



Neutral Citation Number: [2020] EWCA Civ 507

Case No: B4/2019/3017

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT IN DERBY
HHJ Williscroft
DE18C00328

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/04/2020

Before:

LORD JUSTICE McCOMBE
LADY JUSTICE KING
and
LORD JUSTICE PETER JACKSON

Re T (Children)

Between:

The Children's FATHER
- and -
DERBY CITY COUNCIL
and
A, B and X (Children) (by their Guardian)

Appellant

Respondent

Brendan Roche QC (instructed by Ringrose Law, solicitors) for the Appellant
Gregory Pryce (instructed by Dodds Solicitors) for the First Respondent, Derby City Council
and **Steven Veitch** (written argument only) (instructed by Kieran Clarke Green, solicitors) for
the Guardian

Hearing date: 24 March 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Tuesday, 7 April 2020.

Lord Justice McCombe:

Introduction

1. This is the appeal of a father of three children from the order of 14 November 2019 of HH Judge Williscroft, sitting in the Family Court at Derby. In her order the learned judge recited that findings of fact had been made by her in these care proceedings in her judgment of the same date, in which she had made a number of findings of sexual and other abuse committed upon the children in the case. The children are A (a boy, now 12), B (a boy, now 10) and X (a girl, now 9). In this judgment the appellant will be called “the Father”. Permission to appeal to this court was granted by Peter Jackson LJ by his order of 20 February 2020.
2. For the purposes of the appeal we have had skeleton arguments from Mr Roche QC for the Father, from Mr Pryce for the Local Authority and from Mr Steven Veitch for the Guardian on behalf of the children. At the hearing we had oral submissions from Mr Roche and Mr Pryce. Pursuant to directions from my Lord, Peter Jackson LJ, Mr Veitch did not attend the hearing as the Guardian was not putting a case distinct from that of the Local Authority. I was much assisted by the helpful arguments of all counsel.
3. The appeal hearing was one of the first to be conducted remotely, in this time of Coronavirus, and I am sure that we are all grateful to everyone concerned for facilitating this arrangement and for enabling a very satisfactory hearing to be conducted.
4. The judge gave her judgment on 14 November 2019 after a six-day hearing held on 4 to 7 and on 11 and 12 November. The hearing was concerned principally with allegations of serial sexual and other abuse made against the children’s mother (“the Mother”) and her then domestic partner, W, in the period between July and October 2018 when they were living together at what had been W’s home in Derby. This was a period of about 11 weeks when the children were, for the first time for a while in the care of the Mother, with W living in the same home. The Mother and W, as an intervener, were principal parties to the hearing below. Two specific allegations of sexual abuse were, however, also made against the Father, in respect of matters said to have occurred while the children were in the care of their paternal grandparents in Lincolnshire between 2015 and 2018. The Father also faced allegations of physical mistreatment of the children in the same three-year period.
5. In her judgment, the judge made the following findings against the Father:
 - “1. Sexual Abuse ...
 - a) Between 2015 and July 2018 in [X]’s bedroom at [the Father]’s home in Lincolnshire, [the Father] sexually assaulted [X] by touching her genitals and digitally penetrating her vagina.
 - b) Between 2015 and July 2018 [the Father] encouraged [X] to have sexual intercourse with him. [X] refused to do so. ...
 9. Physical abuse ...
 - a) On occasions between 2015 and 2018 [the Father] physically abused [B] by punching his legs and shaking him on the forehead/around the face.

b) On occasions between 2015 and 2018 [the Father] over chastised the children by hitting them.”

6. The Father now appeals against the sexual abuse findings but does not appeal against the findings of physical abuse. No appeal is brought by the Mother or by W in respect of the findings about them.

