

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2024] EWCA Crim 544



No. 202301691 B3

Royal Courts of Justice

Tuesday, 30 April 2024

Before:

LADY JUSTICE WHIPPLE
MR JUSTICE HILLIARD
HER HONOUR JUDGE LUCKING KC

REX

v

L

(admissibility of confession evidence)

REPORTING RESTRICTIONS APPLY
Sexual Offences (Amendment) Act 1992

Computer-aided Transcript prepared from the Stenographic Notes of
Opus 2 International Ltd.

Official Court Reporters and Audio Transcribers

5 New Street Square, London, EC4A 3BF

Tel: 020 7831 5627 Fax: 020 7831 7737

CACD.ACO@opus2.digital

Mr B. Newton KC and Mr L. O'Brien appeared on behalf of the Appellant.

Mr P. Morley appeared behalf of the Crown.

J U D G M E N T

LADY JUSTICE WHIPPLE:

- 1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where an allegation has been made that 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 it is waived or lifted in accordance with section 3 of the Act.
- 2 On 21 April 2023, the appellant, who was then aged 66, was convicted by a jury at Durham Crown Court, before Her Honour Judge Kidd, of a number of historic sexual offences, including multiple counts of rape. He was acquitted on two counts on the indictment. On 25 May 2023 he was sentenced to a total term of 21 years' imprisonment and consequential orders were imposed. He now appeals against his conviction with the leave of the single judge.

Facts

- 3 The complainant was the appellant's step-daughter. On 8 August 2021, the complainant made a report to police of allegations of sexual abuse at the hands of the appellant. She described numerous different incidents in which she was subjected to various forms of sexual abuse by the appellant. She said the abuse started just before she turned 13 and continued very frequently, multiple times a week, until she was 17 when she left the family home. The abuse included vaginal and oral penetration.
- 4 The appellant was interviewed on 21 August 2021. During the interview he confirmed that he had a close relationship with the complainant until she left the family home at around the age of 16 or 17. He said the allegations were lies. He was not sure of the reason for the lies, but said that he assumed that she was using him as a scapegoat to try and get back in with her family.

- 5 To prove the case, the prosecution relied on a number of different types of evidence. First, there was the complainant's evidence. Her evidence-in-chief and cross-examination was contained in pre-recorded interviews.
- 6 Secondly, there were witnesses to whom the complainant had made disclosures. They were as follows. There was "A", the mother of the complainant's boyfriend. "A" first met the complainant as she was approaching 17 years of age. As they got to know each other, the complainant described being afraid of the appellant because of the physical abuse. The complainant later disclosed to "A" that the abuse had been sexual as well as physical. There was "B", the complainant's boyfriend and partner since 2014. He said there were disclosures by the complainant of physical abuse and violence, and then disclosures of sexual abuse. Over the course of their relationship further details were provided. The complainant had said that she was 12 when it had begun. "B" begged her to report it to the police but she was scared that no one would believe her because there was no evidence. There was "C", the complainant's brother who was significantly older than she was. His perception of watching the appellant with the complainant when she was aged 7 or 8 was of bullying behaviour, sexual comments and that the appellant was somebody that you would not challenge because he was something of a bully. He had witnessed the appellant sitting with the complainant with her under the blanket. The complainant made the disclosure to "C" in July 2021. He said that she was concerned of a fear of rejection and that people would not believe her.
- 7 Thirdly, there were other witnesses. They were, first, "D", another brother of the complainant, who described the complainant as having a different standing in the house as something of a "second-class citizen". He perceived the appellant to belittle the complainant, that she was the butt of the joke and frequently embarrassed and humiliated. He said the appellant used to bring a blanket to his house when he went to visit. He talked about being spoken to in July 2021, the disclosure by the complainant and his subsequent support for her to go to the police. There was "E", a friend of the appellant. He recalled an

