



Neutral Citation Number: [2010] EWCA Crim 4

Case No: 2009/02867/C5

COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
HIS HONOUR JUDGE KRAMER QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2010

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LADY JUSTICE HALLETT
and
MRS JUSTICE MACUR

Between :

R
- v -
Barker

Miss Sally O'Neill QC for the Crown
Mr Bernard Richmond QC and Mr R Patton for the Appellant

Hearing date : 24th November 2009

Approved Judgment

The Lord Chief Justice of England and Wales:

1. On 1st May 2009 at the Central Criminal Court before His Honour Judge Kramer QC and a jury, Steven Barker was convicted of anal rape of a child under 13 years of age (count 1). His co-accused, Tracey Connelly, was acquitted by the jury on cruelty to the same child by wilful neglect (count 2). On 22 May Barker was sentenced to imprisonment for life with a specified minimum term of 10 years. Appropriate orders were made in relation to time spent in custody on remand, and he was made subject to a sexual offences prevention order, a notification requirement, and disqualified indefinitely from working with children.
2. Barker's applications for leave to appeal against conviction and sentence were referred to the full court by the Registrar. The application for leave to appeal against conviction requires the court to address the circumstances in which very small children may give evidence in criminal trials. Although it was not quite how Mr Bernard Richmond QC advanced it, stripped to essentials, the argument at the heart of this application is that it is not acceptable for a conviction, very heavily dependent on the evidence of a child as young as 4½ years, describing events said to have occurred when she was not yet 3 years old, to be regarded as safe: more formally, the competency requirement was not satisfied. The argument merits attention. Leave to appeal against conviction and sentence are granted.

The Evidence

3. The appellant is now aged 33. He became involved with Tracey Connelly, a young woman with children and in early 2007, he moved into her home in Tottenham. There he came into contact with a number of young children. X, as we shall call her, was born in November 2004. On 3rd August 2007, together with her 2 somewhat older sisters, she was taken into care following the unnatural death of her younger brother. The appellant was arrested on 6 May 2008 and interviewed in connection with an allegation that he had sexually abused X. He denied any inappropriate touching, and could advance no reason why she should make the allegation. Tracey Connelly was arrested a few days earlier. She made no comment in interview. In the meantime, she, the appellant and his brother were all charged with causing or allowing the death of a child known in the media as "Baby P" or "Baby Peter", contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004. They were convicted on 11 November 2008. For his involvement in that offence the appellant was sentenced to 12 years' imprisonment. It has not been suggested that the case for the prosecution that the appellant raped X can or should receive any support or confirmation from the lamentable circumstances in which Baby P died. However, if the present conviction is upheld, the death of Baby P will become relevant to the appeal against sentence.
4. X and her sisters went to live with Joan Evans on 3rd August 2007. Mrs Evans kept a notebook record of her care of the children. She remembered an occasion in October 2007, shortly before the complainant's third birthday. As X was dressing herself after breakfast and about to put on her knickers, she said something indicative of sexual abuse by the appellant. Mrs Evans made a contemporaneous or virtually contemporaneous note which was in evidence before the jury. In it she wrote: "I was dressing X. She was sitting on the floor, taking off her PJ and was TO (short for touching) herself. I asked her was she sore? She said no. Her dad does that to her fanny. Asked was it in the bath? She said no, in Mum's bedroom and Mum said: Don't do that again. Not Kenny, other Dad". It is unnecessary to summarise the evidence

given by Mrs Evans in chief, save that X described her mother telling her “other dad” not “to do that again”, as she wagged her finger at him with an angry expression on her face. Mrs Evans was also asked about the relationship between the three children. She confirmed that X’s elder sister would boss the others around and was very much in charge. Mrs Evans insisted however that she had not heard her using the language used by X when making her disclosure.

5. DS Kate Bridger is a child protection officer. She spoke to X at her home on 21st November 2007. In what seemed to us a rather curious exchange with a young child, the officer asked X about what she had told Joan. DS Bridger indicated with both hands the general area around her hips, genitals and bottom. X either could not recall or had no idea what she was talking about. The officer then “narrowed the question” and asked her whether anyone had touched her in the area which she again indicated with her hands. X shook her head. The officer was unsure whether the complainant was effectively saying no one had touched her or that she did not understand. The officer then asked whether Steven had ever touched her around “here”, indicating the same area. X shook her head.
6. DS Bridger was cross examined and agreed that her questions were designed to establish whether X had been subjected to sexual abuse. Her note of the conversation was read out to the jury: “I attended the children’s home and spoke with X. She is a very young girl, 3 years old. We had a discussion regarding what she had told her foster carer and who had touched her inappropriately. She made no disclosures and when asked directly if Steven touched her genital area, she shook her head. X has never mentioned the incident since. With regard to this allegation X is too young to ABE interview. When spoken to by myself, she made no disclosures. When asked about any possible sexual abuse she made no disclosure. All enquiries regarding this incident are now complete.” DS Bridger confirmed in cross examination she did not pursue the allegation because X had said nothing about sexual abuse and she “did not have much speech at the time”. No further action was contemplated.
7. The allegation resurfaced when Dr De Jong, a consultant child psychiatrist and her colleague, Mrs Seymour, became involved with the children. They were asked to make a behavioural assessment in relation to care proceedings.
8. On 11th January 2008 the doctor interviewed each girl separately at Great Ormond Street Hospital. A verbatim note was made. X was then just over 3 years old. Her speech was not as developed as it should have been for a child of her age and was occasionally indistinct. She was asked about members of her family. She said she cried when she missed her mum but she did not cry about Steven. Unexpectedly, and spontaneously, she announced that she hated Steven and said, “I saw his willy”. The doctor asked how this had happened. “Steven took his trousers off. He got it all down me.” “I saw Steven’s willy in Mummy’s bedroom. Mummy was there, Mummy told him not to do it, Steven. He tries to get me into trouble”. She was asked where and she said: “He did it in my bedroom. Steven took his trousers off and showed me his willy”. The doctor asked what she was wearing and she said she had her pyjamas on. She said “I kept it on. Steven did it in my bedroom. I saw Steven’s willy. It was not nice what he did”. Dr De Jong asked if he had touched her and she said, “Steven hurt me. It was harder. I do not know how.” She put both her hands on her bottom and said “it hurt all day” and “he hurt me with his willy”. She demonstrated what had happened, using a table to represent the bed and dolls. She put the girl doll down on the table, face up. Then she turned the girl doll over and placed her face down and the boy doll

