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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 24 June 2011

B e f o r e:

LORD JUSTICE PITCHFORD

MR JUSTICE WALKER

HIS HONOUR JUDGE PERT QC
(Sitting as a Judge of the CACD)

R E G I N A

v

RAYMOND P

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(Official Shorthand Writers to the Court)

Mr A Baker appeared on behalf of the **Appellant**

Miss J Warburton appeared on behalf of the **Crown**

J U D G M E N T
(As Approved by the Court)

1. LORD JUSTICE PITCHFORD: This is an appeal against conviction for sexual offences with the leave of the single judge. The conviction occurred on 19th January 2009 at Nottingham Crown Court following trial of the appellant upon a 17 count indictment concerning two complainants. Set out below are the sentences which were imposed upon each verdict of guilty, sentences imposed by the trial judge on 13th February 2009.

Count	Complainant	Offence	Sentence
1	**DH** (aged 6)	**Rape** (1975-1976)	**10 years' imprisonment**
2	**DH** (aged 6)	**Rape** (1975-1976)	**12 years' imprisonment to run concurrently**
3	**DH** (aged 7-8)	**Rape** (1976-1978)	**12 years' imprisonment to run concurrently**
4	**DH** (aged 9-10)	**Rape** (1978-1980)	**12 years' imprisonment to run concurrently**
5	**DH**(aged 11-12)	**Rape** 1980-1982)	**14 years' imprisonment to run concurrently**
6	**DH** (aged 6)	**Indecent Assault** (1975-1976)	**4 years' imprisonment to run concurrently**
7	**DH** (aged 7-12)	**Indecent Assault** (1976-1982)	**4 years' imprisonment to run concurrently**
8	**DH** (aged 6)	**Indecent Assault** (1975-1982)	**4 years' imprisonment to run concurrently**
9	**DH** (aged 7-12)	**Indecent Assault** (1976-1982)	**4 years' imprisonment to run concurrently**
10	**LP** (aged 5)	**Indecent Assault** (1979-1980)	**4 years' imprisonment to run consecutively**
11	**LP** (aged 5)	**Indecent Assault** (1979-1980)	**4 years' imprisonment to run concurrently**
12	**LP** (aged 6-7)	**Indecent Assault** (1980-	**4 years' imprisonment to run concurrently**

		1982)	
13	**LP** (aged 8-9)	**Indecent Assault** (1992-1984)	**4 years' imprisonment to run concurrently**
14	**LP** (aged 10-11)	**Indecent Assault** (1984-1986)	**4 years' imprisonment to run concurrently**
15	**LP** (aged 13)	**Indecent Assault** (1987-1988)	**6 years' imprisonment to run concurrently**
16	**LP** (aged 13-14)	**Indecent Assault** (1987-1989)	**2 years' imprisonment to run concurrently**
17	**LP** (aged 15-16)	**Indecent Assault** (1989-1991)	**2 years' imprisonment to run concurrently**

2. The complainants were the appellant's daughters who we shall describe as DH, born 6th September 1969, and LP, born 2nd July 1974. The appellant had three other children. He had a daughter who gave evidence, to whom we shall refer as SS. She was born in 1973. He had two sons: M, who gave evidence, and Ted. The family lived in the Mansfield Woodhouse area and the children were brought up at three different addresses. Their mother sadly died as long ago as 1997 following a terminal cancer.

3. When we turn to the facts of the case we are required to consult the prosecution opening note because there was no summary of the evidence contained within the summing-up. That is one of the complaints now made on behalf of the appellant by Mr Baker.

4. This was a trial of alleged historical abuse. At the time of trial DH was aged 39 and LP was aged 34. There was evidence that DH first made a complaint of sexual abuse to her friend Lesley in about 2000. LP said that she had complained of abuse to her GP in 1991. Their sister, SS, said that she heard of abuse towards LP in 1998 and towards DH in 2006. It appears to have been common ground that the wider family and the police knew nothing about the sexual abuse until approximately 2008.

5. The nature of the evidence given by the complainants was as follows. DH claimed to have been raped when she was six years old and said that the appellant had told her that he was preparing her for childbirth. That was count 1. She said that thereafter she had been raped on regular occasions. He also indecently assaulted her by penetrating her vagina with his fingers and with a pepper pot which was in the shape of a carrot. Those

incidents were represented by counts 2 to 9. It was said that these incidents of abuse took place both in the family home and in the appellant's motor vehicle. She was to tell the jury that she did not feel able to inform anyone of these events because she was terrified of the appellant who would beat her if she resisted his advances. DH said that the abuse stopped when she was 12 or 13 years old and, as she put it, she got on with her life. She made a disclosure in 2000 to her friend Lesley.

