



Neutral Citation Number: [2022] EWCA Crim 690

Case No: 202103070 B5

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CROWN COURT AT WOOLWICH**  
**Her Honour Judge Downing**  
**T20200806**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 23 May 2022

**Before:**

**LADY JUSTICE THIRLWALL**  
**MRS JUSTICE LAMBERT**  
and  
**MR JUSTICE RITCHIE**

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**Between:**

**Sathinesh Padman**  
**- and -**  
**Regina**

**Appellant**

**Respondent**

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**Catherine Daly** for the **Appellant**  
**Richard Witcombe** for the **Respondent**

Hearing dates: 25.03.2022  
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**Approved Judgment**

*This judgment was handed down remotely by circulation to the parties' representatives by email, release to the National Archives. The date and time for hand-down is deemed to be 10:30am on 23 May 2022.*

**Lady Justice Thirlwall :**

**The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act. We shall refer to the victim as X.**

1. This is an appeal against conviction brought by leave of the single judge.
2. On 01/09/2021 in the Crown Court at Woolwich the Appellant (then aged 59) was convicted (by a majority of 10 to 2) of indecent assault contrary to s. 14 of the Sexual Offences Act 1956 (count 1). The offence was one of digital penetration of the vagina.
3. He was acquitted of a second count of indecent assault on the same victim.
4. On 24 September 2021 he was sentenced to four and a half years imprisonment (less time spent on a qualifying curfew). A victim surcharge was imposed, and he was required to comply with the provisions of Part 2 of the Sexual Offences Act 2003 indefinitely.
5. It is the Appellant's case that the conviction is unsafe because there was before the jury evidence of two separate incidents of digital penetration. They were not directed that they must be sure of the specific incident alleged in count 1 and so it may be that the majority verdict was based on some of the jury being sure of one event, and the rest of the majority being sure of the other. This, it is submitted, is the explanation for the difference between the verdict of not guilty on count 2 where the jury were not sure of a single incident and the verdict on count 1.

**Background**

6. X was the daughter of the Appellant's then partner. At the time of the offending X was about five years old (DOB 15.9.89). The Appellant lived with her mother, the victim and her older brother at two addresses in East London. He also retained a flat he rented from a Housing Association in South East London. The offending took place in the early 1990s, between 1993 and 1995.
7. Matters came to light in 2017 when X confided in a family friend that the Appellant had touched her inappropriately when she was a child. X then went to the police and an ABE interview was conducted.
8. The Appellant was traced and invited to attend the police station for a voluntary interview, which he did on 25th April 2017. He answered all questions and denied the allegations.

**X's evidence**

9. In her ABE interview, played at the trial, X described occasions when the Appellant took her to his flat in Lewisham and assaulted her. On one occasion he showed her a newspaper picture of a young woman sitting backwards on a chair with her legs spread.

He told her to do the same thing, while sitting across his legs. He inserted his fingers into her vagina. These were the facts of count 1 and the incident was referred to during the trial as “the chair incident”.

10. On another occasion (but possibly on the same day as the “chair incident”) the Appellant asked if she wanted a cup or a dummy, and when she replied “dummy” he inserted his penis into her mouth. These were the alleged facts of count 2 and that incident was referred to during the trial as “the dummy incident”. The Appellant was asked about both during the course of his interview.
11. There was an occasion when her brother went with her and the Appellant to his flat. Her brother was older than X, between 9 and 12 at the time of the offences. X said that the Appellant took her into the bedroom and inserted his fingers into her vagina. Afterwards they joined her brother in the living room and watched television.
12. Soon afterwards, X told her mother that the Appellant had touched her “down there” but the matter was never spoken about again. At some point after that the Appellant left the family home.
13. X also told her brother, when she was about 15 and he was about 18 that the Appellant had touched her inappropriately.
14. More recently, in 2017, she told a long standing family friend whom she called “aunty”. Aunty persuaded her to report the offences to the police.
15. During the course of the ABE interview the incidents which were to lead to charges were referred to as the Chair Incident and the Dummy Incident. They were given the same description in the interview of the Appellant. X was cross examined at trial. It was put to her that her allegations were all untrue.
16. The prosecution called X’s mother, her brother and two family friends to give evidence of her complaints. Her brother also gave evidence of going to the flat with the Appellant and X in a silver Renault car on a handful of occasions. The Appellant would take X off to a separate room, and on one occasion when he knocked on the door, the Appellant was angry when he came out, and his sister was very quiet. He confirmed that when he was aged 18, his sister told him she had been “touched” by the Appellant, but she did not give any details. X’s mother said that she met the Appellant in 1994, and that he had lived for a time with her and her children. The Appellant would take the children out in his car in order to bond with them. She confirmed that X complained to her that the Appellant had touched her inappropriately, but said she had not reported it to the police because she hoped her child would forget about the matter. She spoke about it at the time to a friend of hers. That friend also gave evidence. She said that X was a very unhappy child during 1994. She recalled X’s mother telling her about the allegation of assault, which she understood had taken place when the complainant was in the bath.
17. The family friend known as aunty described how in 2017, X had told her, unexpectedly, that she had been abused as a child. She said she had been touched inappropriately by the Appellant at his flat in Lewisham. She said her brother had been in another room at the time and that she had told her mother about this on the way back from the swimming pool.

