Case No: B4/2011/1880/FAFMF

Neutral Citation Number: [2012] EWCA Civ 1269

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM The High Court of Justice Family Division**
**The Hon Mrs Justice Pauffley DBE**
**FD09C00539**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/10/2012

**Before:**

**THE PRESIDENT OF THE FAMILY DIVISION**
**LADY JUSTICE ARDEN**
and
**LORD JUSTICE SULLIVAN**

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**Between:**

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| **SB** | **Appellant** |
| **- and -** | |
| **A Local Authority** | **1st Respondent** |
| **KB** | **2nd Respondent** |
| **JB (through a Children's Guardian)** | **3rd Respondent** |
| **GB (by a litigation friend, the Official Solicitor)** | **4th Respondent** |

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**Paul Storey QC and Camille Habboo** (instructed by **Charles Allotey & Co)** for the **Appellant**
**Frances Heaton QC and Damian Stuart** (instructed by **the Local Authority**) for the **1st Respondent**
**Jenni Richards QC and Katherine Scott** (instructed by **Steel and Shamash** through the **Official Solicitor**) for the **4th Respondent**

Hearing dates: 26 June 2012

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# Judgment

**Sir Nicholas Wall P:**

***Introduction***

1. At the conclusion of the argument in this case on 26 June 2012 we took an unusual course. Following discussion amongst ourselves, we were each of the opinion that the appeal fell to be dismissed. Given both the importance of the subject matter for the parties and the length of time the case had take to reach this court, we decided to announce our decision, but to reserve our reasons. This we duly did, and this judgment is designed to explain why it was that I came to the conclusion that the appeal should be dismissed.

***The appeal***

2. This is an appeal is by a father against findings of fact made by Pauffley J on 1 July 2011. The findings are contained in a recital to an order made by the judge on that date following a 14 day hearing. They read as follows: -

> "AND UPON the Court having made findings that (the father) had exposed himself to (G) touched her sexually and raped (G) on more than one occasion……."

3. The judge gave a number of directions, and refused the father permission to appeal. On 19 October 2011, Thorpe LJ on paper likewise refused permission to appeal: however, the father renewed his application and at an oral hearing on 26 January 2012, Ward LJ granted permission. As the case is ongoing, and since, as a consequence of the appeal no further reports or risk assessments have been undertaken, this judgment will be written anonymously.

***Appeals against findings of fact***

4. It is well recognised that appeals against findings of fact, and perhaps particularly against the findings of an experienced High Court Judge on the subject of sexual abuse, are extremely difficult to mount. The reason for this is not far to seek. It is the trial judge who sees and hears the witnesses. It is the trial judge who has the "feel" of the case. It is the trial judge who has immersed him or herself in the evidence over a period of many days, and who knows the case better at the end of that process than anyone else.

5. Mr. Paul Storey QC recognised this fact at the outset in his skeleton argument:

> "We are fully aware that in a three week case the Court of Appeal will proceed from the starting point that the first instance Judge saw the witnesses and their personalities, together with those of the parties. We have very clearly in the forefront of our minds in launching this Appeal the observations made by the House of Lords in ***Re D (An Infant) (Adoption: Parents' consent)*** [1977] AC 602 at 606 [Lord Wilberforce] and of Steyne and Hoffman LJs in ***Re C (A Minor) (Adoption: Parental agreement; Contact)*** [1993] 2 FLR 260 at pages 273 to 275. Similarly, the case of ***Piglowska***

***v Piglowski*** [1999] 1 FLR 1360 at page 1372, and ***Biogen v Medeva PLC*** [1997] RPC 1 at page 45 and the observations therein about the advantages to the first instance Judge over the appellate Court. More recently in ***Re A (A Child) (Fact finding speculation)*** [2011] 1 fcr 141 at paragraph 38 and ***Re L, R, MH & C (Children)*** [2011] EWCA Civ. 525 Munby LJ discussed the difficulties for a Judge in bringing the dynamics of the hearing onto the printed page in the form of a judgment. We rely on the observations of Munby LJ at paragraph 46 of the latter case as follows:"

"Findings of fact must, of course, be based on the evidence (including inferences that can properly be drawn from the evidence) and must, of course, be adequately explained and reasoned."

