



Neutral Citation Number: [2021] EWCA Crim 262

Case No: 2020/01531 + 03145 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM WOOLWICH CROWN COURT
HHJ TOMLINSON
T.20127689

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2021

Before :

LADY JUSTICE MACUR
MRS JUSTICE McGOWAN
and
MRS JUSTICE TIPPLES

Between :

REGINA

**Applicant/
Appellant**

- and -

PATRICK JOHN RYAN

Respondent

Mr A J H Williams (instructed by **GLD**) for the **Crown**
Mr M Scott & Ms E Torr (instructed by **The Centre for Criminal Appeals** (known as
“**APPEAL**”) for the **Respondent**

Hearing date: 18 February 2020

REASONS

**If this Approved Judgment has been emailed to you it is to
be treated as ‘read-only’.
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Word document.**

**NOTE – THE RE-TRIAL IN THIS CASE HAS NOW TAKEN PLACE.
ACCORDINGLY THIS JUDGMENT IS NO LONGER SUBJECT TO REPORTING
RESTRICTIONS PURSUANT TO S.4(2) CONTEMPT OF COURT ACT 1981.**

**IT REMAINS THE RESPONSIBILITY OF THE PERSON INTENDING TO SHARE
THIS JUDGMENT TO ENSURE THAT NO OTHER RESTRICTIONS APPLY, IN
PARTICULAR THOSE RESTRICTIONS THAT RELATE TO THE
IDENTIFICATION OF INDIVIDUALS.**

Macur LJ:

1. This is a case to which the provisions of the Sexual Offences (Amendment) Act 1992 apply. No matter relating to the complainants shall during their lifetime be included in any publication if it is likely to lead members of the public to identify them as the victim of the offences. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.
2. We indicated at the conclusion of the hearing on 18 February 2021 that we intended to grant an extension of time in which to seek permission to appeal, to grant permission to appeal in relation to one ground only, and to allow the appeal with full reasons to follow, as they do hereafter. In these circumstances we refer to Patrick Ryan as the appellant throughout this judgment.
3. On 30 April 2013, the appellant was convicted of a total of 13 sexual offences against two complainants, who we shall refer to as LD and DG, namely four offences of rape, seven offences of indecent assault, and two offences of attempted rape. He was sentenced to 12 years imprisonment concurrent on each of the rapes, nine years concurrent on the attempted rapes and with sentences of five years in respect of one and four years concurrent on the other indecent assaults, making a total of 12 years imprisonment in total. In relation to these sentences, those passed other than in relation to the offences of rape are unlawful considering the date of the offending, namely prior to 16 September 1985, and the terms of the indictment laid. The maximum sentence in relation to the indecent assaults was 2 years, and for the attempted rape 7 years. In that we give leave and allow the appeal against conviction for reasons appearing below, the necessity to rectify these sentences falls away.
4. His application for an extension of time (2,560 days) in which to apply for leave to adduce fresh evidence and to appeal against conviction were referred to the full Court by the single judge. Further, he renewed his application to seek leave to appeal conviction in respect of the remaining grounds following refusal by the same single judge.
5. The 28-day period in which to apply for leave to appeal conviction expired on 28 May 2013. The Form NG and grounds of appeal were received at the CAO on 1 June 2020, approximately 7 years out of time. An affidavit from Edward McGowan has been lodged in support of the application for an extension of time. Mr McGowan was a barrister working for “Appeal”, a charity providing pro bono services in relation to criminal appeals. He had been involved with the appellant’s case since he joined the charity in 2019. Apparently, the appellant received a negative advice from his trial

counsel and thereafter from another barrister in relation to the merits of appeal. The appellant approached “Appeal” and asked for assistance in October 2015. “Appeal” was unable to assist at that time but invited him to contact them again in 2016, which he did, and thereafter the charity commenced consideration of his case. Counsel, Mr Scott, was instructed on a pro bono basis in November 2018. Detailed work followed including obtaining transcripts and various documentation. ‘McCook’ due diligence was completed in March 2020.