6. In circumstances which were never fully revealed to the jury, there was a family discussion in 2008 which led to the involvement of the police. We are informed, as was Mr Way who represented the appellant at his trial, that the son, Ted, went to see a clairvoyant. He claimed to have been told by the clairvoyant that he had heard the voice of the children's mother informing him that two of her children had been abused by the appellant. He went to each of the complainants in turn who confirmed what he was putting to them. In consequence, it was agreed that they should go to the police. Mr Way made a perfectly understandable forensic decision that if possible those specific circumstances should not come to the attention of the jury and the evidence was handled by agreement. It can form no ground of the present appeal that that decision was made.

7. LP gave evidence that she was first sexually abused by her father when she was five years old by a touching of the vagina. She recalled on the first occasion being woken by the appellant touching her vagina and digitally penetrating her. That incident was reflected in count 10. She said that such incidents recurred several times over the following six years. They were represented by counts 11 to 14. She said that the appellant had touched her breasts on occasions when she was between 12 and 15 or 16 years of age. Those incidents were represented by counts 16 and 17. On one occasion the appellant, she said, forced her to perform oral sex on him to ejaculation into her mouth. That was count 15 in the indictment. LP was threatened by the appellant on her account that she would be removed from the family home if complaint was made. The appellant would refer to her as "backward". He would beat her on occasions. She said that she had disclosed the abuse to her general practitioner in 1991 and to a counsellor in 1999. She did not however tell her brothers or DH until several years later. We have learned that tragically since this trial LP died from an overdose of prescribed medicine.

8. SS gave evidence that the appellant seemed to derive pleasure from bullying her. She described how he would deliberately frighten her to such an extent that she would wet herself and when she did so he would humiliate her by making references to that fact. On one occasion this occurred in front of one of her friends. She said that she lived in fear of the appellant. She was unaware of the abuse of her sisters until she learned from LP in 1998 that she had been abused and in 2006 from DH that she had been abused. She supported the evidence of the complainants as to the violence and intimidation to which they were subjected as girls in the family.

9. The prosecution called evidence from a neighbour and childhood friends who spoke about the appellant's aggressive conduct towards his family and the fact that he "ruled" the household.

10. When interviewed the appellant denied the allegations made against him. He accepted

that he adopted a strict attitude towards discipline in the family home, but claimed that any force used was in reasonable chastisement. The sexual allegations were untrue and there was a conspiracy against him. In evidence, the appellant gave an account which was consistent with that which had emerged in the interview. He pointed to the fact that there had been family gatherings and occasions since the abuse was said to have ceased when he appeared to be on good terms with the complainants. In particular, he produced wedding photographs.

11. It was the defence case that the complainants may have been influenced to make false complaints against him in consequence of disagreements about money within the family. MP, one of the sons, was called to give evidence that the complainants were unhappy that their brother Ted, who had been disabled in an accident when he was comparatively young, had received a significant sum of money by way of compensation. In consequence, the appellant had lost his carer's allowance when Ted moved in with his partner. The appellant had refused to give one of the complainants a loan. MP gave evidence that this was a family at war, always arguing and fighting, even as adults.

12. Counsel who represented the appellant at trial advised that there was in his opinion no proper ground for an appeal against conviction. In his more recent response to the Registrar's request for his reaction to the present appeal, counsel described the complainant's evidence as compelling.

13. Mr Baker, who now represents the appellant, has advanced four principal grounds of appeal. Before we consider them in turn, we shall describe the scheme of the judge's summing-up as a whole. The judge provided the jury with virtually no directions as to the ingredients of the offences charged. Counsel representing the defendant, as he then was, had acknowledged that it was unnecessary to do so. The appellant was not saying that there had been some sexual activity short of the offences charged or that any of them in any relevant sense was consensual. It was conceded that if the complainants were telling the truth the offences charged were committed. It seems to us that in these circumstances legal directions as to the ingredients of the offence were not necessary and Mr Baker does not make a complaint in this respect.

14. There was in addition, however, no conventional summing-up of the evidence either. The scheme of the judge's summing-up was as follows. He instructed the jury that the facts were for them. If he mentioned something it did not mean that it was important. Conversely, if he did not mention something it did not follow that it was unimportant. The judge told the jury that they were well aware of the evidence, including that evidence given in cross-examination, so "I am not going to spend a lot of time going through all the factual evidence because I don't think there is any need to."