6. For G, Ms Jenni Richards QC put the same point a slightly different way;-

"The Court has jurisdiction to hear an appeal from a fact-finding hearing even if there is no order: ***In the Matter of A (A Child) (No. 2)*** [*2011] EWCA Civ 12* at [7].

The trial judge who has seen and heard the witnesses has an "immense" advantage over an appellate court: ***In the Matter of L, R, MH and C*** *[2011] EWCA Civ 525* at [43]. He is *"uniquely placed to assess credibility, demeanour, themes in the evidence, perceived cultural imperatives, family interactions and relationships"* ***In the Matter of A (A Child) (No. 2)*** at [39].

In ***Piglowska v Piglowski*** *[1999] 3 All ER 632* Lord Hoffman (quoting from his own judgment in ***Biogen Inc v Medeva*** *(1996) 38 BMLR 149*) explained the need for appellate caution in these terms: *"It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualifications and nuance … of which time and language do not permit exact description, but which may play an important part in the judge's overall evaluation."*

Put another way, *"Character and personality certainly cannot be judged as well from a transcript of evidence … as by seeing and hearing those involved"* ***In the Matter of A (A Child) (No. 2)*** at [36].

Provided that the judge's decision is adequately explained and reasoned, the judge is entitled to explain his thought processes and reasoning in whatever seems to him to be an appropriate

> and illuminating way: ***In the Matter of L, R, MH and C*** at [46].
>
> A judge should give reasons for his findings but he is not required to go on and give reasons for his reasons: ***In the Matter of A (A Child) (No. 2)*** at [43].
>
> The Court of Appeal is only entitled to interfere if it considers that the trial judge was **plainly wrong** to reach the conclusions he did – ***SW and KSW v A City Council*** *[2009] EWCA Civ 644* at [81]"

7. There was thus no dispute as to the law, and it is clear, as Mr Storey accepted that the father had a very steep hill to climb. In my judgment it is not simply a question of demonstrating – if he can – that the judge's assessment of credibility is flawed: to enable this court to interfere he must show that in one or more than one respect, in Lord Fraser of Tullybelton's words in ***G v G*** [1985] 1 WLR 647, 652 the judge was "plainly wrong" – in other words that there is palpable error or errors by the judge such as to make her conclusion unsustainable. It is not enough, in my judgment, to argue that the judge was wrong to prefer witness A to witness B.

8. For the father, Mr Storey submitted that he had a number of points of sufficient gravity to vitiate the judge's decision and to demonstrate that her conclusion was "plainly wrong". I propose to examine two of them in particular as they seemed to me the points on which Mr. Storey placed greatest emphasis.

9. The first I propose to designate the "alibi" point – in summary that G's charge she was raped on a particular occasion is; (a) demonstrably untrue because the father has a "watertight" alibi for the time in question and (b) that her lack of credibility on this occasion infects the balance of her evidence. The second is what I will call the "opportunity" point namely that the flat which G, two of her brothers, and her parents occupied was so tiny and so arranged, that the rapes of which G complained simply could not have taken place there.

10. Before I set out the facts, however, it is worth pointing out – indeed it is an essential element in child protection - that a judge exercising powers under the Children Act 1989 has the right to make findings of fact on the balance of probabilities against an individual even though, on the same facts either a jury has acquitted that individual or a criminal prosecution has not been pursued. The reason for this is not far to seek Criminal proceedings, which require a jury to be sure before they convict, are concerned with punishment and guilt: civil proceedings are concerned with child protection and whether or not a given event occurred or series of events occurred.