representing Steven face down on top of her. She said: "I felt his willy". Asked what it felt like she said he hurt her and again without hesitation twice put the dolls one on top of the other in the same position. The doctor asked her what she did. She said "I went to the toilet. I needed to go to the toilet. My bottom was sore." During this exchange the doctor noted that X had stopped smiling. She said she had not told Jo her foster carer, but she had told her eldest sister and her mummy. She said it happened lots of times. She was asked specifically whether Steven put his "willy" in any other place, and said no. She was asked whether anyone else had done this to her and said no. She said she asked Steven to stop but he never did.

9. In cross examination Mr Patton pressed the doctor on whether it would have been important for her to know that the child had apparently denied any sexual abuse. She said that she was not involved as an investigator. She agreed that she ended her conversation with X by praising her for revealing what had happened to her, and accepted that this might have reinforced in the child's mind the notion that to give an account of abuse is a good thing.
10. Mrs Seymour, the family therapist, confirmed the evidence of Dr Jong, and the complaint made by X. She also explained that X's disclosure was completely unexpected and came in the course of a general conversation about her family. Although X had difficulties articulating what she wanted to say, Mrs Seymour was sure that she was telling them that the applicant had hurt her, that it had happened several times, that she had wanted him to stop, and had asked her mother to make him stop.
11. Dr Hodes is a consultant paediatrician. She saw X on 4th April 2008. During the course of her examination, she asked X: "Did anyone hurt your bottom?" and the complainant repeated the allegation, "Yes, Steven did it." On examination Dr Hodes found no injury to X's genitalia and her vagina intact. She examined the anus using a colposcope. There was no evidence of scarring, anal fissures and tags, but there was one finding upon which the doctor remarked. Normally, in a child of this age, the external sphincter muscle remains closed. However after ten seconds of gentle movement the complainant's sphincter opened and the doctor could see up into the rectum. This is an unusual finding, but of itself not diagnostic or conclusive of anal penetration. Even when there is no allegation of sexual abuse the condition may occur in as many of 11 % of children who are examined in this way. However, the doctor said that, absent a medical condition such as constipation (and no such condition was canvassed in evidence), the finding could be supportive of an allegation of penile anal penetration.
12. Dr Hodes was cross examined about the fact that reflex anal dilatation has caused major controversy and the Royal College of Paediatrics has expressed considerable reservations about its use as any kind of diagnostic tool. It may be explained by various medical conditions, or it may simply be a natural anatomical variation. The doctor accepted the Royal College has commented on the lack of good quality comparative studies to assist.
13. As a result of what X said to Dr Hodes the decision was taken to carry out an ABE interview. Before admitting the evidence the judge examined X's competence as a witness. He studied the ABE interview itself. He heard evidence from experts on both sides who proffered their opinions about X's competence. Dr Weir, called on behalf of the appellant, questioned the extent to which X had the ability to understand questions

and whether she would become confused. He criticised the way in which the ABE interview was conducted, arguing that the officers were guilty of putting leading questions to X. He expressed considerable doubt as to the value of her evidence given “her age at the time of the alleged offence, her apparent developmental difficulties, the passage of time before the ABE interview, her exposure to multiple and possible flawed interviews and the further passage of time”. However he accepted that she appeared to understand the questions put to her in the ABE interview and could provide answers to questions that could be understood, provided the questions were put in simple language. On this evidence, X passed the competency test. Dr Baker, called on behalf of the Crown, acknowledged the considerations which led Dr Weir to form his opinion, including the child’s very young age and immaturity of speech, but he nevertheless concluded that X had the capacity to give “cogent” evidence of her “own remembered experience”. He saw no reason to doubt her veracity. Mr Richmond on behalf of the appellant, accepted that it was open to the judge to find on the basis of this evidence and his own consideration of the ABE interview that X was competent to give evidence. We ourselves have studied the ABE interview. We should immediately record not only that it was open to the judge to find that X was competent as a witness, but that he was right to do so.