15. Mr Baker points out to us that the evidence occupied five days. It included two lengthy ABE interviews from the complainants. Miss Warburton informs us that Mr Way cross-examined as to the detail of the way in which these complaints emerged. It was put to the witnesses that they were fabricating their evidence for motives of their own. At page 2B of the summing-up, the judge said this:

> "... most importantly, members of the jury, you have to form a judgment,

> again as I told you on Monday, about people and the way in which their evidence was given to you. And when I talk people, I include the defendant, because he chose to give evidence, you have heard from witnesses that he has called and every person who entered that witness box did so from and on the same level playing field. That means you have to apply the same fair standards to all of those witnesses, regardless of whose witnesses they were."

16. The judge told the jury not to speculate about what missing witnesses might have said. He included in that warning the fact that the appellant's wife had died in 1997. He said:

> "None of us knows what she may or may not have said about anything that has gone on."

17. The judge reminded the jury of the essence of the particulars in support of each count. This was not in the nature of a summary of the evidence, but a description of the act alleged to constitute the offence. He correctly informed the jury that while they could consider their impression of all the evidence when reaching their conclusion on any particular count, they must consider each count separately. We will need to examine the terms in which the judge gave that direction since it may be that he gave the jury the impression that they were entitled to rely upon the evidence of one complainant when considering the reliability of the other.

18. The judge told the jury that because of the time delay, (32 to 34 years in the case of the first allegation and 17 years in the case of the last):

> "There may be a danger of real prejudice to the defendant and that possibility has to be in your mind when you decide whether the prosecution has made you sure of his guilt."

19. The judge posed the question whether late reporting of these matters reflected on the reliability of the complaints or, in the alternative, it was caused by the conduct of the defendant. The judge proceeded to remind the jury of the prosecution case that the appellant ruled his household with fear and actual violence. The judge reminded the jury of the violence and humiliation to which SS had been subjected. The jury were told that the passage of time was bound to affect memory: "There can't", the judge said, "be crystal clear clarity." It was more difficult for the defendant because he had come to these allegations cold, although he had been open and forthcoming about some things. The judge explained the effect and limitation of previous complaints. He explained the relevance of the defendant's alleged bullying of the family. At page 16F he said this:

> "Because this was a very close household, wasn't it? Particularly in the early days when it was quite crowded before the move from one home to another. This was a household in which you may think it would be difficult for people not to know about what was going on in another part of the same house. What the Crown say about that and the reason that

> you have heard about the defendant's behaviour that they allege is because that ensured the silences, because he made sure the children were not particularly good mates. Even MP described them still arguing and fighting sometimes, even as adults."

20. The judge told the jury that before they could convict they must be "satisfied that those who make the allegations have made an honest account and one that you believe ... so you are sure." About the appellant's interviews, the judge said at page 17A:

> "Mr P in all of his interviews, has given an account which Mr Way quite rightly says is largely consistent - there may be some areas of difference - with what he has told you from the witness box. It is what he does say in his interviews and in his evidence, aspects that were drawn out from him in his cross-examination, that you are invited by the Crown to look at, because he has to prove nothing. What the Crown says - and it is a matter entirely for you - is if you look at those aspects as you go through them and they will have been highlighted and you may have marked them, there are things there that really Mr P in essence damns himself from his own mouth by his attitude or his behaviour or his conduct. But that is entirely a matter for you."

21. We observe that no admission of sexual abuse was made in the interviews. Accordingly, the judge's reference to the appellant damning himself from his own mouth must be referring to the appellant's admitted attitude to the issue of discipline. That observation has an effect upon the direction which the judge gave in respect of the explanation for the delayed reports of sexual abuse to which we shall come when we consider the grounds.

22. The judge continued at page 17E:

> "He has told you he had a good relationship with his daughters. Well, is that true?"

23. The judge then proceeded to remind the jury of the evidence of the complainants themselves. He continued at page 17G:

> "He brought along to court two very big pictures of himself giving away his two daughters: one at church and the other at the Registry and he proudly showed those to you to show what a good relationship he has and how the daughters have kept in touch with him. But does that help you, members of the jury, any more than SS saying to you, 'Me dad's me dad'?"