incident in 2012 at a party at another person's house (that other person we shall refer to as "F") when he saw the appellant and the complainant lying on the sofa together in a spooning position. Another occasion was when the complainant was sat on the appellant's lap picking hair out of his ears. A further occasion was when he walked in on the appellant and the complainant as they sat under a blanket on a reclining chair. His perception was that the complainant was masturbating the appellant under the blanket; he recalled he saw the hand moving up and down. One time that other person, "F", said to him, "He's fucking her." What "E" had witnessed concerned him sufficiently to take matters to the police and to raise a formal complaint. There was "G" who was a friend of the appellant's. He gave evidence of an incident at "F's" house where he and his wife walked into a room. The curtains were drawn, and there was giggling from under a blanket. The appellant's head came out from under the blanket and then the complainant emerged. "G" was so concerned about the incident that he said he felt sick and told his family that they were leaving the party. Finally, there was the officer in the case who interviewed the appellant.

- 8 The fourth area was transcripts of recorded conversations between the complainant and the appellant on 4 May 2021. In the fourth of those conversations the appellant admitted physically and sexually abusing the complainant. We shall consider those transcripts in greater detail below.
- 9 The defence case was of a denial that the appellant had engaged in any behaviour which was either inappropriate or sexual at any time and in any manner howsoever alleged by the complainant. At trial, the appellant gave evidence and was cross-examined. When asked during his evidence in chief about these recorded conversations, he said, "Well, she threatened me. I was under duress." He said his wife had then threatened him and told him to do as the complainant said. He said his wife had placed pressure on him to admit to doing what the complainant had alleged. In cross-examination, he accepted that during the phone calls he did not ask the complainant why she was accusing him of rape. He said he was in shock, he was being shouted at and threatened. He said he wanted to diffuse the

situation. He trusted his wife who told him to do that. His wife had said, amongst other things, that if he said sorry she would not call the police and the wider family would not be affected and would not find out.

- 10 The following witnesses were called for the defence: first, the appellant's wife and the complainant's mother ("the wife"); and secondly, "F", the friend referred to in the evidence of "E" and "G" (he was a friend of the appellant's); thirdly, the appellant's son. The appellant also called two character witnesses.
- 11 Thus, the issue for the jury was one of credibility of the complainant's account and whether the jury could be sure of the evidence of the complainant.

The Confession Evidence

- 12 There were a total of four telephone conversations which took place on 4 May 2021. During the first call the complainant spoke to both the appellant and his wife. The second and third calls consisted solely of conversation between the complainant and her mother. During the fourth call the complainant again spoke to both her mother and the appellant. All four of the conversations were recorded. We have been taken through the transcripts of the four conversations in some detail during the course of today's hearing.
- 13 In the initial phone call the complainant said to the appellant, "Put Mum on the phone. I'm going to tell her." The complainant also told him, "I'm going to report you." The appellant passed the phone to his wife, and the complainant disclosed the allegations to her at that point. The appellant's response to the threat that the complainant would make an allegation to the police was met with the appellant saying, "I will defend myself," and later, "Do whatever you want." He said he would not admit to doing something he had not done.
- 14 There was a break between the first and second phone call, during which time it was clear that the appellant had spoken to his wife. In the second phone call the wife told the complainant, "He's denying it."

15 There was a further break before the third phone call, in the course of which the wife told the complainant that the appellant would say sorry. The complainant told her mother that he had to admit what he had done.

16 There was a further break before the fourth and final call during which the confession was made. The following exchange took place, with the names anonymised in this extract:

"APPELLANT: Right, okay ... I'm asking for your forgiveness and I'm sorry for what I did.

COMPLAINANT: What did you do?

APPELLANT: Well the things that you said.

COMPLAINANT: Where you raped me and physically and sexually abused me.

APPELLANT: ... this is hard, hard but your Mam's asked us to phone you right, I've said ...

COMPLAINANT: Yeah to own up to the disgusting stuff that you've done to me yeah.

APPELLANT: I've just said I'm sorry and I'm asking for your forgiveness and I want you and your Mam and the family to move on. I'm dead and I'm out of your life.

COMPLAINANT: And you admit that you physically and sexually abused me?

APPELLANT: Well I've just said that haven't I. I'm sorry and I'm asking for your forgiveness.

COMPLAINANT: I need you to say it.

APPELLANT: I admit it.