14. X’s evidence-in-chief was the video recording of that interview conducted on 8th April 2008 by DS Bridger, known to X as Curly Kate or Kate, and DC Wright, known to her as Tony. A social worker, Sarah Skipper, was present throughout. The first half of the interview was conducted by DS Bridger and was focussed on the present allegation. DC Wright participated in the interview at a later stage, and investigated whether the child could throw any light on the circumstances in which Baby P came to sustain his injuries. A few days before the trial X viewed the ABE interview. This process itself was video recorded and the recording was disclosed to the parties. She watched it intently and silently. No point was taken on behalf of the appellant. Immediately before the trial she was given the opportunity to watch the video recording in the presence of her Guardian ad Litem and the court trained usher. This became her evidence in chief. She was then cross-examined and re-examined by video link. As already indicated, we have watched the video ourselves and we also have the benefit of a full transcript of cross examination and re-examination.
15. It was not in dispute that the child’s account described an incident of anal penetration, sufficient to found the allegation against the appellant. The relevant passages from the video recording include:

“Q...what did you tell the doctor about your bottom, can you remember?

A. Steven got hurt me.

Q. Steven hurt your bottom and how did he hurt your bottom?

A. Cos he gave me his willy.

Q. Say that again.

A. He gave me his willy.

Q. He gave you his willy and what did he do with his willy?

A. He got hurt me.

Q. How did he do it. Show me?

A. Well he put it in me.

Q. He put it in you whereabouts?

A. There.

Q. There, at the front, (X nods) OK and what did he do with his hands when he put his willy there?

A. He didn't ...he didn't put his hand in there.

Q. What did he put there?

A. He just put his willy in there."

The witness then described where this incident had happened and said that he did hurt her. It happened at night, and the light was on. She was asked what she was doing when it happened.

"A. I was laying down.

Q. You was laying down, where were you laying down?

A. On mummy's pillow.

Q. Your head on mummy's pillow? So on mummy's bed and where was mummy?

A. Mummy was downstairs.

Q. She was downstairs."

The interview then addressed clothes worn by the appellant and the witness said that he "put his willy out" of his clothes. She was then asked.

"Q. And did he say anything when he hurt your willy...when he hurt your bottom, sorry?

A. Hurt my bottom.

Q. Did he hurt your bottom and how did it, and what did you do when it hurt? What did you say?

A. Don't do it.

Q. Don't do it?

A. And my mum.

Q. And who did you tell Steven had hurt your bottom?

A. My mum.

Q. And what did she say again?

A. (The answer is inaudible to start with and then continues) and hid behind my mum and my mum goes, Steven don't do it.

Q. Don't do it, alright. OK, and who else have you told about Steven hurting your bum?

A. Social workers.

Q. Hmm

A. Joan and social workers.

Q. Oh Joan and the social workers, OK that's a good girl because we are all here to help you aren't we?

A. And her Sarah.

Q. Sarah, that's right.

A. And I talked to Sarah."

The child was referring to Sarah Skipper who was the social worker present during this interview.

16. DC Wright continued the interview and eventually returned to the current allegation.

"Q....I think Kate said this but I want you to show me how you were when Steven hurt you. Show me what position you was in, do you know what I mean?

A. We was lying down.

Q. You was lying down or he was?

A. He was and I was.

Q. You were both lying down yeh and how was you...show you how you was lying down. Can you show me on the floor, its clean."

The child then gave a demonstration, lying down on her front. The question continued:

"You was like that, so you was lying on your front. Would that be right? On your front, yes OK. And how was Steven lying?

A. Not very well.

Q. Not very...do you remember what position you were lying?
Do you remember? Can you show me?

A. He was lying down like that too.”

The child demonstrated.

“Q. He was like that as well? He was like that, the same as you?

Q. So you were both lying on your tummy?

Q. OK

A. Like penguins

Q. Like penguins do?

...

Q. And was Steven’s ...did you see Steven’s hands? Where were his hands?

A. They were there (demonstrating that the appellant was holding himself up with his hands.)”

D.C. Wright briefly left the room, and on his return he asked “...you was on your belly, Steven you said was on his front, and his belly yeh and was he behind you over the top of you ...”

“A. Over the top of me.

Q. Over the top of you? Right so if you looked up you would see Steven, would that be right, OK and when you said it hurt, whereabouts did it hurt?

A. There.

Q. There, OK or was it more round the back?

A. Round the back.

Q. ...and what happened after it hurt, tell me exactly what happened after it hurt.

A. My mum come up.

Q. Mummy came up yeh, and what did Steven do when mummy came in?

A. My mum said, don’t do that. I hide (there was then something inaudible)’hind my mum.”

The interview then drifted away from matters of importance to an end.

17. In cross-examination X was asked by Mr Richmond about the difference between the truth and a lie. She was asked what happens when you tell fibs. She answered: “You’re lying”. The questions continued in the following vein:

“ Q. Can you give me an idea of a fib? Tell me a fib. Can you think of a fib?

A. (Witness shakes head)

Q. Let me think of an example. If I said my name was Curly Kate, would that be a fib?

A. (Witness nods)

Q. Why would that be a fib? Can you think?

A. (Witness shakes her head)

Q. What is my name? I told you didn’t I? What is my name? Everyone forgets my name, don’t worry. It is Bernard. Do you remember?

A. (Witness nods)

Q. My name isn’t Kate, is it?

A. (Witness shakes her head)

Q. Let me think of another one. If I said it was Sunday today, would that be a fib?

A. (Witness nods)

Q Why? What is today?