Background Facts

7. The background facts in outline were as follows.
8. The Mother is now aged 44 and has 10 children. A, B and X are the three youngest. Social Services have been involved in the Mother’s life for many years and at least two of her children have been adopted. The circumstances of the other children are not known to the court. The Father is now aged 52. The parents lived together for 19 years and were married for 15 of those years.
9. Until a point in 2015, after separation from the Father in the February, the Mother had sole care of A, B and X. In the May, the Mother suffered a serious accident and sustained injuries of a life-changing nature. She made an informal arrangement for the children to live with the paternal grandparents in Lincolnshire. The Father visited them there from time to time. Initially following her accident, the Mother had been living in accommodation with carers and she had not spent much time with the children. In 2018, however, the Mother moved to live with W, by then her partner, who had also taken over as her carer. In this period, she did see the children, as did W, on about three occasions, but for a few hours only.
10. On 27 July 2018, the Mother had arranged for W to go to the grandparents’ home on her behalf and to demand that the children be handed over to him so as to be returned to the care of the Mother. As the judge said, “understandably” the grandparents refused to comply. On the next day, the Mother herself, accompanied by a friend, S, (who featured importantly in later events) went to the grandparents’ home and demanded that the children be handed over to her. The grandparents felt unable to refuse, having had advice that they had no parental responsibility and had no order of the court in their favour allowing them to retain the children.
11. The children were brought to the property where the Mother and W were living. The judge found that the property was not suitable for the children in a number of respects. There was no bed for X and the room that she was supposed to use was undecorated and “full of clutter”. The judge also found that at one stage X had been sleeping at the foot of the bed shared by the Mother and W (sometimes even with “one of the four dogs”). The judge heard evidence that the property was in general “unhygienic, unsafe” and lacking proper lavatory and washing facilities. No schooling or medical arrangements had been made for the children, although later a school place was organised for A. The Mother was to claim that she was engaged in some kind of “home schooling”, about which the judge clearly had her doubts. It is in respect of the period between July and October 2018 that the principal allegations of abuse against the Mother and W arose.
12. There emerges from the judge’s judgment, and from her formal findings of fact, a catalogue of sexual and other abuse perpetrated by the Mother and W upon the children, some of which I will outline below. When the first inklings of this became known to the police, in October 2018, they exercised powers under s.46 of the Children Act 1989

to remove the children from the Mother and W. The children were placed in foster care. Initially, the boys were fostered together, but were later separated. X has always been fostered on her own. The judge noted that when taken into foster care all the children were in poor physical condition and with ill-fitting clothing.

Intervention

13. The intervention in the family's affairs began following reports made by S to the police in Lincolnshire, alleging acts of historic sexual abuse committed upon her by the Father. On 13 October 2018, S was interviewed about these allegations by the police and later that same day she visited the Mother and W at their home. The judge said that it was agreed evidence that some little time before then X had said two or three times to her brother A, "You kiss my foo-foo and I sit on your willy and kiss you lots". S said that when she visited on 13 October, she was asked by the Mother to speak to X who, it was said, had that day repeated the remark just mentioned. S said that, during the subsequent conversation with X, X told her that the Father had abused her. The three adults then agreed that they would report this to the police and S undertook to make the report. However, she did not do so until about 24 hours later and then, after passage of yet another 24 hours, on the evening of 15 October, a police officer (DC G) visited the home.
14. DC G's evidence to the judge was that X repeated that she had made the remarks to A about kissing her "foo-foo" etc. and said that she had been in trouble with the Mother and W for saying it. The officer said (as recorded by the judge) that X told her that

"... she has had bad dreams about [the Father] and says that [the Father] has touched inside her foo-foo and told her to sit on his willy". X was asked whether anyone else had done this and she points to W who is next door and gestures masturbation and then says, "Mum plays with my foo-foo, it tickles, she really played with it on Sunday and it really tickled and I play with her boobies".
15. The judge said about this evidence from the officer:

"I consider such dramatic statements would be notable and likely correctly recorded while the meaning of what she says may be more complex and requires some consideration of context. This includes the fact that she describes a dream in circumstances where I will find and I am confident that W has touched her in a house where the discussion was not private and likely to be repeated over time since S said that something was said to her. What she said and demonstrated about W is however convincing, it was spontaneous and clear and I am confident that it was not prompted".
16. The judge had various criticisms of this initial discussion with DC G to which I will return later.

Interviews/ Evidence against the Father

17. A little short of two weeks after the initial meeting, on 28 October 2018, X was interviewed formally by DC G, and was video recorded, in the presence of an

intermediary. The interview began at 1013 hours and finished at 1201 hours – total of 1 hour and 48 minutes. After almost 34 minutes there was a break for 13 minutes; there was another after 56 minutes lasting 15 minutes. We have received from counsel a very helpful short summary of the interview, with material passages quoted verbatim. There are significant criticisms of the interview process, to which again I will return.

