[2024] EWCA Crim 881

Case No: 202201414 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LIVERPOOL
His Honour Judge David Aubrey KC
T20217231

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 July 2024

Before :

LORD JUSTICE WARBY
MRS JUSTICE MAY
and
HIS HONOUR JUDGE TIMOTHY SPENCER KC

- -

Between :

REX	**Respondent**
- and -	
DB	**Appellant**

- -
- -

Matthew Scott (instructed by **Chris Saltrese Solicitors**) for the **Appellant**
Robert Dudley (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date : 18 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 26 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE WARBY :

Introduction and summary

1. This is the judgment of the court on appeals against conviction and sentence for five historical sexual offences and one historical offence of assault after a trial involving four complainants.

2. The issues raised by the conviction appeal are whether the convictions are unsafe because (1) the judge's direction on cross-admissibility was inadequate; (2) the jury was misdirected on the issue of consent; (3) the indictment was legally flawed on that issue; and/or (4) one of the counts was an abuse of process. Leave to appeal on the first three grounds was given by the full court in advance of the hearing before us. At the hearing we granted leave to appeal out of time on the fourth ground.

3. The appeal against sentence is brought on two grounds identified by the Registrar and subsequently adopted by the appellant. These are that (1) the principal sentence was unlawful because it exceeded the maximum term for the offence and the overall sentence was hence too long; (2) the court had no power to impose a surcharge order. We granted leave to appeal out of time on both those grounds.

4. At the end of the hearing we announced our decision to dismiss the conviction appeal on all four grounds but to allow the appeal against sentence on both grounds. We now give our reasons for those decisions.

Anonymity

5. The provisions of the Sexual Offences (Amendment) Act 1992 apply to all the allegations of sexual offending to which we shall refer. That means that each of the complainants is entitled to lifetime anonymity. Nothing must be published which would be likely to lead members of the public to identify any of them as one of the complainants in this case. We shall anonymise them accordingly.

6. We shall also anonymise the appellant as DB. That is not for his own sake but because identifying him would be likely to identify at least some of the complainants.

The Crown Court proceedings

7. DB, now aged 61, was indicted in the Crown Court at Liverpool on 11 counts alleging offences committed between 1982 and 2004.

8. Count 1 alleged indecency with a child, contrary to section 1(1) of the Indecency with Children Act 1960. The complainant was a neighbour, KH, who alleged that between 1982 and 1984 when she was under 14 the appellant had incited her to touch his penis.

9. The second complainant was DB's ex-wife, whom we shall call AB. They were married in 1983 and separated in 1998. AB alleged that during the marriage DB had been physically and sexually abusive towards her. He would hit her and use sex to control her. She alleged that on one occasion in the summer of 1992, when they were arguing, he knocked a plate out of her hand and kicked her in the jaw when he was wearing steel-capped boots. That gave rise to count 2, assault occasioning actual bodily harm contrary to section 47 of the Offences against the Person Act 1861.

10. AB further alleged that on another occasion when she was drying herself after a shower he told her he wanted to have anal sex. She said she did not want to but he ignored her and forced himself on her using Vaseline. That gave rise to count 3, buggery contrary to section 12 of the Sexual Offences Act 1956.

11. The third complainant was LB, the daughter of the appellant and AB. She was born in 1986. She made allegations of sexual assaults by her father which gave rise to six counts on the indictment.

12. The first was that when she was about 11 or 12 he offered to shave her pubic hair and, as he did so, he inserted his finger into her vagina (count 4, indecent assault contrary to section 14(1) of the 1956 Act). Secondly, that there was an occasion when he grabbed her hand and made her masturbate him to climax (count 5, indecency with a child). Thirdly, that on an occasion between May 1998 and April 2000 when she was aged 12-13 the appellant had kissed her on the mouth (count 6, indecent assault) and on another occasion in the same period of time he had touched her breasts (count 7, also indecent assault). LB also described an incident when she was 13 or 14 and in her father's bed, when he removed her clothes, put Vaseline on her, and tried to insert his penis into her vagina (count 8, indecent assault). LB also alleged that there had been a further similar occasion when the appellant inserted his penis further into her vagina, not using Vaseline, when she jolted with the pain and ran. That gave rise to count 9 which alleged rape, contrary to section 1 of the 1956 Act.