A. Your name is Bernard. “

18. Pausing there, Mr Richmond suggested the child’s response “your name is Bernard” indicates she was not following his questioning. However, on one reading, once she had worked out what he meant, X provided the answer as to why it was a fib for him to say his name was Curly Kate. Mr Richmond made a similar criticism of the next passage:

Q. Do you ever tell fibs?

A. (Witness shakes her head)

Q. Never? Never, ever, ever?

A. (Witness shakes her head)

Q. Everybody tells fibs, do they not? What about if you do not want to get into trouble?

A (Inaudible)

Q. Say that again

A. I don't say anything rude.

19. Mr Richmond claimed her answer "I don't say anything rude." was a non sequitur and an indication of her inability to follow and respond to his questioning. To our mind it shows the opposite. Mr Richmond asked 2 questions in one: "everyone tells fibs don't they?" and "what about if you don't want to get into trouble?" X answered the second question: if she did not want to get into trouble she didn't say anything rude. She was then asked about her sisters to which she responded by saying her sister was rude in calling people "loser". Mr Richmond reverted to the question of whether she told fibs. She shook her head to indicate she did not. He asked her what happened if she told fibs and she replied, "You get told off".
20. Mr Richmond then put his case to her that she was being truthful when she saw DS Bridger the first time and said nothing had happened and that she later changed her account because one or both of her sisters put her up to it:

"Q. What about if you thought Y (her older sister) was going to get into trouble? Would you tell a fib then to help her?"

A (Witness shakes her head)

Q What about to help Z (her younger sister)?

A. (Witness shakes her head)

Q. Never? Do you remember Curly Kate asked you a question? When she saw you one time, she asked you whether Stephen had ever touched you. Do you remember?

A. (Witness nods)

Q. You shook your head, didn't you? Do you remember? Do you remember that?

A. (Witness nods)

Q. She touched down here and said: " Did you ever get touched by Stephen there?" You shook your head, didn't not? That is right, isn't it? Do you remember?

A. (Witness nods)

Q. You remember that happening, don't you? Yes or no?

A. (Witness nods)

Q. So you don't fibs and Curly Kate asked you—not in the tape—whether Stephen had ever touched you and you said he didn't. Stephen never touched you with his willy did he? Did he, X?

A. (Witness shakes head)

Q. Was it something Y told you to say?

A. (Witness shakes head)

Q. Was it something Z told you to say?

A. (Witness shakes head)

Q. Was it something you made up?

A. I (inaudible)

21. Later Mr Richmond repeated his question that Y had told her to say the applicant touched her and again she shook her head. He asked her whose idea it was and she replied: "No-one's". He asked her if she made it up herself and she shook her head. After a break Mr Richmond again reverted to the question of truth and lies and asked her this question:

"Q. Do you remember when you said to me that you do not tell fibs? Is that true or a fib?"

A. Truth."

22. He then asked her a series of questions on the subject of whether she had told Curly Kate the truth when she first saw her. She responded by either nodding or shaking her head, for example she nodded to indicate she remembered Curly Kate asking her if Stephen touched her:

"Q. You did this, didn't you. You shook your head. Do you remember?"

A. (Witness nods)

Q. Curly Kate asked you either here down below. Do you remember?

A. (Witness nods)

Q. You shook your head. Do you remember?

A. (Witness nods)

Q. She touched your bottom, didn't she and asked if Stephen had touched you there. Do you remember?

A. (Witness nods)

Q. You shook your head didn't you.....

23. A short break was then necessary because the child was tiring. After the break, Mr Richmond asked X what she meant when she shook her head and she said: "No". Again, he asked her if she remembered telling Curly Kate Stephen didn't touch her. She nodded. Mr Richmond asked her: "you were not fibbing to Curly Kate, were you?" She shook her head.

24. X was cross-examined by leading counsel on behalf of her mother. The questions were short and simple. It is effectively conceded on behalf of the appellant that they demonstrated that she clearly understood what she was being asked and was well able to answer the questions.

25. In re-examination X said she remembered the video interview and that the applicant had done something to her, but when she was asked twice what he had done she did not answer. Referring to the ABE interview she said she had told Curly Kate and Tony the truth.
26. At the conclusion of X's evidence, the judge was invited to re-visit the competency issue, and alternatively, to exclude X's ABE interview under section 78 of the Police and Criminal Evidence Act 1984. He closely examined the factual background in the light of then recent authorities on the issue. He concluded that "when simple questions were asked, the defence were able to put their cases sufficiently to ensure that the defendants have a fair trial. Inconsistencies...or matters of credibility and reliability and not competence...the interpretation of those silences... goes to credibility and reliability and not competence. The jury observed X with care throughout and are capable, properly directed, of coming to their own conclusions...It may indeed be that this case concerns a child at the edge of competency but, in my judgment, having seen and heard her, although inevitably her intelligibility and, therefore, her ability to be understood were at times difficult, X did pass the test of understanding and intelligibility sufficiently for me to say that she is and was a competent witness". In relation to the submission under section 78, which was based on the difficulties said to be experienced by X in answering questions in cross-examination, the judge did not rehearse what he had already said, but effectively for the same reasons he rejected the submissions. Later, consistently with this approach, he also rejected a submission that there was no case for the appellant to answer.
27. The appellant did not give evidence and relied upon the account given during his police interview when he denied touching X inappropriately. He was unable to think of any reason why she should make up the allegation. An appropriate direction was given to the jury about the potential significance of the defendant's decision not to give evidence
28. Mr Richmond submitted to the jury that they could not safely rely upon the evidence of the complainant because it was inconsistent and contradictory. Dr Hodes' evidence was less than compelling: it certainly did not prove that the child had been anally raped. Criticisms were made of the ABE interview and of the lack of investigation of and explanation for the inconsistencies in the complainant's accounts. The jury were reminded of the complainant's evidence that she "hated" the complainant. It was submitted that the complainant had fabricated the allegations and that she may have been influenced by her sisters or she may have been seeking attention.
29. In the course of the summing up the jury was given detailed and fair directions about the way in which they should approach X's evidence. The judge began by reminding the jury that the procedure adopted in her case was not "intended to pre-judge the evidence" that she would give, and went on to remind the jury that the question whether she was "reliable, credible and truthful" had to be decided in exactly the same way as it would with any other witness. The jury was to judge "her accuracy, reliability and credibility, both in the interview and at court" and he advised them to take 5 specific matters which were said to undermine confidence in X's credibility into account. In very brief summary (the judge dealt with them in much more detail) they were: the child's age at the time of the alleged offence, the date of the interview, and her age when she gave evidence; the various gaps in time which might effect her memory; the sequence of events which culminated in her evidence at trial; the need for the jury to make their assessment of whether she was able to understand and be