6. At all relevant times in respect of the allegations they made against the appellant, DG and LD, were sisters living with their mother and brother in a ground floor flat. The appellant and his family moved into the upstairs flat during the 1970s and remained until 1980. The appellant’s wife, B, had three children, two sons and a daughter, from a previous relationship.
7. In early 2011, DG made allegations that she had been sexually abused by foster carers when she and her sister were in care for a six-month period during 1972 or 1973. These allegations were investigated by police, but the foster parents could not be traced, and the investigation concluded in June 2011. On 24th June 2011 DG told her counsellor that there was a “second abuser”, who had lived upstairs. She and L played with his children. His wife was always out when the appellant used to sexually abuse her and her sister. However, the allegation was not reported to the police at that time.
8. On 30th June 2011, LD contacted police to make her allegation against the appellant. She said the sexual abuse took place inside the appellant’s flat when she was aged 6 or 7.
9. In the subsequent weeks, DG told her counsellor that the police and her sister were harassing her to give her account about the “second abuser”. She eventually spoke to the police on 5th October 2011, when she simply confirmed that what her sister had told them was true. However, in January 2012, DG made complaint that she had also been abused by the applicant for a period of about three years, until the appellant moved out from the flat.
10. The appellant was arrested and interviewed regarding LD’s allegations on 9th November 2011. He denied her allegations entirely.
11. He was re-arrested in February 2012 following DG’s allegations. He denied the allegation in interview, saying he did not know the children who had lived downstairs and no one was allowed into their flat because his wife had OCD and insisted on keeping their flat clean.
12. At trial, the defence case was that the allegations by both complainants were false. The appellant’s family did not move into the address until Easter 1977 and he was away working full time during the indictment period. His wife did not work and was always at home. There was no “open door” policy and on the contrary, his wife insisted that other children did not come into their flat due to her obsession with keeping it clean. It was suggested that DG’s reluctance to speak to police about the appellant indicated her unreliability, and that having gone to the police, she had fabricated a mass of allegations in order to further assist her sister and that she had transferred her desire for justice (having been abused by foster carers and her own father), on to the appellant.

13. The complainants' mother gave evidence that the family moved into the downstairs flat around 1973 or 1974 and moved away in 1978. She thought the appellant and his family moved into the upstairs flat in 1976. Her children, the complainants, did not go upstairs to play except when the appellant's wife was out. She described her daughter LD as having problems at school and being quite a disturbed, nervous child. She was frightened of her teachers, did not make good progress and cried a lot. Frequently she wet the bed and over time her behaviour got worse. She said that DG had suddenly changed from being a lovely child and became rude and aggressive.
14. LD said that she would play with the applicant's children, including in the living room of the upstairs flat. She had played there with the children of the previous occupants. She did not recall the applicant's wife being present, but she would leave her daughter (J) at home with the applicant. Both flats left their front doors open allowing the children freedom to go in and out at will.
15. The first occasion of rape occurred when she was in the upstairs flat with the appellant and J. The appellant dragged J into her bedroom and locked her in, and then dragged LD to the boys' bedroom and raped her. She did not disclose what had happened because her mother was unwell at the time. The same thing happened on a second occasion, in the front room. On another occasion, when J was locked in her bedroom, LD tried to leave but he stopped her on the landing outside the flat. He pushed her to the floor and tried to have sex with her but was unable to do so and instead penetrated her vagina with the metal part of a screwdriver, causing injury and bleeding. The final occasion when the appellant pushed her onto the landing floor and again tried to rape her, her sister came up the stairs and jumped on his back telling him "Get off her". The appellant had then pushed her down the stairs causing a cut to her head. She had not told her mother about any of these incidents at the time and only contacted the police in 2011 because she felt ashamed and disgusted. She knew her sister had made an allegation against their foster carers, but LD had no recollection of those events. During their conversations when she, LD, had been speaking about the appellant's abuse, it seemed that DG had been talking about the abuse she suffered at the hands of the foster carers. LD denied pressuring her sister into making an allegation against the appellant. She simply advised her to report anything that had happened, to which her sister replied, "*I'd rather be dead than make a complaint*". DG was subsequently to allege at trial that her biological father had raped her also on one occasion.
16. DG said that initially it was just LD who would go and play with children from upstairs but soon after, she started playing with them too. The first time the appellant had sexually abused her was soon after the incident when she saw him on top of her sister, at the top of the stairs, and told him to get off her. She said the appellant grabbed her when she was in his kitchen and took her out onto the landing. He had orally raped her and did so on other occasions. He also digitally penetrated her vagina and would use something on his fingers which she thought was an "Avon" product from the bathroom. On other occasions, he performed oral sex on her on the landing. She said she saw the applicant orally rape her sister too, but LD made no such complaint. She had seen the appellant on top of her sister, in the boys' bedroom, and had tried to intervene but could not fight him. She had begged him to stop hurting her sister and he said he would if she, DG, let him do those things