18. The Appellant said in evidence that he had met the complainant's mother in 1991, when she was living in a refuge for a period of 6 months. She and the children came to live with him briefly for two weeks in his Lewisham Housing Association flat, before moving to a property in Poplar. The Appellant moved into the house in Poplar and later to another house with the family. They all lived together until the relationship ended in 1995. During that time, he only returned to his Lewisham flat to collect post from the communal hallway. He never took X or her brother there, and for much of the time he was unable to gain access because squatters had moved in and changed the locks.
19. The Housing Association had taken the squatters to court in order to evict them. The Appellant was a witness in those proceedings, he said, although there was no supporting evidence about it. In 1994 he went to India for the summer and when he returned the relationship ended. He moved back to his Lewisham flat. He never took the children out alone for "bonding". He did not own a silver Renault car, and had no booster / child seats so if ever the children were in his vehicle, their mother would be in the back seat holding X.

20. **The Indictment**

At the outset of the trial the two counts on the indictment were identical. Each read as follows:

**Statement of Offence**

Indecent Assault, contrary to section 14(1) of the Sexual Offences Act 1956.

**Particulars of Offence**

Sathinesh Padman between the 14th day of September 1994 and the 15th day of September 1995 indecently assaulted [X], a female person under 14"

This was inadequate, as defence counsel pointed out later in the trial. Rule 10.2(1)(b) of the Criminal Procedure Rules 2020 requires that each count on an indictment must contain such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant. The particulars of the offence on this indictment added nothing to the statement of offence other than the identity and age of the complainant.

21. In opening, the prosecutor referred to two distinct assaults: first, count 1, the digital penetration after the showing of the newspaper photograph with the girl sitting backwards on the chair and, second, count 2, the incident when the appellant had put his penis in her mouth after asking if she wanted a cup or a dummy. Counsel also referred to the fact that there was another occasion when X's brother was in a different room while X was in a room with the appellant. When she came out she was very quiet.
22. After the evidence was completed but before the first part of the summing up and speeches, prosecuting counsel sought leave to amend the indictment to extend the period on each count so that it began in September 1993, rather than September 1994. There was no objection to this, and the judge allowed the amendment.

23. Defence counsel submitted, correctly, that it was necessary for the Crown to identify which two acts they said the two counts on the indictment reflected. He also pointed out that there were three incidents: the Chair Incident, the Dummy Incident and the brother in the other room incident.
24. Prosecuting counsel sought leave to amend the indictment, going on to say: “Count 1 relates to sitting on him, and the insertion of fingers into the vagina... Count 2, the sucking incident relates to the...then dummy and the..” to which the judge replied [referring to her summing up] “and then make it quite clear that clearly separate consideration on each”
25. The judge then delivered the first part of her summing up, dealing with the core directions of law, including a clear direction on separate consideration of the two counts. “Each must be considered separately. Count 1, you start first – it does not matter where you start, but if you start on Count 1 you have to be sure that the prosecution has proved to you that these events happened, and then, if you are sure, the proper verdict would be guilty. If you were not sure it would be not guilty. And then you turn to Count 2, or the second count, and you start the process again, in the sense that you have decided, I suppose, by that stage on the evidence, a lot of things, then you make the same critical analysis: ‘Has the prosecution made us sure of the guilt on this count?’ And the answer may be the same, ‘Yes, guilty,’ or it may be different, ‘Not guilty’. It does not follow that your verdict on one dictates in any way your verdict on the second. Or if you have a 10 count indictment, the same thing would apply in that. You just have – but you must consider them separately.” The court then adjourned for the day. The following morning, having informed them of the change of date the judge directed the jury to annotate their copies of the indictment as follows:

“For also the avoidance of doubt, Count 1 is the allegation relating to the digital penetration of S’s vagina, so can you annotate that in whatever way you want, either with ‘digital penetration’ or ‘vagina’ or something to just to remind you all that that is what Count 1 is. Count 2, therefore, is the specific allegation relating to the oral penetration of her mouth – sorry, penetration of her mouth with the defendant’s penis, so, again, can you annotate that in a way so all of you know that that is the two counts. And as I indicated yesterday, your task must include a separate consideration of each count, and when you have considered one count, in whatever order you want to do it, and you move on to the others, the verdicts of course do not have to be the same because if your separate consideration leads you to have doubt on one but not the other then that is the appropriate way forward. So, I hope that makes that clear now that, in fact, those two counts are perhaps a little more user friendly in explaining what is there.”