intelligible both in her video interview and her evidence; the way she gave evidence, and in particular whether her evidence about what the appellant had done was spontaneous or simply responding to questions which suggested the answers, and whether she agreed with everything suggested to her, or whether she was prepared to “stick to her guns and disagree” when she thought the question was wrong. Finally, he asked the jury to consider the way in which X had given evidence, making appropriate allowances for her age. One short extract from this part of the summing up will illustrate the fairness with which the issues were put to the jury.

“The interpretation of those silences has been placed in question. Was it or may it have been a silence because she was being stubborn, because she was simply refusing to answer, or because she knew what had happened but could not bring herself to repeat before others something which upset her? Was she silent because she had no answer to the question, having been caught out in a fib, or was it or may it have been because she did not understand? Was it or may it have been because the language concepts failed her? Those are matters for your consideration and on which you should come to your own conclusions without speculating.”

30. The judge then continued the summing up by reminding the jury of the criticisms directed by the defence at the way in which the ABE interview had been conducted.
31. At the end of the summing up the judge summarised the respective submissions made to the jury on behalf of both defendants, and the prosecution. No criticism of the summing up is advanced. None could be: it was meticulous, comprehensive and fair.

Prejudice

32. We can dispose swiftly of the second ground of appeal against conviction. A powerful surge of public revulsion against those involved in the dreadful events which led to the death of Baby P led the judge, unusually, but in the interests of a fair trial, to order that the appellant, and his co-accused should be tried using pseudonyms. Thus, to avoid the risk of prejudice, neither would be linked with the Baby P case. All went well until the summing up when the judge was reading out part of a document and inadvertently referred to the actual surname of the appellant’s co-accused which had been redacted from the document before the jury. This was immediately noticed by counsel. The choices facing the judge were to discharge the jury, or to proceed with the trial, either by ignoring the mention altogether, or, after explaining to the jury that they must ignore his mistake (with the inevitable consequence of highlighting it). This was essentially a case specific decision for the trial judge vested with the responsibility of ensuring that his error did not unbalance the fairness of the trial to the prejudice of the appellant and his co-accused. He decided that the best course was to leave the error unremarked. A specific direction to the jury to ignore what he had said would serve only to draw attention to it. The slip had been minor. The situation was not so grave as to require the discharge of the jury. We have found no basis for interfering with his decision. None has been demonstrated. Without resiling from that conclusion our view is reinforced by the fact that notwithstanding the mention of the name of the co-accused by the judge, she was acquitted by the jury.

Competency

33. We must analyse and address the essential point in the appeal, that is the principles which apply nowadays when young children give evidence in criminal trials. Many accreted suspicions and misunderstandings about children, and their capacity to understand the nature and purpose of an oath and to give truthful and accurate evidence at a trial have been swept away. The former approach was typified by an observation in *R v Wallwork* [1958] 42 CAR 153, when a little girl of 5 years had been called as a witness, and Lord Goddard CJ observed:

“ The court deprecates the calling of a child of this age as a witness...the jury could not attach any value to the evidence of a child of five: it is ridiculous to suppose they could...”

That observation was re-emphasised as recently as October 1986 in *R v Wright and Ormerod* [1990] 90 CAR 91, where it was said, in reference to *Wallwork*:

“...the validity of, and good sense behind, that proposition has remained untrammelled in the practice of the criminal court...”

34. Not very much later, in February 1990 in *R v Z* [1990] 2 WB 355, Lord Lane CJ underlined that “...despite those observations...it still remains a matter for the judge’s discretion”. Perhaps with the then recent Report of the Advisory Group on Video Evidence, chaired by Judge Pigot QC in mind, he drew attention to a changing attitude “to the acceptability of the evidence of young children and of increasing belief that the testimony of young children, when all precautions have been taken, may be just as reliable as that of their elders”. In this jurisdiction these observations represented a dramatic change of approach.

35. This intimation of a changed approach to the evidence of children was consistent with long standing principles in Scotland. As Spencer and Flin describe in their valuable and illuminating study, *The Evidence of Children, The Law and the Psychology*, 1993, (2nd Edition) things were different there. The testimony of children was not subject to any prescriptive arbitrary age limit below which the child was deemed to be incompetent. As long ago as *Treatise on the Law of Evidence in Scotland* (1864) at section 1679 W. G Dixon commented:

“An intelligent child is generally a good witness in matters within his comprehension. Being accustomed to observe more than to reflect, he tells what he has seen or heard without drawing inference or pre-conceived opinion...in cross-examination a young witness generally tells ingenuously whether he has been tutored, and (if so) what he was desired to say.”