to her instead. The first time he raped her was on the landing. During the incident she wet herself and the applicant was verbally abusive and then urinated on her. There were further multiple occasions of indecent assault and rape, but she had not told her mother at the time because her mother was unwell and when she threatened to do so, the applicant said his brother was a police officer and she, DG, would not be believed and he would have her mother killed.

17. DG had disclosed the appellant's abuse to her brother just before he died in 2007; he made her promise to report everything to the police. She had also made disclosures to her husband. She had been reluctant to report the appellant's abuse because she had been through the complaint procedure in respect of her foster carers and did not want to go through it all again, but she remembered what her brother had told her, and realised she had to make the complaint. She denied making up the allegations against the appellant to seek vicarious justice in respect of the alleged abuse by her foster carers, or that she had she made up her accounts to support LD's claims.
18. The appellant's wife, B, gave evidence that they moved into the flat's address around Easter time of 1977. She had enrolled her sons at the nearby primary school on 25th April 1977, as was documented. They moved out in 1980. Her only contact with the complainants' family downstairs was to say "hello" if they passed in the communal hallway. The children never came into her flat, particularly as she had issues with cleaning and did not want the flat to be messed. There was certainly no "open door" arrangement, for the children and their friends to come and go between the flats, and her door was never left open for the children to play. She was not working and was at home most of the time. She agreed she might occasionally leave the flat without the appellant for example to do the shopping, but she always took J with her, and never left her at home with the appellant. She denied that she used bathroom products from "Avon".
19. The appellant gave evidence confirming that he and his family moved into the upstairs flat around Easter time of 1977; he had been mistaken when, in his first interview, he said they moved in earlier than that. He denied knowing the family downstairs, saying that he worked Monday to Friday and would often stay away for business. The doors of the flats were never left open and his wife was always around because she did not work. She suffered from OCD and it made their lives very difficult. His wife also suffered from eczema and never used scented bubble bath or anything similar and there were no such products in the house. He was cross examined regarding his failure to mention his wife's OCD in his first interview - it was suggested that he had made this up, possibly after discussing the matter with his wife after the first interview. He denied that, saying he had never been asked and had not thought to remember it, being in shock when accused of the allegations.
20. The appellant was duly convicted of all offences, save, on the direction of the judge in relation to a rape charged in respect of LD.

The Application

21. The application to adduce fresh evidence refers to: (1) copies of the Electoral Rolls for the address, from 1973 – 1977 and 16th February 1977 - 15th February 1978,

based on a qualifying date of 10th October 1976, which records the occupants of the address as other than the applicant and his family; (2) copies of the Electoral Rolls for the similar period relating to other addresses which records the applicant and his wife to be living in other premises there on 10th October 1976; (3) medical records relating to his wife, containing a letter dated 12th January 1977 from a Senior Registrar in the Skin Department at St Thomas's Hospital addressed to his wife's said previous address; other letters dated 28th October 1975 and 10th May 1976, from the Department of Psychological Medicine at St Thomas's Hospital, which refers (inter alia) to B's "obsessional traits."