Later she said, “your task is to say whether you are sure or not, Count 1, that the defendant put his fingers inside her vagina, and, Count 2, whether he put his penis in her mouth.” This was in the context of a direction on the irrelevance of consent given the age of X at the time.

26. In her closing speech prosecuting counsel addressed the jury squarely on two events: the newspaper photograph/chair incident with digital penetration and the second incident - dummy/penis in her mouth. Counts 1 and 2 respectively. She did not refer to the third incident.
27. Mr Robinson addressed the jury very clearly about the Chair Incident – and suggesting (notwithstanding the detail of the newspaper photograph and the instruction) that there was no real detail about it. He went on “Moving on to the Dummy Incident, which may or may not have happened the same day as the Chair Incident. We don’t know. It may have happened in the kitchen, there’s some suggestion. Perhaps by the end X was saying it happened by the sofa”. He pointed again to the absence of detail although he had not cross examined on the detail. The cross examination had been a straight challenge of X’s account. He then went on “The *third* sort of incident she described, with her brother in the other room, she says she was on a bed in the bedroom and he put his fingers in her vagina. Again, that’s about all the detail there is there.” (our emphasis). He also pointed out the difference between the account of brother and sister on certain aspects of the disclosure by X and the unlikelihood of the allegations against the Appellant, a man of effective good character.
28. The judge introduced the second part of her summing up then told the jury “This case revolves around perhaps two single incidents of sexual assault of a very basic, if I may put it like that, nature, fingers inserted into a vagina and a penis into the mouth of a little girl, as I say, four/five, perhaps no more than six.” She reminded the jury of her ABE interview – starting with the newspaper incident, then the Dummy Incident. And then she mentioned the fact that X had said the appellant had touched her “down there” when she was in the bedroom and her brother was in the next room.
29. She then repeated the ABE evidence of the two incidents again, in detail, followed by the third incident. The judge reminded the jury that X had been asked whether she could remember anything about the defendant’s penis “Not really. I do not remember it. I do not remember it being soft. I do not remember like, choking, or anything like that. I could not tell you, and I am not going to just make things up.”
30. The judge reminded the jury of the detail of the Appellant’s evidence and of his comprehensive denial of all the allegations. She gave a very slightly modified full good character direction, referring to the fact that there was an old and irrelevant conviction in his past.
31. During their retirement the jury sent a note asking why the Appellant had not called good character evidence. The judge dealt with the question appropriately and there is no complaint about that. Some hours later they asked to watch the ABE interview again, or to be given a transcript of it. The judge re read to them the whole of her summary. A majority direction was given on the second day of deliberations. Verdicts were returned after 10 hours and 40 minutes’ deliberation.
32. We have set out much of the detail of the trial in order to put into context the complaints made about the summing up in the grounds of appeal, as developed by Ms Daly, who was not trial counsel.

## Grounds of Appeal

33. Ms Daly adopted the grounds of appeal submitted by trial counsel:
- i) the counts on the indictment were not sufficiently particularised to distinguish the specific sexual activity to which they related.
  - ii) The judge failed to sum up so as to distinguish between the two counts.
  - iii) The prosecution speech at the end did not distinguish between the two counts.
  - iv) As a result, the jury were not properly directed as to how to approach count 1 and there is a real risk that a majority of the jury were not all sure that the same specific instance of sexual activity took place. It is therefore submitted that the conviction is unsafe.
34. In our judgment, whilst the indictment was not sufficiently particularised in the first place, the two types of activity were made clear during the trial and by the time the jury were considering their verdicts it was plain that the first count related to digital penetration of the vagina and the second to penile penetration of the mouth. The prosecution closing speech did distinguish between the two counts, as we have set out earlier in this judgment. The judge repeatedly distinguished between the two counts and there could have been no doubt in the jury's mind to what specific sexual activity each count referred. The acquittal on count 2 is consistent with that.
35. What was not made clear was the status and purpose of the evidence, such as it was, about the third incident. It was before the jury without objection. There appears to have been no discussion about the use to which the jury could put it, if any. For the prosecution before us Mr Richard Witcombe, who did not appear at trial, submitted that it was either to do with the facts of the offences or part of the background. In our judgment it was bad character evidence - of another offence against the same victim. Ms Daly acknowledged that it could have formed a count on the indictment. No objection was taken to it and the prosecution did not seek to rely on it as evidence going to the question of propensity. Instead, the evidence was simply there.
36. One of the risks of the evidence simply being there, as Ms Daly argues, is that we cannot be sure that the jury agreed about the same incident of digital penetration. Some may have been sure about the Chair Incident, others the third incident. In answer to a question from the court she accepted that had the words "Chair Incident" been added to the particulars of offence in count 1 this ground would not have been arguable. She also acknowledged that in his advice on appeal trial counsel had said at [37] "it is not submitted that the lack of particulars prejudiced the presentation of the defence case. On the contrary the prosecution case was perfectly clear as to what was alleged, and the defence case was equally clear in meeting that case." Like Mr Robinson in his written advice, Ms Daly submitted that the position was not made clear to the jury by the judge.
37. She pointed to the fact that when setting out the two counts the judge distinguished between Counts 1 and Count 2 (see paragraph 26 above, repeated in part here for ease of reference) "Count 1 is the allegation of ....., Count 2 is the *specific* allegation of ..." (our emphasis). This suggests, she submits, that the judge differentiated between the