18. From the interview with X, and from interviews with A and B, there emerged the principal elements of the evidence which led to the very large number of findings of sexual abuse which the judge made against the Mother and against W. It is not necessary to state all the findings in this judgment. A summary of the main features will suffice; they were: more than one event when W sexually touched X's genitals and penetrated her vagina; the Mother was present during, and complicit in, these assaults and on one such occasion performed oral sex on W at that time; the Mother also touched X sexually on her genitals; W exposed his genitals to X; the Mother and W engaged in sexual intercourse in the presence of A; W accessed pornography on a telephone in A's presence; the Mother and W caused the children to be naked together in the living room while they (Mother and W) engaged in oral sex and mutual masturbation; the Mother and W caused the children (when naked) to touch each other's genitals; the Mother and W caused X to touch the Mother's breasts; the Mother viewed pornography on her telephone while in bed and in the presence of X; the Mother and W were each found to be in possession of indecent images of children on their telephones.
19. In addition to these matters, there were findings by the judge as to the failure of the Mother and W to keep the home in an acceptable condition; it was cluttered, untidy, unhygienic and without adequate sleeping arrangements for X.
20. So far as the Father was concerned the only material emerging from this interview came after the expiry of some 1 hour and 36 minutes of questions, dealing with other matters, and was some 12 minutes in length.
21. Just before the relevant passage DC G asked whether X could talk about "nan's house" (i.e. the paternal grandmother's home). X answered, "No". The officer asked whether X wanted to come back another day to talk about that. The Intermediary intervened to say that she considered, "... we've gone as far as we can go". The officer left the room to talk with a colleague, returning just over minute later. She immediately asked: "Q: So just got one more question. Have you told anybody else about [W] touching your fu fu?"

"A: Year, dara, dara and ?? ...

Q: Tell me again what you said?

A: Dara.

Q: Dora? [S]?

A:

Q: [S] Oh, [S]. So you told [S].

A: Dad touched me on my willie

Q: Dad touched you. What dad?

A: [Father's first name]

[Note: in following extracts from the interview I use "Z" for the Father]

Q: So you told [S] that Z touched you? We haven't talked about Z yet, have we?

A: No, but I need, but yeah, dad put his fingers in my fu fu.

Q: Who did?

A: Z

Q: Z did.

A: Yeah

Q: ... We need to talk about nan's house.

A: In the house when Z touched me.

Q: they were all in the house when Z touched you? So [A] was in the house.

A: Yes [A], [other names], Nan, [B], me and Z.

Q: Where did Z touch you?

A: In my fufu.

Q: On your fufu?

A: Inside.

Q: Inside your fufu. So dad Z touched your fufu?

A: Mmmm ..."

22. The officer proceeded to ask X more questions about the circumstances in which this incident was said to have occurred. X said she was wearing "clothes" and that "he pulled my trousers down". X was asked what "Z" was wearing. She said, "Owl t-shirt and trousers". Asked which hand he had used, she said he used his left hand. She was asked what the other people were doing, and she answered saying that A and B were in their room playing. She was asked where the others were and whether they had seen "Z do it to you". She answered, "Yes". She was asked how she knew they saw.
23. It seems that X then gave some inaudible answers. She said the others were in the living room and then said she was in her room, "Yeah, with these two Nan and Pap". She repeated that this happened in her room. She was invited to draw the rooms in the house. The Intermediary intervened to say that, "We might be losing it a little bit. Attention-wise". Nonetheless, the officer continued to ask about the room they were in. X is noted as indicating her room on a diagram and she was asked who else was in X's room and she said, "Just [X, naming herself] and Z".

24. There was a second interview on 5 November 2018, lasting 26 minutes. At the beginning, it seems that X was reluctant to enter the interview room at all. The questions began with this:

“At the end of the last interview, last time we spoke about your dad, didn’t we? And you told me that he touched your fufu in your bedroom, can you remember telling me?”

A: Yeah.

Q: How many times has that happened, how many times has dad Z touched your fufu?