22. This 'fresh evidence' is said to be admissible pursuant to s23 of the Criminal Appeals Act 1968 as necessary in the interests of justice to:
- (a) demonstrate that the applicant's sworn evidence that he did not move to the flat until 1977 was obviously and incontrovertibly correct;
 - (b) to support the applicant's case that he was mistaken about the date of the move in his November 2011 interview;
 - (c) to defeat the implicit suggestion that he was lying about the date of the move, both in his February 2012 interview and in his sworn evidence;
 - (d) to support the applicant's evidence that while living in the flat his wife was obsessive about cleanliness (and thus about allowing visitors into the flat);
 - (e) to defeat the explicit suggestion that his evidence about (d) was untrue;
 - (f) to support the applicant's case that his wife did suffer from a skin condition which he described as "eczema" during the 1970s.
23. It is submitted that this evidence would 'found' or support two of the draft grounds of appeal for which renewed application for permission to appeal is made, namely that the Judge: (1) failed to give a 'Lucas' direction in respect of what the jury may have regarded as a lie in the applicant's police interview of 12th February 2012 and in his evidence at the trial, that he did not move into the flat until 1977; and (2) failed to give a McGarry direction in relation to the applicant's failure to mention, in his police interview of 9th November 2011 that his wife, was obsessive about cleanliness in their flat; and as a result she did not allow children to visit the flat or alternatively, to give any proper direction even if an adverse inference pursuant to section 34 of the Criminal Justice and Public Order Act 1994 could be drawn by the jury.
24. Additionally, the appellant renews his application for permission to appeal in respect of three other draft grounds of appeal, namely that the judge: (3) failed to give any direction as to cross admissibility; (4) failed to direct the jury to disregard evidence of the complainants' changed demeanour as corroboration of their allegations of sexual abuse against the appellant; and (5) failed to direct the jury that if they accepted the undisputed evidence of B that she never left J at home with the appellant that they should find him not guilty.

Analysis and Conclusions

25. Extensive and prolix written submissions have been submitted, and lengthy oral submissions made by Mr Scott in relation to these applications. Whilst we commend the obvious industry behind them, we regret that they ‘lost sight of the wood for the trees’ in many respects and, as is often the case, there was a danger that the one ground of appeal upon which we granted permission and allowed the appeal would be lost in the morass.
26. We deal with the application to admit fresh evidence and the renewed application for permission to appeal in respect of draft grounds 1, 2, 4 and 5 summarily as we consider befits their lack of merit.
27. Grounds 1 and 2 are misconceived.
28. The complicated speculation as to the jury’s view about the appellant’s mistake in his first interview as to the date the family moved into the flat, regardless of the fact that the prosecution did not suggest that it was a lie, and in the context of the judge’s undoubtedly correct and explicit direction to the jury that the dates on the indictment were not a material averment in respect of the offences alleged, is to erect a strawman for the purpose of knocking it down. There was no issue between the prosecution and defence that at some stage, and for a not insignificant period, the appellant lived in the flat above the flat inhabited by the complainants.
29. Equally, the unchallenged evidence at trial was that B suffered from OCD. She said this herself, in terms. There could be no possibility of an adverse inference being drawn from the appellant’s failure to mention something which was evidenced and agreed before the jury. This did not call for a McGarry or a section 34 ‘adverse inference’ direction. This is another strawman.
30. The reason why the ‘fresh’ evidence referred to in paragraph 21 above was not adduced at trial, even though it was readily available, is not adequately explained. In any event, we do not see how the fresh evidence founds any ground of appeal for the same reasons we dismissed the renewed application in respect of draft grounds 1 and 2. That is, the reasons given in paragraphs 22 (a) to (c) above would only be pertinent if time were a material averment of the offences charged. The reasons given at paragraph 22 (d) to (f) regarding cleanliness and skin sensitivity to toiletries are not established by the medical file. In the former respect, the evidence is couched in terms of “obsessional traits”, in the latter there is no indication that B was advised against use of proprietary brands and, even if she was, there were other members of the household who may use them. In any event, the offences were said to have occurred when B was absent from the flat. We refuse the application to admit fresh evidence.
31. Apparently, trial counsel for the appellant did not object to the admissibility of evidence going to the complainants’ demeanour during childhood. He may have found himself on rocky ground in doing so, since the defence were alleging recent fabrication, or he may have taken a forensic decision that many years later is criticised in the sterile appellate process, as is Mr Williams’s closing speech in this regard. We see there is a danger that the jury may have regarded it as probative and the judge should have explained the basis of its admissibility, however we do not regard this point, taken in isolation would be sufficient to persuade us to grant permission to appeal.