24. It was the defence case that there had been collusion between the witnesses and jealousy within the family concerning money. The prosecution conceded that there had been talk between members of the family about these allegations for a little time before the police became involved. The judge said to the jury at page 18A:

> "There has been a whole issue about money, to such an extent that you even asked a question about it and you will remember the answer, M's evidence that 'the girls don't like the fact that Ted got compensation'. Why ever not? It is the court of protection that looks after his money, makes sure that he is properly cared for, gets the allowances that he needs. It is not there to be squandered on high living and all the rest. It is to take care of him for the rest of his life. He is quite young still. Did any of those girls strike you, when they gave their evidence, as being so vindictive that they would wish him badly in that regard? Or were they in fact, as their evidence is, glad that he had received that compensation? It seems there was a bit of an issue about dad losing his allowance, but he himself seemed to be pretty upset about that, too, when Ted decided to move in with his girlfriend, because he did not spread it over time, it cut off: 'I had [to] make up quite a lot of money a month, not an easy thing to do.' Is this really about, 'Well, she turned on me in 2008 because I wouldn't give her five grand'? She laughed and said she'd never asked for it. Or was it three? Does it matter? What was Irene's evidence about the relationship and money?"

25. The judge concluded with these words:

> "Members of the jury, at the end of the day - and that is why I haven't gone into all of the evidence of each of the witnesses about each of these allegations in any great detail - you have observed and heard all of that evidence during the course of the first three, four days of this week. You have had the opportunity to assess whether those persons have given you an honest factual account and it is for you to decide whether they have."

26. Apart from the formalities, that was the end of the judge's summing-up.

27. As to the directions upon the impact of delay upon the fairness of the proceedings, it is submitted by Mr Baker that the judge did not address the specific problems caused to the appellant by the late reporting of these allegations. His argument concerns primarily the allegation of physical brutality within the household. Such was the degree of violence claimed by the complainants that a defendant answering these charges would have been assisted by school records for two purposes: either to demonstrate absences by the complainants from school or observations by staff as to the physical condition of the children. They could not, it is submitted, have been subjected to the violence alleged without showing physical signs. In the intervening years the school records for the complainants had been lost and were no longer available for either prosecution or defence at trial.

28. On the contrary, Miss Warburton informs us that medical records were available. There was only one reference to which she could refer with regard to a complaint by one of the complainants to a doctor in 1991 and a second complaint by the other complainant to a

counsellor in 1999. There was no contemporaneous medical record of any injury to any of the children which might have supported their evidence of physical abuse. Nowhere, it is to be observed, did the judge draw the jury's attention to the absence of such evidence.

29. Finally, submits Mr Baker in connection with delay, the complainant's mother having died in 1997, her evidence as to what was going on in the household during the period particularly of the children's infancy was not available to either side. Instead of identifying school records and the absence of the mother as circumstances which may have created a specific prejudice for the defendant, the jury were simply told not to speculate upon what the mother may have said and no reference at all was made to the absence of school records or to the medical records which did not support the allegations of physical abuse.

30. We would add in connection with Mr Baker's submission concerning the mother, that at page 16F of the summing-up, which we have extracted above, the judge expressed to the jury the opinion that those in one part of the house would have known what was going on in another. If that is so, then the judge must have been of the view that the mother, J, may have had relevant evidence to give for one side or the other. It was in our judgment incumbent upon him to give to the jury a direction specifically about these aspects of the evidence which may have caused the appellant a disadvantage.

31. Secondly, Mr Baker submitted that the judge gave an inadequate direction upon bad character, the bad character alleged being the violence which the appellant had used to the girls. The judge correctly informed the jury that they heard about allegations of bullying because they formed part and parcel of the allegations of sexual abuse. It was the prosecution case that the girls were cowled into silence about the sexual allegations. That being the case, it is our view, and Mr Baker conceded in the course of argument, that the judge was entitled to consider that those matters had to do with the facts of the alleged offences within the meaning of section 98a Criminal Justice Act 2003 and were not therefore the necessary subject of an application to admit bad character evidence. However, Mr Baker submits that upon whatever basis the evidence was admitted, fairness required a direction from the judge that the jury should not regard the character evidence as itself supportive of the allegations of sexual offending; only if they accepted it as a possible explanation for late reporting. We accept this submission also.

32. According to the complainants their lives were punctuated by violence and sexual offending. There was an obvious risk that the jury would regard both forms of offending as forming the lifestyle to which these girls had become used. However, SS also gave evidence that she was a victim of violence but she had made no allegation of sexual assault. It seems to this court that it was incumbent upon the judge at least to deal with the issue of physical complaints on the one hand and sexual complaints on the other, that the jury should not over-value the evidence of physical abuse, upsetting as it was, and they should certainly not regard it as evidence which was supportive of the sexual offending.

33. Thirdly, Mr Baker submits that since the defence case was that the complainants had

colluded in order to give false evidence against the appellant for motives of their own, the judge should have given a warning to the effect that if they considered there may have been a putting of heads together they should exercise caution before accepting any particular part of their evidence as true. The judge, as we have observed, suggested to the jury that in the complainants crowded home "it would be difficult for people not to know what was going on in another part of the same house." While the judge reminded the jury of the Crown's case that the appellant had secured their silence by intimidation, he did not go on to place before the jury the defence case as to the risk that they had spoken together with a view to making untrue allegations.