COMPLAINANT: I need you to say it.

APPELLANT: I've just said it ... I admit it.

COMPLAINANT: Say it.

APPELLANT: I'm sorry I admit umm that I abused you. I don't know what else.

COMPLAINANT: Physically and sexually ... it's just telling the truth. I need closure so that I know, you know what you did.

APPELLANT: And where does it go ... from there.

COMPLAINANT: From here I can move on from you and then I can have my brother and mother back and I can then finally be rid of you.

APPELLANT: Right and that's the end of it. It doesn't go any further from here.

COMPLAINANT: No I don't want this to go out. Why do you think I've kept quiet all this time because I'm ashamed of it.

APPELLANT: ... I'm sorry for physically and sexually abusing you and I ask for your forgiveness."

The Judge's Ruling

17 The defence applied to exclude the confession under section 76(2)(b) of the Police and

Criminal Evidence Act 1984 ("PACE"). The Crown objected to that application. The judge held a voir dire on 22 March 2023. The appellant and his wife gave evidence. In a clear and reasoned written ruling the judge ruled that the confession was admissible. The judge held that it was clear from the chronology that by the time the appellant made the confession his wife already knew the substance of the allegations. It followed that the threat of disclosure to the wife did not cause the appellant to make the admissions. The judge then considered whether the complainant's threat to report the allegations to the police caused the appellant to make the admissions. The appellant said in evidence that he did not trust the complainant not to pursue the allegation with the police even if he confessed. The judge concluded that the appellant did not confess to secure a concrete promise that matters would not have been raised with the police. For that reason, the authority of *R v Roberts* [2011] EWCA Crim 2974 was not analogous with the facts of the case. The judge held that the things said or done relied upon by the defence as the cause of the confession were the wife's distress, which the defence argued may have rendered his confession unreliable. The judge concluded that the demeanour of the appellant both on the recordings and attested to by his wife in evidence was calm and considered; there was nothing about the appellant which made him particularly psychologically vulnerable. The judge was satisfied to the criminal standard that the things said or done by his wife were not capable of rendering his confession unreliable.

18 At the end of the trial, the judge directed the jury in relation to the confession evidence in the following way, in relation to which no dispute arises:

"You have heard recordings of phone calls from the 4th of May of 2021, which passed between [the appellant], [the complainant] and [the wife]. You have transcripts of the first and fourth conversation. During the fourth conversation [the appellant] admits physically and sexually abusing [the complainant]. The prosecution rely on that confession, and invite you to find that it honestly reflects [the appellant's] sexual abuse of [the complainant] during her childhood. The defence invite you not to rely on the confession and say that it was an unreliable confession because of the circumstances in which it was made. The defence say that [the appellant] was persuaded to make the confession because his wife asked him to do so. They say he was placed under duress by his wife to make a false confession of persistent rape of their daughter when she was a

child. He thought if he admitted the allegation, it would not be reported to the police ... If you conclude that the confession was, or may have been obtained as a result of oppression, or as a result of what [the wife] said to him, which was likely to make it unreliable, you should give no weight to the confession and disregard it in coming to your conclusions in this case."

19 The judge also reminded the jury, during a recap of the evidence, of the confession and the evidence of the witnesses.

Grounds of Appeal

20 In their grounds of appeal, Mr Newton KC and Mr O'Brien contend, first, that the judge ought to have excluded the confession and that, secondly and consequently, the admission of the confession renders the appellant's convictions unsafe.

21 They argue that the judge wrongly focussed, not on the objective question of whether any confession made by the appellant in the circumstances prevailing at the time might make the confession unreliable, but on whether this particular confession was likely to be reliable or unreliable. They argue that the appellant was motivated to make a false confession in order to placate the complainant in the hope that she would not then repeat her false allegations to the police and others, so as to avoid a loss of reputation and impact on the family.

22 Specifically, they contend, at paragraph 27 of their grounds of appeal, that a confession obtained in circumstances where an individual is told that nothing will happen if they make a confession but that terrible consequences will flow if a confession is not made is "inevitably a confession which was or may have been obtained" in consequence of something said or done which was likely to render the confession unreliable for the purposes of section 76(2)(b). Further, they argue that the admission of the confession renders the convictions unsafe.

