offence in interview. He gave evidence that he had not returned to the bedroom a third time and had not assaulted the complainant.

It was put to the complainant in cross-examination that either she had made up the complaint deliberately or that she had fantasised or she imagined or dreamt it whilst she was dozing.

In summing the case up, the trial judge, who was the same judge as in the case of Makanjuola, gave no corroboration warning. Mr. Kent submits that he should have done so in the exercise of his discretion. In particular, he bases this contention on the fact that the complainant was a 16-year-old girl, who had been asleep or dozing in bed immediately before the alleged assault. In effect, the submission was that in these circumstances the judge should have given the time-honoured direction that complainants of sexual offences may be prone to fantasise or dream or fabricate untrue complaints.

We reject that submission. Here, as in the application of Makanjuola, there was no evidential basis for regarding this 16-year-old complainant as an inherently unreliable witness.

Again, reliance was placed upon alleged retrospectivity. The committal for trial took place on 28 October 1994. The trial did not come on until 23 February 1995, 20 days after section 32 came into force. Clearly, any change of procedure must take effect from a particular date. In section 32(4), Parliament made perfectly clear to what proceedings the change was to apply. We see no reason to criticise the judge's exercise of his discretion by reason of this argument.

Finally, Mr. Kent criticised the admission of evidence of recent complaint and the way in which the judge dealt with it. He sought to argue that in the absence of a corroboration direction, which was previously obligatory, the admission of recent complaint evidence was unfair to the defendant. Under the old regime, a judge would deal compendiously with corroboration and recent complaint producing, it was submitted, a balanced approach. As we understand it, Mr. Kent's argument is that, absent a corroboration direction, the admission of recent complaint produces an imbalance. Undue attention may be paid by the jury to that element.

We cannot accept this argument. It seeks to link corroboration and recent complaint whereas, under the old regime, judges were always at pains to point out that recent complaint could not be regarded as corroboration. The two elements were quite distinct. A recent complaint is admitted in evidence as an exception to the hearsay rule in order to show consistency. We see no reason why the absence of a corroboration direction renders the admission of recent complaint to show consistency unfair or inappropriate.

As to the judge's treatment of recent complaint, it is submitted that he did not fully explain to the jury what significance that evidence had. He said:

> "This evidence is what we call 'recent complaint,' in other words, very soon after the incident she complains to her mother then to the police. It is admissible before you as showing consistency, in other words that an incident has happened and she has complained at the first opportunity."

In our judgment that direction was correct and sufficient in law. Accordingly, this application was refused.

Applications refused.

Solicitor: Crown Prosecution Service, London.

L. N. W.