13. The fourth complainant was the applicant's step-daughter, JT. She alleged that in 2003 or 2004 when she was aged 11-12 he had touched her vagina. Count 10 alleged that this amounted to indecent assault contrary to section 14(1) of the 1956 Act. Count 11 alleged that it was sexual assault of a child under 13, contrary to section 7(1) of the Sexual Offences Act 2003. These were alternatives, necessitated by the fact that the allegation was of offending on a date unknown in a period during which the 1956 Act was repealed and replaced by the Act of 2003.

14. LB said that having kept matters to herself she was prompted by a television programme to disclose the facts to her mother, AB. Both women then reported their alleged experiences to the police. They were interviewed and in April 2017 the appellant was arrested. The other complainants were interviewed thereafter, JT in July 2017 and KH in 2020.

15. In interview and at his trial before HHJ Aubrey KC and a jury the appellant denied having sexually abused or assaulted his wife, his daughter or either of the other two complainants. He said that his marriage had not been abusive and that he had never slapped or assaulted AB. There had been two occasions when he had anal intercourse with her. On both occasions she had fully consented. He had never sexually abused LB in any way. She had been a rebellious teenager who abused alcohol and drugs (points which she admitted in cross-examination). Her allegations were pure fabrication.

16. The case was left to the jury on the basis that the issue for them in relation to each count was whether they were sure that DB had behaved in the way alleged. On 26 January 2022, the jury acquitted DB of the alleged offence against KH (count 1). They convicted him by a majority of both counts involving AB (counts 2 and 3) and four of the six counts involving LB (counts 4, 5, 8 and 9). They acquitted him of two of the

offences alleged by LB (counts 6 and 7) and of the offending alleged by JT (counts 10 and 11).

17. On 12 April 2022, DB was sentenced by the trial judge. On each of counts 2 and 3 the judge imposed standard determinate sentences of two years consecutive thus amounting to 4 years imprisonment in total. On count 4 he imposed a consecutive special custodial sentence for an offender of particular concern, pursuant to section 278 of the Sentencing Act 2020, of 11 years, comprising a custodial term of 10 years and a further one-year licence period. On counts 5 and 8 the judge passed sentences of 18 months and two years concurrent. On count 9 he imposed a standard determinate sentence of 10 years' imprisonment to run consecutively to the four years on counts 2 and 3.

The conviction appeal

Ground 1: Cross-admissibility

18. The judge gave the jury written directions and a route to verdict. He took the jury through these in his oral directions. At an early point the judge gave the standard legal direction that the jury must consider each count separately. Later, and before Counsel gave their closing speeches, the judge said this:

> **"Cross Admissibility**
>
> I have told you that you must consider each count separately and you should first decide whether the defendant is guilty of one of the offences with which he is charged.
>
> You may then consider whether he has a propensity, or tendency to commit offences of that nature. That is a matter for you. If you are not sure that he does then your conclusion that he is guilty of one offence does not support the prosecution case in respect of another.
>
> If you are sure that he has such a tendency, then it may provide additional support for the other allegations against him. But you cannot convict solely or even mainly based on a person's propensity. Just because a person has done something on one occasion it does not mean that he has done so on another. Propensity to commit an offence could never be direct evidence that a person had committed an offence."

19. Shortly afterwards the judge gave the jury directions about other bad character evidence, namely AB's evidence of other violent behaviour by DB towards her and evidence from AB and other witnesses of behaviour and remarks by DB that could indicate a sexual interest in children. The jury were directed that the other evidence of violence could lend some support to the allegation of assault in count 2 but only if they were sure of the other evidence, and that it showed a tendency to behave violently towards AB. The evidence of sexual comment and behaviour on other occasions could lend some support to the allegations that DB committed sexual offences against LB, KH and JT but only if the jury were sure of the evidence and that it demonstrated a sexual interest in young girls.