32. Ground 5 is entirely misconceived and an over simplistic assertion of the evidence in this case. The case of *Pell v The Queen* [2020] HCA 12 provides no authority to support the general proposition that is advanced even if a decision of the High Court of Australia was binding on this court. B's evidence was contradicted and thereby implicitly challenged by the evidence of LD and DG. The issue for the jury was whether the complainants were credible and reliable historians, it was not for the judge to make that assessment.

Cross admissibility

33. We extend time, grant permission to, and allow, the appeal on ground 3.
34. The considerable delay in proceeding with an application for permission to appeal has led to difficulties in ascertaining whether, and if so what, matters of law were raised at the time of trial. The tapes of the proceedings were made available by the Court below to APPEAL in order to identify necessary transcripts, but there did not appear to be a full set of them. What is certainly missing before us is any transcript referring to either an application to admit 'bad character' evidence of the applicant's assaults he is alleged to have committed upon LD as evidence of propensity in relation to the assaults alleged to have been committed upon DG, and vice versa, or the 'stock take' prior to summing up which we assume must certainly have occurred in a case of this nature.
35. The advice on appeal from defence trial counsel dated 7 May 2013, referred to in 'McCook' correspondence, apparently mentioned that "several matters of law were adjudicated upon". However, he was unable to recall what they were, beyond an abuse of process application made in relation to the police/prosecution decision not to proceed against two men whom DG had alleged were present and sexually assaulted her at the encouragement of and connivance with the appellant. He has not retained his original notebooks and cannot assist further on the point from memory.
36. Mr Williams, who was prosecution trial counsel, understandably, also has little independent recall beyond the prompts of the available transcripts. He does not remember if the issue of cross admissibility of LD and DG's evidence was specifically canvassed, but he concedes in the Respondent's Notice filed, that a direction on cross admissibility would have been desirable, albeit its absence is not fatal to the safety of these convictions. He submits that there is no reason to think that the judge would have refused such an application to allow the jury to consider and rely on evidence of propensity if made.
37. That the judge was likely to accede to the view that the evidence of LD and DG was cross admissible may be right but misses the point. The necessity to make application to admit bad character evidence, or the undesirability or lack of necessity to do so, would determine the crucial discussion as to how the jury were to be directed in this case. It may be, and we can only speculate, that since it was evident that the complainants had discussed the allegations that this meant there was no 'coincidence' to rebut, or because DG gave direct evidence of witnessing one of the indicted

assaults and in relation to other incidents involving LD, as indicated in paragraph 16 above, and it was overlooked or thought to be unnecessary.