A: Errrrmmmm, not too much, not too much.

Q: Are you able to count?

A. No.

Q: No?

A: Only 1, 2, 3, 4, 5, 6

Intermediary: Do you want me to hold those ones?

A: ...

Q: Ok then, so you told me that daddy Z touched your fufu, yeah.

A: Mmmmm”

Q: Whereabouts?

A: Inside it ...”

25. The evidence against the Father was confined in all, therefore, to four elements: 1) what X said to S, the Mother and W on 13 October; 2) what X said to DC G on 15 October; 3) what X said in the first interview on 28 October; and 4) what X said in the second interview on 5 November. None of the children was required to give further evidence before the judge.

The Judge’s Conclusions on the Case against the Father

26. The judge’s conclusions in respect of the case against the Father appears in two passages in the judgment. First, at paragraphs 49, 50 and 51, immediately after the judge’s summary of the evidence of X’s interviews and before dealing with the Father’s evidence and his denial of the allegations. The judge said:

“49. I have considered these statements very carefully and on reflexion I do find them compelling. Of course I remain troubled about what took place at the home on 13 October but I do not consider this child is capable of repeating overheard matters well; I consider adds to the authenticity of what she says.

50. I note of course in relation to the Father the odd comment from A saying Nan had called him back from his friends as [X] and [the Father] were having sex, when A he did not know what sex was [sic]. I simply record that as being odd, it does not add to my understanding of what she says.

51. I note that in her second interview [X] says in response and I accept a reminder about this that she is very clear that [the Father] has touched her inside, though I accept that this is a prompted reminder not a recall. She has not repeated the allegation she had been told to sit on his willy and I accept that she was referred to therapy soon after her first visit.”

27. Then, rather later in the judgment, after summarising the Father’s own evidence, the judge expressed her conclusions as follows:

“103. My conclusions are that in respect of [the Father] I consider, as he does, that his children tell the truth in general terms. ... [Findings as to physical mistreatment of A and B] ...

104. I have given careful and anxious consideration for all the reasons I have set out to consider whether or not I can find the Local Authority has proved to the civil standard that he has sexually abused his daughter, [X], by putting his finger inside her. I have already set out the reasons that I am anxious about a number of things, the parents and [S]’s role in what was said first of all and generally my worries about the length and so forth of the interviews, but I have determined, on balance, that I am persuaded that those allegations made by [X] are proved for the reasons I think I have already given when I considered the Achieving Best Evidence interviews. The allegations are spontaneous, clear and come from the child not probing...

109. I find that [the Father] sexually assaulted [X] by touching her genitals and digitally penetrated her vagina and that when he said ‘He told me to sit on his willy’ this was encouragement to have sexual intercourse with him.”

The Appeal and my Conclusions

28. There are three grounds of appeal:

“1. The evidence on which the learned judge relied to make the findings that are challenged was so flawed that it was wrong to place any reliance on it.

2. The learned judge wrongly characterised the allegations made by the complainant child in her interview on 28 October 2018 as unprompted.