20. Mr Scott, who came into this case for the appeal, submitted that the cross-admissibility direction was too blunt a tool to deal with the complexities of the cross-admissibility issues in this trial.

21. He argued that the direction had its origin in an uncontested bad character application made by the Crown, in which it was alleged that "the evidence of each complainant is admissible in relation to the counts in respect of the other complainant" because it "goes towards the defendant's propensity to commit offences of this type". Mr Scott submitted that this was an unduly broad-brush approach that carried over into the judge's legal directions. He reminded us that evidence of bad character cannot be left as a "free for all"; juries must be given "clear directions on whether, and if so how, evidence relating to one count may be taken into account in deciding guilty on another count": *Adams* [2019] EWCA Crim 1363 [22]. Mr Scott submitted that the direction given here offends established principles, as summarised in *Fanta* [2021] EWCA Crim 564 [64]:

> "… It is critical that judges, when bad character evidence is admitted, clearly explain why it has been introduced, the limits of its potential usefulness, and by their directions ensure that all of the protections for the accused against the misuse of this evidence have been properly explained."

22. There were two aspects to the criticism. The first is that the direction failed clearly to identify to the jury the propensity which the evidence was capable of establishing. It was said that the phrase "offences of that nature" was too vague: the direction invited or at least permitted the jury to conclude that if they were sure of DB's guilt of any of the counts he faced they could treat that finding as probative of his guilt on any other count. So, for instance, they might have treated proof that the appellant committed the offence against his wife alleged in count 2 or the offence in count 3 as supportive of the allegations of sexual offending against his daughter. Or they might have reasoned in the opposite direction, treating proof that the appellant sexually abused his daughter as evidence that he assaulted his wife. Any of these lines of reasoning would, Mr Scott submitted, be illegitimate. The offending alleged in each of counts 2 and 3 was fundamentally different in nature from the sexual offending against children that was alleged in all the other counts.

23. The second aspect of the criticism was that the direction failed to identify the uses to which bad character evidence could not be put. Directions on that point can be as important as guidance on how evidence of bad character can be used: *PHH* [2017] EWCA Crim 2046. Mr Scott submitted that the judge's directions in this case should have guarded against the risk that the jury might consider that evidence of the child sexual offences was relevant to consideration of the counts alleging offences against AB or *vice versa*. Another risk, it was submitted, is that the jury might have wrongly allowed their decisions to be influenced by the extensive background evidence given by AB about DB's violent behaviour towards her during the course of the marriage. Mr Scott argued that it was not enough for the judge to direct the jury that this evidence could be relevant to count 2. He should have directed the jury that this evidence had no relevance to any other count on the indictment.

24. We are grateful to Mr Scott and to Mr Dudley who has appeared for the Crown.

25. This ground of appeal hinges mainly on the use of the governing phrase "offences of that nature" in the context of this case as a whole. There may well be cases in which the judge needs to do more to explain and spell out the practical implications of a phrase like this. The trial judge could have done so in this case. But he was not asked to do so nor do we consider that it was necessary for him to do so or that the absence of such an explanation means that the convictions or any of them are unsafe.

26. The indictment contained eight allegations of sexual offending against three different female children, one allegation of sexual offending against a female adult, and a single allegation of assault on the same adult female. It is accepted that the jury could properly have considered all the alleged sexual offences against children to be of the same nature or kind. The prosecution's bad character application was put on the basis that count 3 was another offence of the same nature or kind. That application was uncontested. The appellant's trial Counsel has made clear to the court that he understood the way the prosecution put their case. Further, as is standard practice, he was given advance sight of the judge's legal directions in draft. He understood the term "offences of that nature" to mean sexual offences. He appreciated that the jury were to be told that they could, within the limits prescribed by the judge, use a finding of guilt on any one or more of counts 1 and 3 to 11 as some support for the case against DB on any other of those counts. Counsel took no issue with the terms of the proposed directions on cross-admissibility. In our judgment he had no good grounds for doing so. It was open to the jury in this case to treat proof of one or more of the sexual offences as some support for the prosecution case on another count alleging sexual offending.

