No. 96/2643/X5

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Tuesday 17 December 1996

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND
(Lord Bingham of Cornhill)

MR JUSTICE SACHS

and

MR JUSTICE TOULSON

R E G I N A

- v -

KEVIN JOHN WHELAN

Computer Aided Transcription by
Smith Bernal, 180 Fleet Street, London EC4
Telephone 0171-831 3183
(Official Shorthand Writers to the Court)

MR JOHN GARDINER appeared on behalf of THE APPLICANT

MR JEREMY LEA appeared on behalf of THE CROWN

JUDGMENT

(As Approved by the Court)

Tuesday 17 December 1996

THE LORD CHIEF JUSTICE: In March 1996 Kevin John Whelan stood trial in the Crown Court at Nottingham before Mr Recorder Metcalf and a jury on an indictment which contained two counts. The first count charged him with indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956. The particulars of that count were that, on a day between 1 January 1985 and 31 December 1989, he indecently assaulted Tammy Yvonne Whelan, a female person. The second count was one of indecency with a child, contrary to section 1(1) of the Indecency with Children Act 1960. The particulars of that count were that on a day between 1 January 1982 and 31 December 1985 he incited Tammy Yvonne Whelan, a child under the age of 14, to commit an act of gross indecency with him. It is apparent from the particulars which we have recited that count 2 was set at a time earlier than count 1; it covered a period of two to three years before count 1. It is also apparent that the child involved in both counts was the same; she was the daughter of the defendant, born on 13 September 1976. Thus she was aged five-and-a-quarter to nine-and-a-quarter during the period covered by count 2, and eight-and-a-quarter to thirteen-and-a-quarter during the period covered by count 1. By the time of the verdict it was plainly understood that count 1 related to one specific offence said to have been committed when the defendant was living at Lowdham. The jury acquitted the defendant on count 1.

Count 2 was a specimen count said to represent a series of offences committed by the defendant when he was living at Blidworth. The jury convicted on count 2. Sentence was adjourned and on 26 April 1996 he was sentenced to 18 months' imprisonment. He gave Notice of Appeal, but on 17 July 1996 he died in hospital in Lincoln at the age of 46 from natural causes.

Between the conviction on count 2 of the indictment, to which we have referred, and his death he had been convicted and sentenced for two other alleged sexual offences committed against his step-sister a number of years earlier. He did not seek to challenge those convictions and they are not the subject of any application before us today.

The first application before us is made on behalf of Mrs Patricia Whelan, the widow of the

defendant, seeking the approval of the court that she should continue the appeal which the defendant began. The application is made under section 44A of the Criminal Appeal Act 1968, which is a section inserted into that Act by section 7(1) of the Criminal Appeal Act 1995. The amendment was prompted by a decision of the House of Lords in R v Kearley (No. 2) [1994] 2 AC 414, in which the House of Lords held that the right to appeal to the Court of Appeal Criminal Division was personal to the convicted person and so abated on the death of the appellant. At page 422H of the report of their Lordships' decision, Lord Jauncey of Tullichettle said:

> "My Lords, although I reach the foregoing conclusion without hesitation I do so with some regret. There is no doubt that as the law now stands injustice could, as Lord Goddard CJ pointed out in R v Rowe [1955] 1 QB 573, 575, result if an individual's estate were obliged to suffer a wrongly imposed pecuniary penalty whether by way of a fine, confiscation order or an order for costs, because there existed no procedure for challenging the order. It must be for serious consideration whether some machinery to alleviate such possible injustice should not be available. This is, however, a matter for Parliament since it would be necessary to determine as a matter of policy to whom any such machinery should be available and whether it should be limited to cases involving pecuniary matters or whether, and if so in what circumstances, it should also include cases in which relatives of the deceased were anxious to clear his name. It would, on any view, seem right that such machinery should only be available with leave of the Court of Appeal but, once again, this would ultimately be a matter of policy for Parliament."

On this occasion Parliament responded to their Lordships' invitation with commendable alacrity.

Section 44A of the Act provides:

> "(1) Where a person has died --
>
> > (a) any relevant appeal which might have been begun by him had he remained alive may be begun by a person approved by the Court of Appeal; and
> >
> > (b) where any relevant appeal was begun by him while he was alive or is begun in relation to his case by virtue of paragraph (a) above or by a reference by the Criminal Cases Review Commission, any further step which

> might have been taken by him in connection with the appeal if he were alive may be taken by a person so approved."

