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Criminal Mock Appeal – Mr Justice Green, The Right Honourable Sir John Goldring, Mr Justice McCreath, Mrs Justice Andrews, David Etherington QC, Sarah Whitehouse QC

(transcript of video)

Mr Justice Green: The appeal you are about to watch would probably in real life take longer, nonetheless what you will see demonstrated are some of the points made in the talks.

The case study used is fictional, but is based on a real case.

The Appellant; Peter Smith, was convicted in the Crown Court, of two counts of causing or inciting a child to engage in sexual activity, contrary to section 8(1) of the Sexual Offences Act 2003.

The Crown's case was that the Appellant had used his position at a playgroup to obtain the telephone number of Violet ("V"); a 12 year-old girl. Thereafter a series of "WhatsApp" messages were exchanged between them. The messages are part of the papers supplied to the judges.

The Prosecution asserted that the messages amounted to an attempt to "groom" Violet, therefore were causing her to engage in "sexual activity" as defined in Section 78(b) of the 2003 Act.

The Appellant's case was that it was the messages sent by Violet, in response to those sent by the Appellant, which the Prosecution had to prove were sexual and nothing in those messages was capable of being sexual.

A submission of "no case to answer" was made to the trial judge at the close of the prosecution case. He rejected the submission. It is this rejection which forms the ground of appeal.

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Sir John Goldring: Yes Mr Etherington?

David Etherington QC: May it please your Lordship, I together with Mr. Herman appear for the Appellant in this case and the Respondent is represented by my Learned Friend Ms. Whitehouse.

Neither of us appeared in the court below, but as your Lordship knows the case involves text messages sent between Mr. Smith - a young male adult and helper at a playgroup - and V - a 12 year-old girl who was a member of that group.

Of the three original charges at trial, the count alleging grooming of V by Smith was withdrawn by the judge from the jury, at the close of the prosecution evidence. And the Appellant's case is that the other two counts - both of which allege that Mr. Smith caused V to engage in sexual activity, contrary to section 8(1) of the Sexual Offences Act 2003 - should also have been withdrawn.

Your Lordships will have seen the skeletal arguments served by both parties, I wish if I may to crystallise the point made in the Appellant's argument, and address the Respondent's observations.

The Appellant's central submission is that there was no evidence for the jury to consider as to whether V ever did engage in sexual activity, and that it is therefore a situation posited by the well-known case of Galbraith, where under limb one of the test - where there is no evidence that the crime has been committed by the defendant - then there is no difficulty the judge should stop the case. To prove Mr. Smith guilty of counts one and two it is our submission that the prosecution had to show that it was V who had engaged in sexual activity, rather than Mr. Smith.

Sir John Goldring: Mr Etherington may I just ask you something? It relates to count one, it's the schedule of messages, its page 11...

David Etherington QC: My Lord, yes

Sir John Goldring: The messages for the fifth of April, at 13:00 hours

David Etherington QC: Yes my Lord

Sir John Goldring: That part which reads "can I kiss it better? Haha..." and the parts that follow - may those words when read as a whole by their nature be sexual?

David Etherington QC: My Lord, may I make two points in response to that question?

Sir John Goldring: Certainly

David Etherington QC: First of all it was V's evidence - about which she was adamant throughout - that she had not meant in any way to convey anything sexual in the messages. She thought some of them were rather peculiar by their nature, but to her sexuality had not crossed her mind. That that's the first point.

Second, looking at the message in a little more detail, where she says "no, I'm, sick", "can I kiss it better?" - we do not in fact know what was wrong with her, but it's likely to have been a childhood infection, such as a cold or stomach upset. Therefore her question "sure, but where?" is far, far more likely to simply be a child's response to it being impossible to kiss the condition away. And without further we would say it falls below the line even for the fairly low test that's posited by Section 78(b) of the Act.

Mr Justice McCreath: Yes, before you put your papers down Mr. Etherington can I take you please overleaf to the count two material, pages 12 and 13...

David Etherington QC: Yes

Mr Justice McCreath: ... Where we a find at eight o'clock in the morning, the question about her riding her bike: "how far ride do you ride it?", "all round the

park twice", "doesn't that hurt?", "yes, I've got a new saddle though". The question is does that not make reference to particular parts of her anatomy? And then later at 18:00 hours as it's set out in the documentation, the question about what she's wearing: "what are you wearing?", "my summer dress like the other week" and then the question "what else?", then "just girls stuff, my bra and that". Taken as a whole do you submit that that is not capable of being sexual?

