

## **Regina v W**

No: 200901879 B3

Court of Appeal Criminal Division

29 January 2010

**[2010] EWCA Crim 307**

**2010 WL 605812**

Before: Lord Justice Pill Mr Justice Bennett Mr Justice Field

Friday 29 January 2010

### **Representation**

- Mr M D Barlow appeared on behalf of the Appellant.
- Mr P O'Brien appeared on behalf of the Crown.

### **Judgment**

Mr Justice Pill:

1 On 7 March 2005 in the Crown Court at Minshull Street, before His Honour Judge Fish and a jury, W was convicted by a majority of 10 to 2 of offences of indecent assault (counts 1 to 12). He was sentenced to an extended sentence of ten years' imprisonment pursuant to Section 85 of the Powers of Criminal Courts (Sentencing) Act 2000, comprising a custodial term of six years and an extension period, by way of extended licence, of four years.

2 W appeals against conviction, in certain respects with leave of the single judge. There are other grounds which we shall consider in the course of our judgment. We do not give permission on grounds four and seven which have not been pursued on behalf of the appellant.

3 The period of the alleged offending was between 1990 and 1998. The two complainants were the adopted daughters of the appellant, their mother having been separated from their natural father in 1985. The family moved into a flat at Ashton-under-Lyne. Another child, P, was born to them in November 1986. The parents' two children before the marriage were also regular visitors to the home. For a time the wife was suffering from a serious illness with the result that the appellant was at home to care for the children. The prosecution case was that during a period of years the appellant indecently assaulted the two girls, beginning when one was about 9 years old and the other about 8 years old.

4 The defence was a complete denial of the offending.

5 The first complainant, who was born in August 1981, gave evidence that the first incident was in 1991 following her mother's admission to hospital when she was 9 years old. The claimant asked her to come into his bed. Once there, he pushed his penis into her back and pulled at her pyjama bottoms. When she returned to her own bedroom she found that the pyjama bottoms were wet with a creamy liquid on them. Two months later, when she was asleep in a bedroom shared with her sisters, the appellant entered the bedroom, put his hand down the back of her knickers and touched her bottom (count 2).

6 In 1992 the family moved into a larger house. The complainant shared a bedroom with the youngest child, her half-sister. She recalled being asleep one night and was woken by the feeling of something in her mouth. She opened her eyes and saw the appellant had put his penis into her mouth. She ran out of the bedroom. The defendant walked around the house in his underpants or a bath robe on occasions. On several occasions, the complainant, having fallen asleep, was grabbed by the appellant who put his penis into her hand. When she woke up she would pull away. He would also massage her feet and move his hands up so as to touch her vagina. Counts 4 and 5 were specimen counts, said to represent a period of two years over which that type of activity occurred.

7 The last incident was when she was 14 or 15. She woke up to find the appellant standing over her naked with his penis inside her mouth (count 6). He ran off. She had a vile taste in her mouth. She left home when she was 15. She was not aware of any abuse of her sister.

8 In cross-examination she agreed that she had let her daughter stay overnight at the appellant's house. She denied that she had made up the allegations at a time when there was real hostility between her and the appellant.

9 The younger sister, born in December 1982, also remembered her mother going into hospital. On occasion she woke up at night and found that the appellant had her left leg between his legs (count 7). At the time she thought he had simply mistaken her for her mother. Following the year when they moved to the larger house she awoke to find the appellant stroking her and tickling her breasts (count 8).

10 On another occasion the complainant fell asleep and woke up to find the appellant standing over her with his penis in her mouth (count 9). That only happened on one occasion.

11 On another occasion the appellant was checking her back for spots, and he moved his hand down touched her bottom (count 10).

12 She remembered another occasion when she woke to find the appellant's penis pressed against her vagina in bed (count 11). Her mother woke up and asked why she was crying. She said, "Nothing."

13 The final incident occurred when she said she was lying in bed and woke to find someone poking at her backside (count 12). She jumped up and said, "No." He ran out of the bedroom. By this time she was 15 years old. The appellant did not touch her again.

14 She, too, agreed that the appellant was a proud and supportive father. She had allowed her own son to stay over at his house. She admitted that her partner in later years had used different types of drugs, but was not aware that this was of concern to the appellant.

15 The complainants told their natural father of the alleged abuse. In May 2004 they gave statements to the police.

16 At interview the appellant said he could think of no reason why the allegations, which were false, had been made up. There had generally been a happy atmosphere in the home. He denied any impropriety. In evidence, he denied any sexual touching. At the end of his evidence-in-chief he said that he was under the impression that partners of both young women were involved in drug abuse, and this was a danger to his grandchildren. He threatened to inform the police. He thought it likely that this had prompted the complaints by the two young women. Ten witnesses were called in support of the defence. The trial lasted for six days, we are told, or thereabouts. Clearly, there was substantial cross-examination of the witnesses.