27. We do not accept that the judge's direction created any risk that the jury might use a conclusion that DB had assaulted his wife as support for a finding that he was guilty of a sexual offence against her, still less that the jury would use such a finding as probative of sexual offending against a child, or that they would reason in the opposite direction.

28. Again, we note the position of DB's trial Counsel. He plainly took the view that the allegation of assault was separate and distinct and of a different "nature" from the allegations of sexual offending and that neither had any bearing on the other. It evidently did not occur to him that the judge's directions might lead the jury to think otherwise. We consider his judgment was sound. The cross-admissibility direction was clearly framed as a qualification or exception to the general direction that the jury must consider each count separately. The two categories of allegation were patently different in "nature".

29. This straightforward point was underlined by the judge's directions on the ways in which the jury could use the evidence of violence and sexual behaviour that was not the subject of any charge on the indictment. The judge spelled these out with precision, telling the jury that the former could be relevant to count 2 and that the latter could be relevant to counts 4 to 11 but only in the circumstances identified by the judge. He did not state in terms that these were the only ways in which that evidence could be relevant. However, in the context of the case, and considering the legal directions as a whole, we see no room for a conclusion that the jury might have thought that they could properly rely on this evidence for any other purpose. It was thus unnecessary for the judge to give a specific direction on the point.

30. Our conclusions are buttressed by the pattern of the jury's verdicts. This demonstrates that none of the convictions can have been based on anything that was alleged by KH or JT and that the jury took a discriminating approach to the allegations of LB.

Grounds 2 and 3: the rape allegation

31. The second and third grounds of appeal are both concerned with Count 9, the allegation of rape of AB, contrary to s 1 of the Sexual Offences Act 1956.

32. The particulars of Count 9 were that between 1 May 1990 and 30 April 2002 the appellant raped LB, aged between 13 and 15, by penetrating her vagina with his penis:

> "and [LB] did not consent to the penetration and [DB] did not reasonably believe that [LB] consented to the penetration".

33. The judge's legal directions reminded the jury that DB's case was that nothing of a sexual nature had taken place between him and LB and went on:

> "The issue is are you sure the sexual activity, the subject of the count you are considering happened. The Prosecution do not have to prove that the complainant was not consenting save for the allegation the subject of Counts 3, which relates to his ex-wife. In all the other counts the allegations relate to children and thus any issue of consent does not arise. Thus it is not necessary to provide to you each and every legal element of each offence and what you must do is follow the route to verdict below."

34. The route to verdict followed the same approach. It told the jury that they should arrive at their verdict on count 9 by answering a single question. If the answer was yes the jury's verdict was guilty. If the answer was no, the verdict was not guilty. The question was:-

> "Are we sure that the defendant put his penis in her vagina when she was aged between 13 and 15 years?
>
> Note: There does not have to be full penetration or ejaculation"

35. The second ground of appeal was that the judge was wrong in law to direct the jury that consent was irrelevant to count 9. Regardless of age it was an essential ingredient of the offence of rape that LB did not consent to the sexual intercourse. The jury were thus misdirected and the route to verdict was erroneous.

36. The third ground of appeal was that the particulars of Count 9 were wrong in law and confusing to the jury because they reflected the law as it stands today under the Sexual Offences Act 2003, rather than the law as it stood at the time of the alleged offence. Under the 1956 Act it was necessary for the prosecution to prove not only that the person did not consent but also that the defendant "knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it." The effect was that a defendant was entitled to be acquitted if he held an honest belief in consent even if that belief was unreasonable: Morgan [1976] AC 182.