Indeed at much the same time when the observations in *Wright and Ormerod* were being made in England, a discussion paper from the Scottish Law Commission in 1988, at para 2.3 included this comment:

“...nowadays many judges ...assume that a child is prima facie a competent witness but may, upon a preliminary conversation with the child, reach the conclusion that the child is either incapable of giving intelligible evidence or is not yet able to understand the difference between right and wrong, and so is unable to undertake to tell truth”.

36. The result of a complex legislative process is that the old misconceptions no longer apply and have no relevance in England and Wales. The principles are encompassed in and governed by statute.

37. Section 53 of the Youth Justice and Criminal Evidence Act 1999 (the third legislative attempt to address these issues) provides that:

“Competence of witnesses to give evidence.

(1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.

(2) Subsection (1) has effect subject to subsection (3) and (4).

(3) A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to –

(a) Understand questions put to him as a witness and

(b) Give answers to them which can be understood.

(4) A person charged in criminal proceedings is not competent to give evidence in the proceedings for the prosecution (whether he is the only person, or is one of two or more persons, charged in the proceedings).

(5) In sub-section (4) the reference to a person charged in criminal proceedings does not include a person who is not, or is no longer, liable to be convicted of any offence in the proceedings (whether as a result of pleading guilty or for any other reason).

38. These statutory provisions are not limited to the evidence of children. They apply to individuals of unsound mind. They apply to the infirm. The question in each case is whether the individual witness, or, as in this case, the individual child, is competent to give evidence in the particular trial. The question is entirely witness or child specific. There are no presumptions or preconceptions. The witness need not understand the special importance that the truth should be told in court, and the witness need not understand every single question or give a readily understood answer to every question. Many competent adult witnesses would fail such a competency test. Dealing with it broadly and fairly, provided the witness can understand the questions put to him and can also provide understandable answers, he or she is competent. If the witness cannot understand the questions or his answers to questions which he understands cannot themselves be understood he is not. The questions come, of course, from both sides. If the child is called as a witness by the prosecution he or she must have the ability to understand the questions put to him by the defence as well as the prosecution and to provide answers to them which are understandable. The provisions of the statute are clear and unequivocal, and do not require reinterpretation. (*R v MacPherson* [2006] 1 CAR 30: *R v Powell* [2006] 1 CAR 31: *R v M* [2008] EWCA Crim 2751 and *R v Malicki* [2009] EWCA Crim 365.)

39. We should perhaps add that although the distinction is a fine one, whenever the competency question is addressed, what is required is not the exercise of a discretion but the making of a judgment, that is whether the witness fulfils the statutory criteria. In short, it is not open to the judge to create or impose some additional but non-statutory criteria based on the approach of earlier generations to the evidence of small children. In particular, although the chronological age of the child will inevitably help to inform the judicial decision about competency, in the end the decision is a decision about the individual child and his or her competence to give evidence in the particular trial.
40. We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence.
41. The judge determines the competency question, by distinguishing carefully between the issues of competence and credibility. At the stage when the competency question is determined the judge is not deciding whether a witness is or will be telling the truth and giving accurate evidence. Provided the witness is competent, the weight to be attached to the evidence is for the jury.
42. The trial process must, of course, and increasingly has, catered for the needs of child witnesses, as indeed it has increasingly catered for the use of adult witnesses whose evidence in former years would not have been heard, by, for example, the now well understood and valuable use of intermediaries. In short, the competency test is not failed because the forensic techniques of the advocate (in particular in relation to cross-examination) or the processes of the court (for example, in relation to the patient expenditure of time) have to be adapted to enable the child to give the best evidence of which he or she is capable. At the same time the right of the defendant to a fair trial must be undiminished. When the issue is whether the child is lying or mistaken in claiming that the defendant behaved indecently towards him or her, it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness, and fully to ventilate before the jury the areas of evidence which bear on the child's credibility. Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources. Notwithstanding some of the difficulties, when all is said and done, the

witness whose cross-examination is in contemplation is a child, sometimes very young, and it should not take very lengthy cross-examination to demonstrate, when it is the case, that the child may indeed be fabricating, or fantasising, or imagining, or reciting a well rehearsed untruthful script, learned by rote, or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which is beyond his or her level of comprehension, and therefore likely to be derived from another source. Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence.

43. The competency test may be re-analysed at the end of the child's evidence. This extra statutory jurisdiction is a judicial creation, clearly established in a number of decisions of this court (*R v MacPherson: R v Powell: R v M: R v Malicki*; see to the contrary effect *DPP v R* [2007] EWHC 1842 (Admin)), where it was emphasised that an asserted loss of memory by a witness does not necessarily justify the conclusion that the appropriate level of understanding is absent.) If we were inclined to do so, and we are not, it would be too late to question this jurisdiction. This second test should be viewed as an element in the defendant's entitlement to a fair trial, at which he must be, and must have been, provided with a reasonable opportunity to challenge the allegations against him, a valuable adjunct to the process, just because it provides an additional safeguard for the defendant. If the child witness has been unable to provide intelligible answers to questions in cross-examination (as in *Powell*) or a meaningful cross-examination was impossible (as in *Malicki*) the first competency decision will not have produced a fair trial, and in that event, the evidence admitted on the basis of a competency decision which turned out to be wrong could reasonably be excluded under section 78 of the 1984 Act. The second test should be seen in that context, but, and it is an important but, the judge is not addressing credibility questions at that stage of the process any more than he was when conducting the first competency test.
44. Mr Richmond submitted that a close analysis of X's evidence reveals that attempts to examine her were futile and that he was unable effectively to challenge her account and to put the appellant's case to her. There was no other evidence of guilt, and without the evidence of the complainant, there could have been no conviction. The argument was developed on the basis that it was not practicable for Mr Richmond to put the full details of his case to the witness. As he could not do that, the end result was an unfair trial.
45. We are very conscious of the extreme youth of the child, and that the ABE interview took place long after the alleged indecency occurred. The first question for decision is whether the judge was wrong when he concluded that the child's competence had been established not only before she gave evidence but after its conclusion. We have the advantage of the ABE interview of the child, which we studied closely. As we have recorded, we ourselves are satisfied that both the child's answers and her behaviour during the interview demonstrated her competence to give evidence. We did not observe the child being cross-examined: the judge did. We have studied the transcript of her evidence, and taken note and commented on specific features of it which concerned Mr Richmond. We note that she gave clear answers although, from time to time, she responded by nodding her head or shaking it. That is what she had done during the ABE interview. No one entertained the slightest doubt that a nod meant "yes", and a shake of a head meant "no". Neither indicated uncertainty nor lack of comprehension by her of the question or her intended response, or left any doubt about her meaning. Having reflected on these submissions, and considering the matter with