David Etherington QC: My Lord we do make that submission, we submit that in the context of the messages - and her evidence - that there was nothing being conveyed in what she said of a sexual nature. They are simply innocent answers to questions, whatever the motive of the question - which we accept may be a different matter, but is not the relevant part of the test Section 78(b)- Mrs Justice Andrews

Mrs Justice Andrews: -So Mr. Etherington, do you submit that both counts would stand or fall together?

David Etherington QC: My Lady not necessarily, the principal is the same of course in both, and it is our submission is that the effect is as it happens the same in both, but it need not be because it is entirely fact-specific. If her answers in the tenth of April text for instance were of a sexual nature then different considerations may apply to that, so there's… as a matter of law it's not necessarily going to be the same, although the principal underlying the submission is the same - and we submit as it happened the facts are.

Activity as the Court knows isn't in fact defined in the act, but as already referred to in the answers "sexual" is under section 78, and as the court knows the question was subjected to detailed scrutiny and guidance in this Court by Lord Justice Atkins in the case of Grout 2011, 1 Criminal Repeal Report, page 38,

which also helpfully reviews earlier authority. And indeed at paragraph 30, the court citing Lord Woolf in the earlier case of H poses a three-stage test:

1. Whether a reasonable personable would consider relevant activity was by its very nature sexual. This is the test posed by section 78(a), and it's our submission that the answer here in respect of both counts is no, and we do not understand from the respondent's skeletal arguments that is in fact disputed.

2. Whether a reasonable person would consider the relevant activity because of its nature **may** be sexual, and

3. If so, whether considering all of the circumstances the activity was in fact sexual, and those last two stages are of course section 78(b) of the act. And we concede that stage three must be a question for jury.

So the issue therefore is this: was there evidence at stage two for the jury to consider that the relevant activity performed by the child may have been sexual? And it's our submission that where there is no evidence of activity capable of being considered sexual by a reasonable person then the judge should withdraw the relevant count from the jury.

So stage two in our submission is - in effect - a threshold test, and the Respondent says that it's a low test, but it's our submission that there is nothing to suggest that there is any diminution in the ordinary meaning of the word "sexual". Although, we of course accept for the purposes of stage two the jury are only considering whether there *may* be sexual activity.

Section three is where they consider there was - or not. Here the respondent argues in respect of count 1 that in the text messages generally and taken as a whole, between April the second – I apologise - and April the tenth, the activity of

V in response to the text messages **was** sexual, because it was an activity that took place in the context of his grooming her.

The Learned Judge in her ruling - following that line of logic - said that the long term purpose of Mr. Smith, being potentially that of engaging in sexual activity with V in the future, was sufficient to satisfy the test. However in our submission the case of Grout shows clearly that this Court was anxious to emphasise that the activity in question must be that of the child, and not that of the perpetrator.

The Respondent says - correctly in our respectful submission - that it's not necessary for the child to understand the activity as being sexual, and if I may give an example that illustrates that point clearly: a child who touches an adult inappropriately-

Sir John Goldring: -Forgive me interrupting Mr. Etherington-

David Etherington QC: Yes

Sir John Goldring: Can you take us to where this appears in your advice on appeal?

David Etherington QC: My Lord I cannot, but can I explain why I cannot?

Sir John Goldring: Of course

David Etherington QC: And then add a short apology. I am in fact in this section of my submissions to the court responding to the skeletal argument of the Respondent, which post-dated the advice and skeleton in the Grounds of Appeal. Now, in a perfect world - and I apologise for it - there should have been a supplementary skeletal argument to deal with this aspect, but I hope I can make it both brief and intelligible to the court so that no disadvantage will be suffered to anybody as a result - but I do apologise.

A The example I was giving is this: A child touching an adult inappropriately at the instigation of that adult does not require the child to comprehend any sexual nature of the activity, and indeed in the case of a very young child, the child may B well not. But the child is nevertheless engaged in an activity that a reasonable person would term "sexual activity".

C However the activity here - the sending of messages by the child - cannot properly be described in our submission as being even capable of sexual activity, whatever the Appellant's long term plans. And indeed, grooming itself frequently does not involve sexual activity, but is an act preparatory - as the court will have found on many occasions - to such activity occurring in the future. And that D activity - the activity of grooming - is criminalised by section 15 of the act, the charge in this case that ironically the judge did withdraw from the jury.