37. Both these points were fairly made. There was no dispute before us nor do we doubt that Count 9 was wrongly drawn as a matter of law and that the judge's directions failed correctly to reflect the applicable law on consent. The question to be addressed, however, is whether those were material errors that is to say whether they undermined the safety of the appellant's conviction. As this court said in *Yeld* [2021] EWCA Crim 866, where a similar issue arose, it is important to focus on the real issues and "a misdirection as to the ingredient of an offence does not necessarily render the conviction unsafe."

38. It is clear that these mistakes passed unnoticed by all the experienced lawyers involved in this trial. It is plain to us that the main reason for that is that, the defence case being one of straightforward denial, the issue on count 9 was the one which the judge identified to the jury: did the sexual activity alleged happen? Nobody ever suggested that LB might have consented to having her vagina penetrated by her father's penis. Nor was there any suggestion that DB might have penetrated her in the belief that she was consenting.

39. Beyond that, it is clear that nobody at the trial thought there was any evidential basis for leaving any issue about consent or belief in consent to the jury or saw any possible advantage to the defence from doing so.

40. The appellant's new legal team asked his trial Counsel whether he had invited the judge to direct the jury that they could only convict if they were sure that LB had not consented and that the applicant had not believed she was consenting at the time the intercourse took place and if not why not. He replied that this was the last in a series of allegations in relation to which there had never been any suggestion of consent or belief in consent. There was "simply no evidential basis to submit that belief in consent could be an issue." Counsel commented that in the context of this trial, it would have been "tactical suicide" to ask the jury to consider that the appellant believed his own daughter was consenting to sexual intercourse with him.

41. Mr Scott acknowledged the force of this and accepted that the defence would not have wanted to raise the point. He argued nonetheless that this "does not necessarily absolve" the judge of his duty to direct the jury correctly on a fundamental ingredient of the offence of rape. He submitted, further, that there was some evidential basis in LB's evidence for concluding that she had in fact consented to intercourse. In support of that last submission he pointed to some passages in the transcript. These included a passage suggesting that LB had gone into the bedroom "knowing what [DB] intended to do". He also pointed to her evidence that when she said "no" he stopped.

42. In our judgement the legal directions were faithful to the way the issues in the case emerged and consistent with the way the appellant and his legal team quite properly wished to run his case. We are also satisfied that the judge's directions were consistent with the evidence. Having examined the transcript with care our conclusion is that the passages relied on are far too frail to carry the weight that Counsel seeks to place upon them. We accept that a reasonable jury could infer from LB's evidence that she anticipated that her father would attempt to rape her and that he might succeed. We are however unable to find in the evidence any tenable basis for a finding that LB consented or may have consented to being penetrated, or that DB might have believed that she was consenting to intercourse.

Ground 4: abuse of process

43. The argument is that it was an abuse of process to prosecute DB on Count 8. That was, as we have said, an allegation of indecent assault contrary to section 14(1) of the 1956 Act. The particulars alleged that DB had committed that offence "by touching [LB]'s vagina with [his] penis" between 1 May 1999 and 30 April 2002 when she was aged between 13 and 15. Mr Scott contends that on the prosecution's factual case the conduct alleged against DB was properly categorised as unlawful sexual intercourse with a girl under the age of 16 contrary to section 6(1) of the 1956 Act, or an attempt to commit such an offence. Section 37(2) and paragraph 10(a) of Schedule 2 to the 1956 Act specified a special restriction on a prosecution for this offence, providing that it "may not be commenced more than 12 months after the offence charged".

44. Mr Scott relies on the decision of the House of Lords in *R v J* [2004] UKHL42, [2005] 1 AC 562 and in particular what Lord Bingham said at [26]:

> "It is impermissible for the Crown to prosecute a charge of indecent assault under section 14(1) of the 1956 Act in circumstances where the conduct upon which that charge is based is only an act of unlawful sexual intercourse with a girl under the age of 16 in respect of which no prosecution might be commenced under section 6(1) of the Act by virtue of section 37(2) and Schedule 2 to that Act."