11. The question in the instant case is thus not that the father should be vindicated on the basis that it was impossible to mount a criminal prosecution against him, but whether or not the evidence, taken as a whole, warrants the findings sought by the local authority: in a nutshell, was the judge entitled to find as she did on the balance of probabilities?

***The essential facts***

12. I can take these from the judgment of the Judge:

> "5. The two subject children are G who was born on 26th February 1994 so that she is now 17. *[I interpolate – she is now 18]* She is represented in these and the Mental Capacity Act proceedings by the Official Solicitor as her litigation friend. J is her younger brother. He is 7 years old, born on 15th February 2004. They have older siblings, L who was born in December 1985, now 25 and P who is 24 years old; he was born in December 1986. "
>
> 6. The children's mother is KB, born in 1967; their father is SB, born in 1964. They were married in 1984 and continue to live in the family home in South London together with P and J. L lives at her own accommodation and G is looked after by her foster mother…. with whom she has lived since making allegations against her father.
>
> 7. There is a considerable history of established incest within G's wider family and of alleged sexual abuse within her immediate and extended family.
>
> 8. The paternal grandfather is TB, born in 1940; his wife is S born in 1944. One of their four children, MB, born in 1965, is SB's younger brother. MB is married to his first cousin, SH. Their three children are SA, born in August 1985, D born in May 1987 and LO born in July 1988. SA had two children, CH born in July 2001 and CO born in June 2003. CO suffered from a progressive and ultimately fatal genetic condition. DNA testing established that MB was the father of both CH and CO. In 2007, he was convicted of having had sexual intercourse with his under-age daughter and sent to prison for 5 ½ years.
>
> 9. Complaints of sexual interference against SB first surfaced in 1996. From time to time between then and 2001, his nieces SA and LO said he had abused them. In January 2001, aged just 15, L left home and made allegations against her father, SB, which were amplified in March, April and June of that year. L lived initially with her maternal aunt and uncle and then with her maternal grandparents. She subsequently went to live with her friend PD.
>
> 10. On 6th April 2001, by agreement with social services, SB left home and remained away for some 10 months until February 2002. During that period all contact with his children was supervised. In July 2002, L made a complaint of sexual wrongdoing against SB. In November 2003, SA and L were ABE interviewed and made allegations against SB, saying he

had abused them, L and D. At the end of May 2006, L alleged that SB had abused her as well as her cousins, SA and LO.

11. In addition to what the three girls said about SB, they also alleged that their paternal grandfather, TB had abused them. MB, too, has made an historic allegation of sexual abuse against his father, TB. D was known to have abused at least one and maybe both of his sisters, SA and LO.

12. Against that background, the Local Authority began care proceedings in relation to G; on 12th January 2006, an interim care order was made. G spent 11 months living with foster parents and then for 8 months she stayed with her maternal grandparents. She had regular contact with her family except for P who chose not to attend. When she was medically examined in October 2006, there were no physical signs that she had been sexually assaulted.

13. In May 2007, the proceedings came before Her Honour Judge Mayer. The hearing lasted for 16 days. On 9th July, during the course of her judgment, the judge made a number of findings which might be summarised in this way –

The local authority had not proved on the balance of probabilities that SB had abused L, SA and LA or that TB had abused his grandchildren.

MB had sexually abused SA and LO. He was a "pathological and cunning liar" who had successfully managed to disguise his abusive behaviour from 1997 until September 2006 – when DNA tests proved him to be the father of his two granddaughters.

MB had deliberately coached his daughters to make allegations against SB and TB.

MB had coached L to make false allegations against SB and TB in 2006. He was also instrumental in L making allegations against her father in 2001 although the mechanism was not clear and he may not have been alone in encouraging / inducing LB to make allegations.

It was also part of the judge's judgment to urge caution about contact between G and L. She said that "unless L accepts some ability to accept the findings, her contact with G should be closely supervised especially so long as MB was at large."