E On count two the Prosecution puts its case in a different way and this is only in respect of the text messages of April the 10th, to which the Court referred me in argument. Here the Crown says that the activity was sexual, because it appealed F to an interest which unknown to the child the defendant had, and the interest was reading about the removal of a schoolgirl's clothing.

G Now, it is true - and in evidence - that he had both explored and downloaded some pornography of a woman – a woman I should emphasise in her thirties - dressed as a schoolgirl performing lewd acts which the Prosecution introduced with leave as evincing an interest in real schoolchildren. Whether or not that is an argument of any substance or is fanciful, it doesn't matter for the purpose of my H submission, because we submit that once again this is to confuse the Appellant's intentions with the child's activity, which is impermissible, particularly at stage two. An example I would give is this: the singing of a nursery rhyme - for instance by a child - is plainly not sexual activity in any reasonable world, by that child,

whether or not it arouses the perpetrator because that is a particular perversion or kink in his character.

However, a child playing with private parts for a perpetrator is sexual activity even if the child does not perceive it as such. In our respectful submission, in this case, that is the difference and the distinction which goes to the heart of the problem the Crown has with both counts. In those circumstances and accordingly, the Appellant asks the court, respectfully, to quash both convictions, and because this appeal concerns evidential sufficiency submits that there should not be a retrial.

Sir John Goldring: Thank you Mr. Etherington

Yes Ms. Whitehouse?

Sarah Whitehouse QC: My Lord the Respondent's essential submission is that the judge was right to find that there was a case to answer on both counts. And the reason for that is that she was correct in finding the sending of messages by Ms. V was **capable** of being a sexual activity.

I'll take the Court first - if I may - to the case of Grout who has just been mentioned by my Learned Friend. Now because in this case at paragraph 30, the Court helpfully set out the questions that must be answered in considering whether or not there is a case to answer in cases of this nature.

The first submission we make is this: and that the sending of text messages in an activity and that does not appear to be in dispute. We rely on section 78(b) - which is set out at paragraph 30 - where the Court said, six lines from the bottom:

"The second question under section 78(b) is whether a reasonable person would consider that the relevant activity (that is the sending of these messages) because of its nature, **may** be sexual."

A My Lord, our submission is that in this case the sending of messages by Ms. V may be sexual because of the context in which they were sent. They were messages between a male and female, of widely differing ages, who had no B obvious relationship with each other, and therefore they couldn't be seen in the context for example of a brother and sister or two friends. And for that reason, they may be - depending on the view of the jury - considered to be sexual.

C **Mrs Justice Andrews:** Ms. Whitehouse, sorry to interrupt but don't you have some difficulty reconciling the decision in the case of Grout with your position in this case?

D **Sarah Whitehouse QC**: My Lady no; in Grout the convictions were quashed, and they were... it was a conviction under this same section but the reason for the quashing of the convictions was because at the outset the Crown had charged E the defendant with in one count with both causing and inciting the child to engage in sexual activity, and it wasn't made plain which of two different activities related to the causing and which related to the inciting. In effect F therefore, there were two charges, at least two charges rolled up into one. That lead to confusion and the court found consequent errors in the judge's directions.

G And so my Lady the decision in Grout has limited relevance in this case. The relevance of Grout for the purposes of this appeal, are the way in which the Court has analysed the section at paragraphs 29, 30 and 31.

H If I may return my Lady to - and my Lord - to analysing the facts of this case in relation to section 78(b) I have made submissions as to why the activity **may** be sexual. We then move to the third question, which is whether a reasonable person would consider that because of the circumstances or the purpose of any person in relation to that activity it **is** sexual. Now that is a question for the jury, of course, and in this case the jury in our submission was entitled to consider that because

of the relationship between these two and because of the content of the messages, the defendant - in encouraging Ms. V to respond to him in the way that she did - was feeding his own fantasy of a possible future sexual relationship between them, and thereby providing sexual gratification to himself, and that was a matter properly in our submission left to the jury in relation to Count one.

Sir John Goldring: Ms. Whitehouse can you just help us about this? Its paragraph 14 in your skeleton argument where you refer to... you say that there should not become a space outside the terms of the act, and that to allow this appeal would set a dangerous precedent. What are you there submitting?