17 A number of grounds of appeal are taken. We grant leave on the other grounds, save counts four and seven to which we referred. The general submission is that the summing-up has been unfair to the appellant, and prejudicially so, to such an extent that the verdicts are unsafe.

18 We do not necessarily take the complaints in the order in which submissions have been made by Mr Barlow on the appellant's behalf. He submits that the character direction was insufficient. The appellant was treated as a man of good character. But the second limb of the usual character direction was not given. Moreover this relates not only to the direction but also to the summary of the evidence. There was no sufficient summary of the evidence of the supporting witnesses. All that was said was:

"... his good character is testified to by a large number of people who have come along and have told you that from their respect their respective viewpoints, all of them, as they are accepting neighbours or relatives or friends, not actually living with him in the household, with the exception of R, but all of them coming along and saying that he is a very decent family orientated male."

In that context it is submitted that a direction was required, not only on credibility but on whether the appellant was the sort of man who would or might have committed these offences.

19 The witnesses included the complainants' mother. They included R, just mentioned, who

shared a room with the complainants and with the youngest of the three sisters. Evidence was given by neighbours who frequently visited the home. They were not aware of any misbehaviour, and spoke well of the appellant's character. In our judgment, a fuller direction by way of legal direction and summing-up of the evidence should, in the context of this case, have been given.

20 The general ground is to a similar effect. The judge at no stage summed up, even by way of brief summary, the evidence given at the trial. He said:

“... the evidence was given to you in a clear and you may think compelling way by all of the witnesses who came. Therefore, I am not going to go through the evidence line by line. In fact, I am not going to say anything more about the evidence to you.”

In our judgment, that was an unsatisfactory approach following a case which had gone on for about six days. Mr Barlow submits that there were features of the evidence about which the jury should have been reminded so that they could consider it when reaching their verdicts.

21 There was cross-examination on points such as the willingness of the complainants to leave their own children overnight with the appellant. There was evidence that other people, including the third sister and the appellant's daughter by a separate relationship, were in the house and the jury could and should have been reminded of that evidence.

22 Moreover several of the complaints related to the complainants waking up to find the appellant's penis in their mouth. That of course is a serious - an extremely serious - allegation and extremely unpleasant conduct. It is out of the ordinary run - it may be thought - of evidence given even in cases such as these. Some reference to the need for the jury to consider it when assessing the credibility of the complainants would, in our judgment, have been appropriate.

23 We turn to the specific complaints about the summing-up. One relates to the direction given as to the approach the jury should take to the presence of two complainants. The judge did direct the jury that they should give separate consideration to each of the counts. He went on to say:

“... in doing so I have to realise the reality of the situation which is that in this case the Crown are putting those counts before you as being examples of a course of conduct.”

References to the reality of the situation have the danger that they may distract the jury from focussing on the specific allegations made. The direction which purported to be on separate consideration continued in this way:

“Of course, it would be possible for you to say, if you thought the evidence established this, that that course of conduct was made out and proved in the case of one of the girls but not of the other, but subject only to that, and you may well feel in the overall tenor of the case that, in fact, the case rests upon the allegations of both of them. If you were to find that they were not proved in the case of one that might also persuade you that it were not proved to be the case of the other girl either. But I am obliged to tell you that that option is available to you.”

24 We find that direction confusing. We find the expression “subject only to that” confusing, particularly as part of a direction that the counts are to be considered individually. The reference to “the overall tenor of the case” was unfortunate. Again it is liable to distract the jury from having regard to specific evidence as against having regard to whatever the overall tenor is.

25 Thirdly, the way it was put: “also persuade you” was, as worded, not unfavourable to the appellant. There was, however, a risk that the jury would apply the converse in that case, that is if they were satisfied that the evidence of one of them was proved it followed from that that the evidence of the other was proved. Again, the opening words of the last sentence “but I am obliged to tell you” we find, in the context, to be confusing. That, in our judgment, was a defective direction on the consideration of individual counts and individual complainants.

26 The judge gave a Lucas direction. The lie said to require it was that the appellant failed to tell the police at interview of what he said in evidence, namely the alleged complaint about the conduct of the partners of the two complainants. That had not been mentioned to the police. It arose only in the course of the appellant's evidence. The complainants were - understandably in all the circumstances - not recalled to deal with it. It may well form the basis for a Section 34

direction, a direction that the appellant was saying in evidence what he had failed to tell the police. That could fairly be brought to their attention as could the consequences which they were entitled to draw from that. It did not, in our judgment, merit the full Lucas direction which was given.