anxious care, there is in our judgment no basis which would justify this court interfering with the judge's conclusion that the competency of the child as a witness was established, and remained established after her evidence had concluded.

46. We are unable to accept that Mr Richmond could not put his case to X. Indeed as the transcript demonstrates, he did. His case was that the child was not telling the truth, and that she was advancing fabricated allegations against the appellant because of the influence and pressure exerted on her by her older sisters to improve the position of her mother at the expense of the appellant. He also asked questions with a view to demonstrating that the child's responses to the first interview with the police officer, when she did not formulate a complaint of sexual misbehaviour against the appellant, represented the truth. Her answers were that she was telling the truth about what had happened to her and that she was not acting on her sister's instructions or at her behest to fabricate a false story. Indeed given the extreme youth of the child, it seems plain that if she had been advancing a story manufactured for her by her older sisters, a very short cross-examination would have revealed, "ingenuously", as W.G. Dixon had observed in 1864, that the child had been tutored, and what she was "desired to say".
47. Mr Richmond's fallback position was developed in the context of delay. He suggested that although an abuse of process submission on this ground had failed, and the argument on appeal is not focussed on abuse of process as such, Mr Richmond identified two earlier decisions of the court, *R v Powell* and *R v Malicki* in support of his contention that the conviction should, in any event, be quashed on the basis of delay.
48. In *Powell*, after considering a video recording of the child's evidence, as well as evidence of the officer responsible for the interview and expert evidence, the judge decided that a girl of 3½ years satisfied the competence test. This court concluded that her decision was justified, but went on to examine whether the competency decision should have been revisited in the light of the cross-examination of the complainant, which, taking it briefly, provided serious grounds for doubting whether she was "simply not intelligible in the context of the case". The court suggested that the competency issue should have been revisited, and that if it had been, the competency of the witness would not have been established. Accordingly the case should have been stopped. The court expressed concerns about the delay which had overtaken the preparation of the child's video evidence. Expert evidence in that case suggested that very young children did not have "the ability to lay down memory in a manner comparable to adults". However the conviction was not quashed on this ground, the court simply observing that "looking at this case with hindsight, it was completely unacceptable that the appellant should have been tried for an offence proof of which relied on the evidence of a 3½ year old when the trial did not take place until over 9 months had passed from the date of the alleged offence".
49. In *R v Malicki* the complainant was 4 years 8 months at the date of the alleged indecent assault. The video interviews suggested she was competent. After cross-examination the question of her competence was re-visited. In cross examination the complainant had asserted a recollection of the incident, but it was "impossible to discern whether she was actually remembering the incident herself or simply recalling her video, which she had just seen twice: once on the Friday before the Monday of the trial, and once at the trial before she was cross-examined". It was suggested that the problem of cross-examining the child arose from the fact that it was not possible to ask whether "her being licked was a recollection of a question put to her by the police officer on the

video rather than a direct recollection of the event itself". The court identified two problems arising from the delay, first that a child that young would not have any accurate recollection of events which took place 14 months earlier, and second, what was described as an "even greater risk" that she might merely be recollecting what was said on the video and incapable of distinguishing between what was said on the video and the underlying events themselves. These considerations led the court to conclude that the evidence should have been excluded under section 78 of the 1984 Act and "stopped because of the lapse of time".