Subsection (2) defines the expression "relevant appeal" and that includes an appeal under sections 1, 9, 12 or 15 of the 1968 Act. Subsection (3) provides:

> "Approval for the purposes of this section may only be given to --
>
> (a) the widow or widower of the dead person;
>
> (b) a person who is the personal representative (within the meaning of section 55(1)(xi) of the Administration of Estates Act 1925) of the dead person; or
>
> (c) any other person appearing to the Court of Appeal to have, by reason of a family or similar relationship with the dead person, a substantial financial or other interest in the determination of a relevant appeal relating to him."

It is apparent from the language of the statute that a surviving spouse is recognised as a person with a right to seek the approval of the court. The grounds on which approval may be sought are not limited to a financial interest, as is apparent from subsection (3)(c). It would furthermore appear from the speech of Lord Jauncey, which is in no way contradicted by the language of the section, that the desire to clear the name of a deceased may be regarded as a legitimate objective. The Crown point out that even success in this appeal would not entirely clear the name of the deceased since he stands convicted of other offences anyway and therefore some stigma will remain. The applicant however points out, in our view correctly, that it is one thing to commit an offence against a step-sister at an immature age and quite another as an adult to abuse one's own daughter.

We conclude that Mrs Whelan should be approved by this court as a person to pursue the appeal. In reaching that decision we pay particular regard to the fact that the appeal was begun by the deceased in time. This was a happily married couple and we do not doubt that Mrs Whelan is seeking

to give effect to the wishes of her late husband. We regard her application as bona fide and have no reason to suspect any motive beyond that of seeking to clear the name of the deceased. We regard that as a legitimate objective. It is true that the deceased will in any event remain convicted on other counts which he does not seek to challenge, but we consider the stigma of conviction on this count to be greater. If we were to be persuaded that this conviction was in truth unsafe, then we would in our judgment owe a duty to the cause of truth and justice so to rule. That duty is unaffected by the death of the deceased in a case such as this where only the intervention of death has prevented the defendant himself from pursuing his appeal. Henceforward we shall refer to the deceased as the applicant, although bearing in mind that it is his widow who is truly the applicant.

We therefore turn to the merits of the application. The case advanced on behalf of the applicant essentially rests on a submission that there is a discrepancy between the jury's acquittal on count 1 and the conviction on count 2. It is pointed out that Tammy, the child complainant, was the main prosecution witness on both counts. It is argued that if the jury rejected or felt doubt about the reliability of Tammy's evidence on count 1, then the jury could not properly have been sure that her evidence was to be accepted on count 2. Accordingly it is submitted that the conviction on count 2 must be regarded as unsafe.

As already explained, the two counts related to different periods of time and the offences are said to have been committed in different places. From 25 July 1984 until 31 October 1986 the applicant lived at Blidworth with his second wife Patricia. His son Sean (a year older than Tammy) and Tammy lived with them at the beginning of the period but went to their mother at some date before the end of October 1986. During that period the alleged offences were committed, of which count 2 was a specimen. The learned Recorder summarised the effect of Tammy's evidence in relation to this count at pages 7D to 8B of the transcript of his summing-up:

> "But while she was there she told you things happened, and when describing the first time that it had happened she said that she and the defendant, her father, were playing -- were fight playing. He said 'Come upstairs', and she said 'Why?' 'I want to show you something.'

> They went up to the bathroom. The defendant stood between the door and her so he could -- at the door entrance so he could see anyone coming up the stairs. He took his trousers down and his pants down and said, 'Will you play with me?' She did not know what he was talking about. He started to masturbate. He asked her to do it to him. She said she did not want to, so he got hold of her hand and told her to rub his penis. He had his hand -- had hold of her hand so she had no choice. He ejaculated onto his hand and hers and wiped it off with a tissue, as if it was just normal. Indeed he said, 'You must not say anything.' 'Why?' 'Because it is something normal that happens between a father and daughter.' He just then carried on as normal. 'How frequently did it happen?' she was asked. 'About every two weeks or so, either in the bathroom or in his bedroom.' They were alone in the house when it happened and she agreed that she did not tell anyone."