27 First, it was not clear what the lie was and whether in fact there was a lie and not merely a failure to make the point in the course of interview. Further the direction was given in strong terms. This point was given a prominence in the case which it is doubtful it deserved. The word "lie" or "liar" was used no less than eight times in the Lucas direction. It was put in such a way that there was a risk that what the appellant had failed to mention at the time of his interview became a springboard for a finding that he was a liar in all matters.

28 In our judgment, in the circumstances of this case, the direction as given was erroneous.

29 One point which was not the subject of appeal but which we mention is the reference to the hole in the wall of the bathroom. In a case where he had not summarised the evidence, the judge gave a full paragraph to that. In the course of it he said several times that there was no evidence anyone had used the spyhole. If that is so, it did not deserve the prominence in this short summing-up which it was given.

30 We have also found confusing the approach of the judge when dealing with whether there had been fabrication by the girls. The judge put it in this way:

"... well if we assume for the moment that that is correct, that they had indeed made up their stories, what further questions do we need to ask ourselves about it?"

The same appears at page 10:

"If you are going to continue with the assumption that they are fabricated then, of course, you will also want to turn your attention to the way in which matters eventually were shared between the two girls ..."

There then follows in each case what amounts to a justification for the girls behaving as they did.

31 Undoubtedly, the delayed report was a feature of the case, a feature which would usually go in the appellant's favour. It was, in our judgment, unfair that the judge should deal with it in the way he did. The judge concluded that part of his summing-up by saying:

"Then on a more positive note, or when I say a more positive note, not on the assumption that these are fabrications, you will, of course, want to look at the evidence that each of them gave their evidence to you."

There was then no summary of the evidence which they had given.

32 We have also found difficult the concluding sentence of a paragraph again dealing with the delayed report of the incidents. The judge entirely fairly drew attention to the possibility that for good reasons, or reasons which appear to be good, they do not make complaints at the time and do so very much later. That is a fair point to be brought to the jury's attention. However we find the concluding sentence on that subject confusing:

"It doesn't mean to say that that has necessarily happened in this case, but it does mean to say that if that has been the situation it is not, as you will realise, as I say, from that knowledge and that experience so out of the ordinary that it ought, in fact, to determine the issue that you have to resolve."

If the judge was saying that the jury should not acquit because the allegations were delayed, there was a much simpler way to put it. The jury may well have found that direction confusing.

33 There remains the question of an absence in the summing-up of any reference to the delay between the alleged conduct and the making of the complaints. There is no reference to the prejudice to the appellant or the potential prejudice to the appellant of a much-delayed complaint. That is a different issue from considering the motivation of the girls. If their motivation was good and they were believed in relation to the complaint being a genuine one even though delayed, there remained the question whether the appellant was prejudiced by reason of delay in the

conduct of the trial.

34 Mr O'Brien, for the prosecution, has said - indeed referred to authority - that such a direction is not invariably required. The delay in this case was one of a minimum of seven years from the last complaint by the younger complainant to 14 years from the first complaint by the first complainant.

35 In our judgment a reference to the difficulties which that presented to the appellant was an appropriate part of the summing-up in this case. Any appellant who is asked to take his mind back that far is inevitable prejudiced to a degree. There may be situations where the position is so obvious that no reference need be made to it in the summing-up. In our judgment, in the context of this case and this summing-up, it was necessary for the judge to give a direction upon that.

36 Mr O'Brien submits that this was a very simple case, that the judge in the way he summed up was simply being realistic with the jury and that the convictions are safe.

37 We have come to the conclusion that by reason of the accumulation of points to which we have referred these convictions are unsafe. We do not propose to say which of them - if any of them alone - would have been treated as decisive. We look at the defects - as we respectfully find them to be - which are present in this summing-up.

38 It is no reflection on the evidence of the witnesses that these convictions are to be quashed. Whether their evidence is true or not is not for this court to determine. This court must ensure that defendants have a fair trial and that includes a summing-up which deals with appropriate matters and is appropriately reasoned.

39 In our judgment the defects were such that these convictions were unsafe. For that reason this appeal is allowed and convictions quashed.

40 Are there any applications?

41 MR BARLOW: There is an application for an appellant's costs order in relation to the expense of the appellant travelling down to London today. I think it will be a modest sum. Nevertheless I think he is entitled to recover his costs of travel today.

42 MR JUSTICE PILL: Before we confer on that, Mr O'Brien, do you have any application?

43 MR O'BRIEN: No, I do not. ( Pause )

44 MR JUSTICE PILL: The defendant's costs order which we understand does relate to his costs of coming to court today.

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