50. Both *Powell* and *Malicki* underlined the importance to the trial and investigative process of keeping any delay in a case involving a child complainant to an irreducible minimum. Unsurprisingly, we agree, although we draw attention to the circumstances which did not appear to arise in either *Powell* or *Malicki*, that the complaint itself, for a variety of understandable reasons, in the case of a child or other vulnerable witness may itself be delayed pending "removal" to a safe environment. The trial of this particular issue was delayed because of the trial arising from the death of Baby P. With hindsight it can now be suggested that perhaps the better course, given the age of X, would have been to try her allegation first. Be that as it may, in our judgment the decisions in *Powell* and *Malicki* should not be understood to establish as a matter of principle is that where the complainant is a young child, delay which does not constitute an abuse of process within well understood principles, can give rise to some special form of defence, or that, if it does not, a submission based on "unfairness" within the ambit of section 78 of the 1984 Act is bound to succeed, or that there is some kind of unspecified limitation period. There will naturally and inevitably be case specific occasions when undue delay may render a trial unfair, and may lead to the exclusion of the evidence of the child on competency grounds. *Powell*, for example, was a case in which after the evidence was concluded it was clear that the child did not satisfy the competency test, and if the child in *Malicki* was indeed "incapable of distinguishing between what she had said on the video and the underlying events themselves" it is at least doubtful that the competency requirement was satisfied. However, in cases involving very young children delay on its own does not automatically require the court to prevent or stop the evidence of the child from being considered by the jury. That would represent a significant and unjustified gloss on the statute. In the present case, of course, we have reflected, as no doubt the jury did, on the fact of delay, and the relevant timetable. Making all allowances for these considerations, we are satisfied, as the judge was, that this particular child continued to satisfy the competency requirement.
51. There remains the broad question whether the conviction which is effectively dependent upon the truthfulness and accuracy of this young child is safe. In reality what we are being asked to consider is an underlying submission that no such conviction can ever be safe. The short answer is that it is open to a properly directed jury, unequivocally directed about the dangers and difficulties of doing so, to reach a safe conclusion on the basis of the evidence of a single competent witness, whatever his or her age, and whatever his or her disability. The ultimate verdict is the responsibility of the jury.
52. We have examined the evidence and asked ourselves whether there is any basis for interfering with the jury's verdict. Despite justified concerns about some aspects of the way in which it was conducted, the ABE interview shows an utterly guileless child, too naive and innocent for any deficiencies in her evidence to remain undiscovered, speaking in matter of fact terms. She was indeed a compelling as well as a competent

witness. On all the evidence, this jury was entitled to conclude that the allegation was proved. Unless we simply resuscitate the tired and outdated misconceptions about the evidence of children, there is no justifiable basis for interfering with the verdict.

53. Accordingly, the appeal against conviction is dismissed.

Sentence

54. The appellant was born on 5 June 1976 (33 years old) and had no previous convictions or cautions. He is a man of limited intelligence who claims to have been the victim of sexual abuse as a child. He suffers from depression. When interviewed by the author of a pre sentence report he maintained that the allegations were untrue. Given his denials, the writer was unable to offer any real insight into his offending behaviour and suggested that a psychological assessment should be carried out. The probation officer assessed the applicant as posing a low risk of re-offending against an adult, but a significant risk of causing serious harm to children by the commission of further specified offences, as defined by the Criminal Justice Act 2003. A psychiatrist found no evidence of mental illness.

55. The judge rightly bore in mind that the appellant had been convicted of two different offences in relation to two children under the age of three within the same family. X had suffered anal rape, an abhorrent offence. Baby P died in horrific circumstances set out in the judgment of this court differently constituted in *R v Owen* [2009] EWCA Crim 2259. He suffered a catalogue of abuse and injuries of increasing severity culminating in his death aged just 17 months. Hughes LJ, Vice President of the Court of Appeal Criminal Division, giving the judgment of the court in *Owen* summarised what happened to him in this way at para 7.

“From October 2006 to July 2007 he presented from time to time at the doctor's surgery or at hospital with bruising to various parts of his body: his buttocks, his head, his back and his legs; damage to his fingers with missing nails; lesions and scabs to the top of his head and a missing toenail. After he died it was found he had significant recent non-accidental injuries which caused or contributed to his death. There were fractures to his ribs inflicted probably between seven to ten days and two weeks before death, a broken spinal cord inflicted at most three or four days before death and at some time on the day before he died the forceful knocking into his mouth of a tooth which he ended up ingesting.”

The appellant was one of the adults who caused or allowed this to happen. He was the only adult who interfered sexually with X. Both Baby P and X were exceptionally vulnerable by reason of their ages, and the appellant's activity represented a gross breach of trust. The judge took the view that the offences were very grave and the level of culpability particularly high.

56. Nevertheless, Mr Richmond argued that the sentence was manifestly excessive and or wrong in principle. He criticised the judge for, as he would have it, failing to identify why he had decided to sentence outside the Sentencing Guidelines Council Definitive Guideline. Mr Richmond conceded the offence of anal rape was committed in breach of trust and on a very young child. However, the appellant stood to be sentenced for

one offence of offence of “non violent” anal rape. There was no evidence of ejaculation or lasting injury. Even if the offence was committed on a child as young as X and aggravated by the applicant’s involvement in Baby P’s death, Mr Richmond maintained a life sentence with a minimum term of 10 years was excessive.

57. We disagree. The flaw in Mr Richmond’s argument is that the judge stated in terms the minimum term was intended to reflect the seriousness not simply of the anal rape “aggravated by Baby P’s death” but the totality of the appellant’s crimes. The questions for this court, therefore, are whether a life sentence was justified and the minimum term excessive for these associated offences of causing or allowing the death of Baby P and the anal rape of X. Both P and X were very young children and both entrusted to the care of the appellant. One died aged 17 months of appalling injuries and the other suffered an anal rape when she was under 3 years old. The trial judge was satisfied, on the evidence before him, that the appellant played a major role in the events of December 2006 to August 2007 which led to P’s death. At about the same time as he was causing or allowing one toddler to be physically abused he abused another sexually.
58. All the reports upon the appellant indicate he is a danger to young children. We agree with the judge that his culpability was high and the offences particularly grave. These crimes were simultaneously incomprehensible and truly appalling. The sentence of life imprisonment was merited, and further, given the gravity of the two offences, for which consecutive determinate sentences could with every justification have been passed, the minimum term was neither excessive nor wrong in principle. The appeal against sentence is dismissed.