***How the judge went about her task***

13. Having set out the essential background, traced the evolution of G's allegations, and set out the respective positions of G's parents, the Official solicitor on behalf of G and

of J's guardian, the judge directed herself immaculately in line with the decision of the Supreme Court in ***Re B*** [2008] UKHL35 and gave herself a ***Lucas*** direction. She then went immediately to what she saw as "the key issue".

> "Discussion and conclusions on the key issue
>
> 39. On the key issue, namely whether or not there has been sexual abuse of G by her father, I am entirely satisfied that the core of her allegations is true and notwithstanding everything so comprehensively argued on SB's behalf by Mr Storey QC and Miss Habboo, I conclude that G was indeed the victim of sexual abuse and it was her father, SB, who abused her. The overwhelming probability is that in the beginning, he indecently assaulted G or 'touched her up' by groping her breasts and touching her genitals. I believe he did expose his penis and make rude gestures in G's presence when she was working on her computer as she described to her friends at school. As time went on, I find that the abuse developed into full sexual intercourse; and there was a pattern of incidents of sexual abuse occurring on a Monday evening when Mrs B was out at Bingo, as she was on three Mondays out of four throughout the last three to four years before G went into care.
>
> 40. Now I shall explain my reasons for those conclusions and why it is that I cannot agree with the submissions made on behalf of (Mr. SB)."

14. The judge then explains her conclusions under a number of headings (to which I will refer in a moment) and in paragraph 70, she re-iterated the point:-

> "70. The critical question for me is as to whether as a result it would be appropriate to regard everything else G has said about her father both before and since 19th May with extreme suspicion, even disbelief. In my assessment, it would be unjust and profoundly ill-advised, in this instance, to attach great importance to the precise dating of the last occasion of abuse, as described by G. She has a well described learning disability, evident difficulty in recalling precisely when events occurred and in sequencing them."

15. The judge explains her reasoning under a series of headings. Firstly, she explains over some twenty-two paragraphs why she believed G - the headings here are ***Constancy and cohesion***, ***G's credibility***, **Consistency *in the face of challenge*** and, slightly later ***Emotional affect***, the ***Emotional Cost of maintaining the allegation*** and ***G's character and trustworthiness.*** The judge then examines carefully all the arguments mounted on the other side: these include: ***A fabricated account? Paucity of detail;*** and ***Motivation for a fake allegation.***

16. The judge then comes to the alibi for the evening of 18 May 2009. I have already set out paragraph 70 in which the judge poses what was, for her, "the critical question".

17. It seems to me that Mr. Storey has a sound forensic point when he asserts that the events of 18 May 2009 as described by G in the ABE interview on the following day did not happen. But in my judgment the judge has the more potent point in paragraph 70 when she refers to the "well described learning disability" and describes in the following paragraphs not only the person whom she observed giving evidence, but the observations of others in relation to the same issue. In addition, we were taken by leading counsel for the local authority through the expert evidence relating to G's disability, evidence which the judge herself examines with care under the heading ***A fabricated account? Paucity of detail.***

18. It is, I think, worth pointing out that that one particular feature of G's disability was a sequencing difficulty. Thus when she said "it happened yesterday" it could have been any day in the past. This, in my judgment, goes a long way in taking the force out of the "watertight" alibi point. Furthermore, there had been an interim application heard by the judge to decide whether G could give evidence at all. This meant that the judge had an in depth knowledge about her intellectual abilities.

19. Added to which, it needs to be recalled that this was not just a family with a history of abuse but a case where SB had been vindicated by a court (Her Honour Judge Mayer) in relation to another child. The latter's judgment, which was of course before Pauffley J, was very thorough, but the point of distinction between the two trials is that a great deal of help – in the form both of expert evidence and a facilitator when G gave evidence - was available to Pauffley J to help her understand the nature of G's disability.

20. Similar considerations arise in relation to Judge Mayer's concern about L and the risk to contamination. The abuse of which G complained was very like that alleged by L, which had not been proved. Moreover G could not give details. This was another aspect of G's disability which the judge understood well. The judge did not believe that she could have learnt to lie on the scale that would have been necessary to make the allegations if false. The judge was thus able to give reasons why she did not accept the contamination allegation.