two counts because there was evidence of digital penetration on two occasions, whereas there was only one occasion of penetration of the mouth with the penis.

38. We are not persuaded that the judge's observation, in an ex tempore section of her summing up directed at distinguishing between the two types of activity, can properly bear the weight of meaning being put upon it. Even if the jury noticed the difference as she said it, which we doubt, and there was no written direction on the point, it is not one which appears anywhere else in the summing up and cannot have misled the jury into thinking that one count was specific, the other not. They were both specific counts as the judge made clear elsewhere in the summing up.
39. Ms Daly submitted that the jury should have been directed, given the evidence of digital penetration in the third incident, that in order to convict on count 1 they had to agree that the Appellant had committed the offence on the same occasion. It was not acceptable for some to be sure of the chair incident and others to be sure of the third incident. She relied on the decision of this court in *R v Hobson* [2013] Cr.App.R. 27, a case involving allegations of sexual offences and specimen counts. There, the court stated at [24] that where specific occasions are not particularised in the indictment it is incumbent on the judge to tell the jury that they can only convict if they are sure that the offence has been committed. The court went on to say [at para 25] that:

*“it is an elementary principle that the jury should be sure about each element of the offence and that is not the case if it is open to a reasonable jury to convict on the basis of different incidents or occasions. Absent such a direction, it will not be possible to say that the jury were unanimous with respect to the same occasion.”*

The court concluded [at para 28] that:

*“the critical question is whether the evidence before the jury was such that there was a realistic possibility that a reasonable jury could have reached its verdict in respect of a specimen count by focussing on different occasions. If so, the summing up would be defective, and the convictions would be unsafe without a direction that the jury had to be sure with respect to the same occasion.”*

40. The question for the court on this ground is whether there is a realistic possibility that the evidence of the third incident may have led the jury to convict on count 1 because some of the jury were sure of the third incident and others were sure of the chair incident, rendering the conviction unsafe.
41. It is submitted on behalf of the defence that the only explanation for the difference between a guilty verdict on count 1 and the not guilty verdict on count 2 is the fact that there were two alleged incidents of digital penetration and so it must follow that the jury may have considered them together so that the verdict was reached by some of them being sure of the Chair Incident and some sure of the third incident (with the brother in another room). We disagree. The account of the incident on count 2 was much less clear than the account of the event on count 1. In the course of her ABE interview when she was asked particular questions, e.g. to describe the state of the Appellant's penis she said she was unable to do so. She couldn't remember and wasn't going to refer to things she could not remember, she said. It is also the case that the people in whom she confided over many years talked of her saying that she had been touched down below. She had never confided about the other incident.



42. We are quite satisfied that there is no realistic possibility that the jury took the approach contended for by Ms Daly. As we have set out above, from the ABE interview, to the interview of the Appellant and the presentation of the case it was understood by all that Count 1 was the Chair Incident, Count 2 the Dummy Incident. The other incident was not on the indictment. It was, as defence counsel described it in closing, the third incident.
43. We have also considered whether the fact that evidence of a third incident was before the jury without a direction as to how they might use it itself renders the conviction unsafe. Assuming for the purposes of the argument that they accepted X's evidence about it, the jury may well have considered that they could put it into the balance against the Appellant when considering the counts on the indictment. A bad character direction on propensity would have allowed the jury to do that. The direction would have included the warning that they could not convict on the basis of that evidence alone. Given the clear and distinctive account of the offence at count 1 we consider there was no risk of the jury taking that course. Accordingly, we are satisfied that the absence of a direction in respect of the use of the evidence of the third incident does not undermine the safety of the conviction.
44. It follows that we are not persuaded that this conviction is unsafe, notwithstanding the eloquent and commendably succinct submissions of Ms Daly. X's evidence on count 1 was clear and compelling and was supported by evidence of recent and later complaint.
45. This appeal is dismissed.