45. This was a point that only came to Mr Scott after the full court hearing at which leave was granted. He had failed to notice the relevance of the case of *J* when the original grounds were drafted. He therefore filed an application for leave to amend the grounds, an extension of time and leave to appeal on this additional ground. At the hearing we were persuaded that the point merited full argument and therefore granted all three applications. Having heard the argument we were not persuaded by it.

46. The facts of *R v J* are stark. The prosecution case was that the defendant had unlawful sexual intercourse with a girl under the age of 16 years and that is how the judge summed up the case to the jury. The case had been prosecuted under s 14(1) "in order to avoid the time limit" which the prosecutor thought he was entitled to do. As Lord Steyn explained at [30], "apart from the wish to avoid the time limit under section 6(1) there was no rational reason for deciding on a charge under section 14." There is no suggestion in this case of any such reasoning on the part of the prosecution, still less any deliberate misconduct.

47. However, as we read the speeches in *R v J* it is or may be an abuse of process for the Crown to proceed in the way described by Lord Bingham regardless of its intention. The reason is that where in substance and reality the conduct relied on against the defendant amounts to the offence contrary to section 6(1), and no other offence, the effect of prosecuting it under section 14(1) is to avoid the limitation period prescribed by Parliament without justification. This is an objective question that turns on the nature of the prosecution case.

48. This ground of appeal therefore depends on the proposition that the conduct on which count 8 was based was "only" an act or attempted act of unlawful sexual intercourse contrary to section 6(1) of the 1956 Act.

49. The short and compelling answer is that the conduct on which the prosecution relied in support of count 8 did not amount to the s 6 offence or an attempt to commit that offence. It went no further than the touching alleged in the particulars to count 8. Neither LB nor the prosecution alleged any penetration nor did the prosecution allege that DB intended to engage in intercourse or was engaging in any act that was more than merely preparatory to an act of intercourse. Even if, arguably, the evidence might have justified a charge of attempted vaginal rape, it cannot be said that the conduct relied on was "only" an act or attempted act of unlawful sexual intercourse with a girl under 16. The prosecution had a proper and rational basis for charging and prosecuting DB on the factual and legal basis alleged in count 8.

50. It is for these reasons that we dismissed the appeal against conviction.

The sentence appeal

51. DB did not initially pursue any challenge to sentence but the Registrar identified two flaws in the sentencing process. The most important is that the total sentence of 11 years on count 4 exceeds the statutory maximum for the offence of indecent assault contrary to s 14(1) of the 1956 Act. That is not authorised by s 278 of the Sentencing Act. Secondly, a surcharge order was imposed when that was not available at the time of the offending. Grounds of appeal were subsequently lodged with the necessary application for an extension of time.

52. The prosecution was unable to identify any answer to either of the points raised by the Registrar. Mr Dudley conceded that on the surcharge point the judge may have been led into error by a mistake in the note on sentencing which he submitted. It was clearly necessary in the interests of justice for us to grant the necessary extension of time of 415 days and to give leave to appeal, as we did.

53. Mr Dudley pointed out to us that in 1992 the maximum sentence for buggery was life imprisonment rather than two years as he (relying on a mistaken passage in Archbold on Criminal Pleading Evidence and Practice) had stated in his sentencing note for the judge. Mr Dudley submitted that in principle it was open to this court to re-structure the sentence in such a way as to maintain its overall length. That may be so, but it would involve a substantial interference with the structure of the judge's sentencing process which we do not consider can be justified.

54. We therefore allowed the appeal, quashed the sentence on count 4 and substituted a special custodial sentence of 10 years comprising 9 years' imprisonment plus 1-year licence period. We also, consequentially, quashed the concurrent sentence of 10 years on count 9 and substituted a concurrent sentence of 9 years' imprisonment. Finally, we quashed the surcharge order. All other aspects of the sentencing remain unchanged.

55. The overall sentence is therefore now a standard determinate sentence of 4 years imprisonment followed by a special custodial sentence of 10 years on count 4, made up in the way we have mentioned, and a sentence of 9 years on count 9, consecutive to the 4 years but concurrent with the other sentences.