38. The evidence before the jury revealed this as a case with a considerable and complex factual hinterland. Quite apart from any issue relating to cross admissibility of evidence, the evidence that the complainants had discussed the allegations of abuse did call for, and in our view received, an adequate warning to the jury to beware of possible collusion to make or bolster false allegations and the consequential verdicts which should follow if they found that this had or may have occurred. However, having scrutinised the summing up, and invited Mr Williams to draw our attention to any relevant passages therein which assist his submission on this point, we are left in doubt as to what had been determined, or collectively assumed, was the position regarding cross admissibility of their evidence. We cannot find a clear indication either way.
39. Whilst we note the direction “to look at the case for and against [the appellant] and in relation to each complainant separately”, it does not describe or delineate the relevant evidence to which the jury could have regard. Thereafter, in other different parts of the summing up, there is confusing reference to “the credibility of ... both of them or either of them,” and “her or their reliability as a whole” and, “other evidence which tends to support either witness’s recollection of detail, you would be able to give effect to it if you thought it right to do so” (underlining provided throughout). We conclude that these directions are, at best, ambivalent with the result that the combination of the directions given to the jury fall into a cross-admissibility no man’s land. Mr Williams candidly and fairly concedes this point.
40. The case of *R v Adams* [2019] EWCA Crim 1363, upon which Mr Scott relies, is not an authority for the proposition that, in every case in which there is more than one complainant alleging similar offences, the failure to give a ‘cross admissibility’ direction will be fatal to the safety of the conviction. Leggatt LJ, as he then was, in giving the judgment of the court expressed doubt at the outcome in *R v H* [2011] EWCA Crim 2344, but specifically adopted its reasoning at [31] to the effect that:
- “Everything depends on the directions and facts of a particular case, and the danger that the jury might seek to use the evidence of one complainant as evidence of his guilt on counts concerned only with another complainant.”
41. We consider that the jury, in the circumstances of this case, would be very likely to use what could effectively be ‘propensity’ evidence/assumptions in their deliberations and should therefore have received a carefully crafted direction in order safely to do so, or been told unequivocally not to do so. We respectfully endorse the judgment in *R v Adams* at [22] in terms:

“The particular ways in which evidence that a person has committed one offence may or may not be relevant in deciding whether that person is guilty of another offence are not always immediately obvious even to legal professionals and have had to be worked out by the courts in a number of cases. Lay jurors are entitled to assistance on these questions and cannot be expected to work out the approach which the courts regard as proper for themselves”

42. DG's evidence that she had witnessed an indicted assault upon LD, (and others of which LD did not apparently complain), was a springboard to such a direction. That is, we consider that the judge should have invited the jury to consider that count first. If, having followed the direction to beware the possibility of tainted evidence, they were sure that the complainants were credible and reliable in their recall of this matter, then they would be entitled to consider whether this evidence showed that the appellant had a propensity to commit these offences, and if so to take it into account when considering the detail of the other counts involving incidents which were not independently witnessed. However, with this direction would come the warning that they should not convict the applicant of the offences wholly or mainly based on that propensity.
43. Consequently, we cannot be satisfied as to the safety of any of the convictions.
44. Regardless of the age of the offences, and the fact that the appellant has now served the sentence handed down, we consider that there is a public interest in retrying these allegations. Mr Scott has drawn our attention to several issues which may form the basis of an abuse of process argument, but that will be a matter for argument in the Crown Court.
45. We make the following order and directions:
 - (1) We grant the extension of time and give leave,
 - (2) the appeal is allowed, and we quash the conviction(s);
 - (3) the appellant is to be retried on counts 1, 2, 4 to 14;
 - (4) a fresh Indictment is to be served on the Crown Court officer not more than 28 days after this order;
 - (5) the appellant is to be re-arraigned on the fresh Indictment within 2months of the date of this order;
 - (6) The venue for the retrial shall be determined by a Presiding Judge for the SE Circuit;
 - (7) The appellant is bailed to the Crown Court; and
 - (8) any applications for legal aid for retrial shall be made in writing to the Legal Aid Agency CAT, Level 6, The Capital, Union Street, Liverpool, L3 9AF, DX: 745810 Liverpool 35, Email: LiverpoolCAT@legalaid.gsi.gov.uk, Telephone: 0151 235 6750.