34. In this context, we need to return to a passage in the judge's summing-up from pages 7F to page 8D. He said this:

> "You have on this indictment 17 counts. You have one defendant who has all these allegations made against him and you have to consider the case against and for the defendant on each of those counts separately. The evidence is different and, therefore, your verdicts do not necessarily have to be the same. Having said that, you would think me mad, I am sure, if you said, 'But how can we look at each of these cases separately without the context in which we've heard all of this evidence?' and, of course, that is absolutely right. You do not remove the facts of a particular incident from the totality of the evidence. You will take that into account and you will take into account all of the surrounding circumstances which may play the same part and assist you in deciding each of those cases, but it is important for you to look at each of the factual allegations that are made. You may be satisfied so that you are sure with regard to some of them. That may assist you when you look at others and say, 'Well, when I consider those facts, am I sure? Well, yes, I am sure and I'm made more sure because I'm completely satisfied about another set of facts' or equally you could say, 'Well, yes, I accept what L', for example, 'said about this on another occasion, but I'm not sure he did touch her breasts on the last occasion' for example and so your verdicts, as I say, because the facts are different, may be quite different too."

35. We consider that the jury may well have understood this part of the judge's directions as a direction that they were entitled to treat the evidence of one complainant as supportive of the other. Miss Warburton informs us that she had agreed with counsel for the defendant at trial that the evidence of each complainant would not be regarded as supportive of the other by reason of the peculiar circumstances which we related at the beginning of this judgment in which the matters came to be reported to the police.

36. The judge having given the jury the impression, as we perceive it, that they could regard the evidence as mutually supportive, he was bound in our view to consider giving the jury a direction about the dangers of contamination and collusion. There is no such direction.

37. We consider that cumulatively there is force in Mr Baker's arguments. We are bound, without any pleasure, to record our view that the summing-up when read as a whole is a

one-sided account of the case. The judge is not of course required to compensate for a strong prosecution case, but there appears to be no significant reference to the appellant's evidence or case save in the context of criticising it. Historical sexual cases of this nature are never simple exercises for summing-up. They require thought and preparation to ensure that the correct balance is provided to the jury in order to assist them to reach a true verdict according to the evidence. True it is that these witnesses may have given their evidence in a compelling manner. We are told that the trial had to be halted at one stage when one of the complainants suffered a fit when giving evidence. It was, we think, important that the judge held the balance in order to assist the jury in their task. The appellant was entitled to rather more than a generalised warning on the issue of delayed reporting, a partial explanation of the significance of his other alleged behaviour and in the face of the defence assertion of collusion more than a mere exhortation that the jury should ask whether they believed the complainants.

38. We do not consider that the appellant's interests were served as he was entitled in the course of a fair trial. Conscious as we are of the consequences which follow, we are driven to allow this appeal and to quash the convictions.

39. Mr Baker, do you want to say anything about a retrial?

40. MR BAKER: My Lord, the criteria that are required in relation to ordering a retrial are set out --

41. LORD JUSTICE PITCHFORD: We are well aware of them.

42. MR BAKER: It is whether it is in the interests of justice. My Lords, there has been a two-and-a-half year delay, one of the complainants has subsequently died, the matters are extremely old by their very nature and there was some publicity of this trial locally. I would submit that it may be a case where the court ought not to order a retrial.

43. LORD JUSTICE PITCHFORD: Thank you very much. We will retire.

(Short Adjournment)

44. LORD JUSTICE PITCHFORD: Notwithstanding the death of one of the complainants in the present case, we are convinced that the public interest requires that these serious matters are the subject of a trial. We shall therefore direct that a fresh indictment will be served and that the appellant be rearraigned on that indictment within two months. Any question as to an application for bail shall be dealt with by the Crown Court in which the presiding judges direct that the retrial will take place. Where is that likely to be Miss Warburton?

45. MISS WARBURTON: Nottingham, my Lord.

46. LORD JUSTICE PITCHFORD: Miss Warburton, Judge Pert reminds me that in the course of my judgment I did not do justice to your submission as to the contents of the

medical records and why they read as they did. When I come to correct the transcript I will put that right. Thank you both.

47. Mr Baker, I am sorry, you will have to go to Havering Magistrates' Court to get your representation order. The court in the past was able to grant a representation order for counsel for a retrial. We no longer have that power. You have to make a new application to Havering Magistrates' Court.

48. MR BAKER: Thank you.