21. Against this background one comes back to the statement of the law accepted on all sides. Were the findings which she made open to the judge? Has she adequately explained her reasoning? One has, I think, only to pose these questions: the answers suggest themselves from a straightforward reading of the judgment.

22. The judge then deals with ***Opportunity***. Her view is that there would have been "ample" opportunity. I respectfully agree. The rapes, according to G did not always take place in G's bedroom. The following is an extract from the ABE interview. It is unfortunate that the sequence begins with a leading question, but the relevant answer contradicts another leading question: -

> **"Question** "Ok. Alright. Now, I think you were saying to your friends or to somebody that it had happened before?"
>
> **Answer** "Yeah"
>
> **Question** "Can you tell me about that?"

**Answer** "He does it every Monday when my mum is out."

**Question** "Ok, Ok the same thing?"

**Answer** "Yeah."

**Question** "Ok. Is it – does he always do it in the same place?"

**Answer** "Yeah"

**Question** "In the bedroom?"

**Answer** "No, he does it in the front room when my brother is asleep."

**Question** "Ok. So how longs your mum out at bingo?"

**Answer** "She goes about 6 and doesn't come back until like 9.30 – 10pm"

**Question** "Right. So your little brother's asleep?"

**Answer** "yeah"

**Question** "Then describe to me what happens when he does it in the front room? How does it go? Does he come and get you or _ _ _ "

**Answer** "Yeah he come and get me"

**Question** "Okay. So say on a Monday when you mum's gone to bingo, you'll be in your bedroom with your brother, your little brother?"

**Answer** "Yeah"

**Question** "And then explain to me what happens?"

**Answer** "He just drags me in the front room and does the same thing"

**Question** "And where does he do it?"

**Answer** "On the bed"

**Question** "The sofa bed?"

**Answer** "Yeah"

23. The judge was of the view – it was common ground – that elder brother P, who has his own bedroom, was football mad, and would be glued to the screen on Monday nights when premier league matches were featured on Sky television. It also emerged during the course of submissions to us that P had a television set in his bedroom.

Thus, if J was asleep in the bottom bunk in the bedroom he shared with G, and P was watching football in his room, the sofa bed in the living room was available. On the other hand, if P and J were watching football together, either in the living room or in P's bedroom, then the bottom bunk in J's room was available. I thus agree with the judge that there was indeed ample opportunity for abuse.

24. The final headings used by the judge are ***An atmosphere of suspicion?, Use of the internet and relationship with DD*** (an underage boy with whom G had a sexual relationship and whom she later accused of raping her) and ***The allegations against P*** (whom she accused of abusing her and against whom the allegations were not pursued by the local authority) ***and DD***.

25. In each of the headings to which I have referred, the judge meets head on and deals with factors advanced to her for bringing G's account into question. Mr. Storey criticises the judge for the strength of her language – for example, she describes as "fatuous in the extreme" the proposition that because G denied to a stranger over the internet that she had ever been raped that was a indicator that her allegations against her father were untrue. In my judgment, however, the manner in which the judge went about her task is exemplary, and it would be difficult to think of a better way of dealing with the contrary assertions.

26. For these reasons, I have come to the clear view that the essential decision, namely that the "core" of G's allegations was true, was a decision which was properly open to the judge on the evidence and one in relation to which she has explained her conclusions fully and carefully. Whether or not I would have come to the same conclusion is immaterial – see the judgment of Cumming-Bruce LJ in ***Clarke-Hunt v Newcombe*** (1982) 4 FLR 482,486, cited with approval by Lord Fraser at [1985] 1 WLR, 647, 651D.

27. For these reasons, my view on 26 June 2012 was that the appeal should be dismissed.

**Lady Justice Arden**

I agree.

**Lord Justice Sullivan**

I also agree.