3. The judge failed adequately to take into account the context in which the evidence found reliable was given.”

29. These grounds were amplified by Mr Roche in his written and oral arguments; it is clear that the grounds are interrelated.
30. Mr Roche emphasised strongly the context in which X first made the allegations against the Father, none of which was contested by Mr Pryce for the Local Authority.
31. X was born in early 2011. She had spent the first four years of her life with both parents and with her brothers, A and B. The Father left them in February 2015 and in the May of that year the Mother suffered her accident. For the first six months, the children were in the care of friends of the Mother and then moved to the paternal grandparents' home, where they stayed until collected by the Mother and S in July of 2018. They then lived with the Mother and W until the police removed them in October 2018. There is no dispute between the Father and the Local Authority but that in that eleven-week period, the children lived in what Mr Roche described as "a depraved atmosphere". Included in the acts of abuse found against W were sexual assaults on and digital penetration of X, acts of the same character as against the Father. The Mother played a full part in that abuse: she was present when acts of abuse took place; she herself sexually assaulted X and encouraged W in his own acts of abuse perpetrated on X. The children were encouraged to be naked in the home and to keep secrets.
32. In the period up to 13 October 2018, X had made the comments to her brother A which I have recorded above. Then on that day, S came directly from the police station where she had made allegations of historic sexual abuse against the Father. In respect of these, as we were told, the Father has never been charged and, as we were also told, the Local Authority did not invite the judge to make any findings in respect of them. It was on this occasion that the Mother and W asked S to speak to X about what she had said to A. The subsequent conversation between S and X was not private; W was present. It was alleged that in this conversation X had made the allegation of abuse by the Father. It was agreed that S would report the matter to the police, but she did not do so for another 24 hours. A further 24 hours then elapsed before DC G's visit on 15 October. The judge found that the matter was likely to have discussed in the two days between S's conversation with X and DC G's attendance. The allegation against the father about "sitting on his willy" was never repeated outside the conversation with DC G; it was not otherwise mentioned to social workers or to foster carers or in the interviews. Equally, nothing was said about the digital penetration other than in the formal interviews. This was in distinct contrast to what the boys had said to their foster carers in relation to W's abusive behaviour.
33. The judge noted a number of unsatisfactory aspects of the initial meeting between X and DC G. Her notes of the meeting were unclear and seemed not to have been reviewed before she gave evidence. She was not sure of the questions that had been put to X. She could not say who was present or could hear as she spoke to X. The judge considered that there was a risk that X might have said things simply to please DC G as a person in authority.
34. There then followed the fifteen days between the initial meeting and the formal ABE interview on 28 October. At the beginning of the interview, DC G failed to remind X of the importance of telling the truth and she did not invite X to tell her if she did not understand any question that was put.
35. At no stage in the interview did X repeat the allegation, said to have been made to DC G on 15 October, that the Father had told her "to sit on his willy". The judge's finding

in this respect had to rest upon DC G's evidence about what X said on 15 October. There was no other evidence of it.

36. During the interview on 28 October, DC G did not explore the alternative explanation of the allegation of digital penetration by the Father. It will be recalled that at the start of what was said at the initial meeting on 15 October, X had said that she had had "bad dreams" about the Father. No questions were asked to elicit whether the allegations were repetitions of dreams or statements of reality.
37. I have already referred to the length of this interview, the stage at which the allegations against the Father were dealt with and that they were made only when prompted by the reference to what X said she had said to S. There were also a number of interventions by the Intermediary about the duration of the interview. In addition, X said more than once during the questioning that she was hungry and wanted something to eat. The judge recognised that X might have said things simply to bring the questioning to an end.
38. The allegation of assault and digital penetration by the Father only emerged in response to an initial question whether X had told anyone else about what W had done. The conversation with S was then raised and in it this allegation.
39. Mr Roche invited us to note the findings as to the domineering nature of W in the household and the potential for "animus" directed at the Father, who had not been part of X's household for many months. He argued that the judge had failed to give proper regard to the tenuous nature of the allegations made in the full context of the overall atmosphere in the home, reflected by the copious findings of multiple sexual abuse against the Mother and W. He submitted that the statements made by X were in reality far from spontaneous and unprompted when reviewed in such a context.
40. Mr Pryce, in a helpful and realistic argument for the Local Authority, accepted the overall background and context of the allegations made against the father as I have outlined in summarising Mr Roche's submissions. However, Mr Pryce argued, the judge clearly had these features of the case well in mind. She was also, he said, fully conscious of the formal deficiencies of the evidence gathering process and she was critical of how the evidence was elicited from X in many respects. The judge had taken all this into account and indeed remarked upon the comfortable interaction that DC G appeared to have with the children, in comparison with other interviewers of whom the judge had experience. In spite of the countervailing features, the judge had made the findings that she did having seen and heard all the evidence.
41. Mr Pryce accepted that S had been an unreliable witness and, when asked directly from the Bench, he said that we could "lay to one side" anything said to S. However, DC G had given evidence of similar allegations made on 15 October. Further, the passage in the first interview (quoted above) was direct and clear. Based on these matters, the judge made the findings that she did on evidence which she had found compelling, in spite of the defects and overall context which she had fully recognised.
42. Again, when pressed from the Bench, whether he sought to uphold the finding about the encouragement to X to "sit on the willy", Mr Pryce said that he recognised the difficulty with the quality of the evidence about that allegation. However, he could not concede the matter; the evidence had been fully recorded by DC G although, as he accepted, it was not recorded well.