The applicant denied that anything of the sort described by the child happened. He furthermore suggested that if one stood at the door of the bathroom one could not see down the stairs from the bathroom door, although he agreed that it was possible to hear anyone coming up the stairs. Mrs Whelan and Sean both corroborated that one could not see down the stairs, but both agreed that it was possible to hear. The child, in giving evidence, said that Mrs Whelan was not usually there because she was out at work and Sean was out visiting friends. That was contradicted by Mrs Whelan who said that at this time she only worked part-time during the morning.

From a date after October 1986, which may have been about February 1987 to September 1987, the applicant lived with his second wife at Lowdham. At that stage the children were not living with him, but the prosecution relied on one incident involving Tammy. That was described by the judge in his summing-up at page 8D to 9A where he said:

> "'It carried on at Lowdham', she [Tammy] said. 'After moving to Lowdham he used to touch me', she told you. She then said, 'The first time he came and took me out, he took me to the house in Lowdham.' He was going to take her to the White Post Farm. 'Took me to the bedroom, laid me on the bed, laid down beside me and tried to kiss me.' She told you she said, 'Get off, or I'll tell.' And then -- and this is the only count, the only incident on count 1 on which the prosecution rely, and about which you have to be sure if the defendant is to be convicted -- he put his hand up her skirt, into her pants, under her pants, onto her vagina, outside the vagina, and she told him to get off, and he did and got off. At that stage he was dressed. She said she wanted to go out of

> the house and, indeed, that is what happened. That was the only occasion, but he did -- she did say that other things happened at Lowdham."

The child gave further evidence about what happened at Lowdham, but it was this single incident which formed the eventual count. The only evidence was that of Tammy. Again the applicant denied the child's account and said that he and Tammy had never been in the house at Lowdham alone. That was a statement which was corroborated by his wife and Sean who both said that the applicant and the child had never been there, save in company.

Directing the jury on these counts the Recorder, at page 5E of the transcript, said:

> "There are two counts. They do not necessarily stand or fall together. You look at them quite separately. You can find the defendant guilty of one, not guilty of the other, guilty of both, not guilty of both. You look at them quite separately, simply because the evidence is different in each one, as you know. So you look at the evidence and say: 'Am I sure?'"

That was a direction which the Recorder gave in the absence of any submission or suggestion by either side that the counts did stand or fall together. Mr Gardiner, who represents the applicant and who has argued the case here with great skill (as no doubt he did below), accepts that he did not at any point suggest to the Recorder that the jury should be invited to treat the two counts as standing or falling together. The learned Recorder, earlier in his summing-up, had given the jury a direction along conventional lines as to the manner in which they should approach the evidence, suggesting that in relation to Tammy they should ask themselves:

> "Is she someone who is telling you the truth? Trying to tell you the truth? Trying to tell you the truth and getting some parts of it right but some parts of it wrong? If she is wrong about some parts of it, does that destroy her evidence and her credibility? Or in the bits that matter do you accept her evidence?"

The Recorder went on to urge them to make all allowances for the errors that might colour the evidence of a child at the end of a disturbed childhood trying to recall events of this kind some years earlier.

Mr Gardiner submits that the Recorder was wrong to leave the two counts separately to the jury, and that they should have been told that they either should accept the child's evidence on both, or reject it on both.

We conclude that that is an unduly simplistic approach to this case. Cases do arise in which, for whatever reason, evidence is found to be completely convincing in relation to one episode but something short of completely convincing, whether by reason of honest error or of an attempt to embroider, in relation to another incident. The second count on which the jury convicted was the earlier in time and it would seem to us quite possible that the jury were impressed by the obvious recall of the child for something which they may well have concluded had made an indelible impression on her mind (whatever the details she may have become uncertain about), whilst they may, for whatever reason, have had doubts about the later and much briefer episode which had, if the wife and brother were to be accepted, formidable objections to it.

Despite Mr Gardiner's submissions, and despite the natural hesitation with which we approach this application on behalf on an applicant who is now deceased, we feel obliged to decide the case in the same way that we would have decided it had he been alive. We bear in mind that it is not only his interests but the credibility of the child which is affected by our decision. In all the circumstances we conclude that this application must be refused.