Sarah Whitehouse QC: My Lord just this - if messages such of this... such as this could never be caught under the act then it would be a license to those who seek to obtain gratification from contact of this nature with children to continue to engage in such conduct. Now of course depending on the circumstances and the facts of the particular case it may well be that such conduct would be entirely innocent and blameless and could never be considered sexual under any circumstances, but to suggest that messages between a male and female of this nature could never be sexual and could never found a charge under this act would leave those with a sexual interest in children free to contact them in this way.

Sir John Goldring: Yes I see, thank you.

Sarah Whitehouse QC: Those are the submissions that I make in relation to count one and the reasons why the judge was correct to find that the messages were capable of being sexual activity.

Mrs Justice Andrews: Ms. Whitehouse can I stop you and ask the same questions I asked of Mr Etherington?

Sarah Whitehouse QC: Yes

Mrs Justice Andrews: Is it the Respondent's position that both counts will stand or fall together?

Sarah Whitehouse QC: No, the counts do not stand and fall together my Lady, the reason for that is that although the essential offense is the same, and the principals of course are the same, count two has a much more direct sexual content in it, in our submission. And it might be possible for a jury to find that count one - the messages involved in count one - weren't sexual activity as far as those in count two were. And the judge found that both were, but the jury may well have considered that one didn't pass the test and the other in count two did. That's not to say my Lady that count one - the evidence in relation to count one - wouldn't of course be admissible in relation to count two as background.

If I can then move to count two, again as with count one it was open to the judge to find that the sending of the text messages by V, or "flirting" as is what the judge called it, **was** capable of being sexual activity, and first for the same reasons I gave earlier; exchanges between an older male and a younger female for no obvious purpose. If his purpose was in fact his own sexual gratification, if the jury found it so to be that would be capable of transforming the messages into sexual activity.

The messages in relation to count two, are of course more graphic then they are in count one because the defendant came to a stage where he was inviting the Ms. V to explain to him what she was wearing and the position in which she was sitting, and there is of course reference to her bicycle. They are to be found on page 12 and 13 in the bundle.

He was asking if it didn't hurt to be riding the bicycle around the park, and asking her later on that day how she was sitting. She was sitting with her legs crossed on

A the couch and what she was wearing. And she then went on later to tell him - at his... in response to his question; "what else are you wearing?" - "girl stuff, my bra and that". Those exchanges between those two went a great deal further than B any conversation about a favourite food or a visit to a film, in our submission, and the questions the defendant was asking of Ms. V were eliciting answers to feed - in the Crown's case - his own sexual desires. And in those circumstances we C contend that both counts are capable of founding convictions under this section.

My Lord unless I can assist further those are our submissions.

Sir John Goldring *(to the bench)*: Thank you very much indeed, anything you D want to ask*?*

Thank you very much Ms. Whitehouse

E Mr Etherington we don't need to trouble you on count one, could you briefly respond on count two?

David Etherington QC: My Lord yes, and to do so it's necessary to look at the F message in perhaps a little more detail than I did in my original submissions.

The message of the 10th of April is really in two parts. The first is the question about what shall we do in the park and what follows from there. And the girl says G she rides her bike usually around the park twice, in answer to the question "doesn't that hurt?" in fact she says "yes, I've got a new saddle though, you do ask funny questions". In our submission, even given the most generous latitude of H interpretation that is not a flirtatious conversation in any shape or form.

However - if I may use a colloquial expression - however "creepy" his questions may have been to her, her answers in our submission do not and could not constitute sexual activity. And the same is actually true, perhaps with more force in the second message, where in answer to the questions about where's she's

A sitting she gives a perfectly ordinary answer and indeed says "you must be bored", plainly not understanding whatever may have lain behind the question, and "what are you wearing?", she says "my summer dress", then "just girl stuff, my B bra and that", and adds - putting beyond any doubt that there's nothing flirtatious in this conversation - "this is really dull, to be honest". And that in our submission is a perfectly normal conversation of a little girl, it could not even a C fevered mind in our submission be described as sexual activity.

Sir John Goldring: Thank you Mr. Etherington

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D **Mr Justice Green**: What you have just seen demonstrated are the following:

- E The use of a skeleton argument - in this place the advice replaced the skeleton argument - as a tool
- Courteous and persuasive addresses
- The use of simple, direct language
- F Clear and immediate replies to the questions posed by the judges
- Engagement with the court
- Limited but appropriate quoting from appropriate authorities
- G And the avoidance of repetition in oral submissions

END

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