43. In a succinct written argument for the children, through their Guardian, Mr Veitch took essentially the same points as Mr Pryce. The judge had properly considered the weaknesses in the evidence and the danger posed by poor investigatory processes. However, in spite of these problems she had found herself able to place reliance upon X's answers which, adopting the judge's language, "had been spontaneous, clear and had come from the child without probing". Mr Veitch concluded his submission by saying that the judge had been entitled to reach her conclusions, taking the evidence as a whole.
44. In my judgment, taking full account of the arguments of Mr Pryce and Mr Veitch, in the light of the extremely tenuous nature of the evidence, the allegation against the Father of encouragement of X to engage in sexual intercourse simply cannot be sustained. The circumstances of DC G's conversation with X on 15 October, inadequately recorded as it was, render the contents of that conversation unacceptable as evidence. Finally, that allegation was never repeated and did not feature in anything that X said in either interview. There was really no satisfactory evidence of it at all.
45. Turning to the single allegation of digital penetration of X, the evidence here too had number of unsatisfactory features which I have outlined above, and which were frankly acknowledged by Mr Pryce. The principal evidence was found in the first interview and was repeated, entirely as a result of prompting, eight days later in the second interview. There were a number of features of those interviews which demonstrated a failure to comply with the applicable Guidance. They will be apparent from what I have said already. Of course, failure to comply with the Guidance will not always render evidence obtained incapable of establishing acts of sexual abuse: see *Re B (Allegation of Sexual Abuse: Child's Evidence)* [2006] EWCA Civ 773, per Hughes LJ (as he then was) at [34] – [35] and [40] – [42], cited by McFarlane LJ (as he then was) in *Re J (A Child)* [2014] EWCA Civ 875 at [73] – [75]. However, deficiencies of this type can be very significant and, in this case, in my judgment, they were just too numerous to be overcome in order to sustain this single finding in the context of the serial sexual abuse that had been perpetrated by W and the Mother against all these children in the immediately preceding 11 week period. For my part, I accept Mr Roche's submission that the value of the evidence about this single alleged act of abuse, elicited at a very late stage of a long interview and only as a result of a distinct prompt about a conversation with S, was also reduced to vanishing point.
46. The transcript and the recorded interview do not sit easily with the judge's description of X's statement being clear and spontaneous. Such information as was obtained arose from directed questioning of a distracted and tiring child. There is no narrative or free recall or any details that might make it possible to understand when and in what circumstances such an event might have occurred. This is of particular significance where the possible allegation is so strikingly similar to abuse that the child was in fact recently suffering on a number of occasions at other hands.
47. I would add that in *Re E (A Child)* [2016] EWCA Civ 473 at [37], McFarlane LJ said:
- "The departures from the ABE guidance required the judge to engage with a thorough analysis of the process in order to evaluate whether any of the allegations that the children made to the police could be relied upon."

That process did not happen in the judge's consideration of the slender allegations made against the Father, in the context of a case where concentration was heavily focused on

the allegations against the Mother and W. As a result, the very weak statements of X were simply not capable of establishing the allegation to the necessary standard.

48. I also accept Mr Roche's further submission that the findings made against the Father do not reflect the domestic context of serial sexual abuse by W and the Mother, in which the allegations first arose.
49. In contrast to the evidence of X, the judge heard firm denials of the accusations from the Father. However, the judgment does not reveal any assessment at all of the Father's own credibility. Given the circumstances in which the evidence had emerged from X, that evidence (even if not intentionally untruthful) became very weak in quality. In the face of that, it seems to me that a careful assessment of the Father's own credibility was required and an identification of the reasons why his denials were not to be accepted. The judgment below does not provide this. The Father has been found to be lying, without any statement of the reasons why his evidence was found to be incredible.

Outcome

50. For these reasons, in my judgment, the findings of sexual abuse of X perpetrated by the Father, which were made by the judge, cannot be sustained. Therefore, I would allow, the appeal and set aside the findings of sexual abuse made against the Father.

Lady Justice King:

51. I agree

Lord Justice Peter Jackson:

52. I also agree.