23 In oral submissions today, Mr Newton has pressed the point that the wife had believed her daughter's promise that she would take no further action, and had in her own evidence said that she had forced the appellant to confess for that reason.

24 The Crown has served a respondent's notice resisting this appeal, which Mr Morley has pressed in oral argument. The Crown argue that the judge correctly focussed on the objective question and did not focus on whether the particular confession was reliable or not. The Crown disputes the appellant's formulation of the test at paragraph 27 of the grounds of appeal, given that the circumstances of this case were that the appellant anticipated that the complainant might take the case to the police in any event. The judge was entitled to conclude that the wife's distress and its impact on the appellant was insufficient to render the confession likely to be unreliable. In any event, the verdicts are safe, given the weight of the other evidence and given the mixed verdicts which show that the jury's mind was open to the appellant's case.

25 We thank all counsel for their helpful submissions focussed on the core issue in the case.

Law

26 There is no dispute about the law, which we set out shortly. Both parties refer to Blackstone, paragraphs F18.17-26 for an overview.

27 Section 76(2)(b) of PACE provides that:

"(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained -

(a)

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

28 The provision was considered by the Divisional Court in *Re: Proulx* [2001] 1 All ER 57

(Mance LJ sitting with Newman J):

"44 ... The real issue is whether the magistrate was, bearing in mind the limited scope of the review which this court should undertake, entitled to conclude that the prosecution had proved beyond reasonable doubt that the applicant's confessions (notwithstanding that they might be true) were 'not obtained as aforesaid', in other words, were not obtained in consequence of anything said or done likely in the circumstances existing at the time to render unreliable any confession so made."

29 The analysis involved a number of considerations (set out at paragraph 45 of *Re: Proulx*).

The court cited *R v Barry* (1992) Crim App R 384 for the proposition that the test was "in a sense hypothetical since it relates not to *the* confession but to *any* confession" (paragraph 46, emphasis in the original), and went on:

"46 ... This does not in my view mean that the subject matter or nature of the confession can be disregarded. A confession will commonly occur in the context of investigations or questioning, may be under caution, relating to a specific offence ... The test in section 76 cannot be satisfied by postulating some entirely different confession. There is also no likelihood that anything said or done would have induced any other confession. The word 'any' must thus, I think, be understood as indicating 'any such', or 'such a', confession as the applicant made. The abstract element involved also reflects the fact that the test is not whether the actual confession was untruthful or inaccurate. It is whether whatever was said or done was, in the circumstances existing as at the time of the confession, likely to have rendered such a confession unreliable, whether or not it may be seen subsequently - with hindsight and in the light of all the material available at trial - that it did or did not actually do so.

47 ... Section 76, although it includes some judgmental elements, involves an essentially fixed scheme. Once it is represented to the court that the confession was or may have been obtained as stated in section 76, then it is for the prosecution to prove if it can that it was not so stated; and, if the prosecution fails to prove this, then the confession must be excluded: *Paris* (1993) 97 Crim App R 99."

30 The Divisional Court concluded that the judge was entitled to rule that the confession in that case would be admissible under section 76(2)(b) (see paragraph 56).

31 In *R v Roberts*, to which we have already referred, the court ruled that a confession was

inadmissible, allowing the appeal, on the basis that the particular confession in that case had been made "in consequence of such a plain inducement to confess that any confession was likely to be rendered unreliable" (see paragraph 18). The confession in that case was made in response to a relatively trivial accusation of stealing from an employer, on the basis of an assurance that if made that would "be the end of it" but if not made the police would be called.

Conclusion

- 32 The judge recorded that the appellant's case was that following his wife's conversations with the complainant, the wife's distress caused him to make the confession (paragraph 24 of the ruling), such that the question for the judge was whether the level of the wife's distress and its impact on the appellant was of such a nature that it may have rendered his confession unreliable (paragraph 26 of the ruling). The judge reminded herself that the test was objective, that all the circumstances had to be taken into account, including the circumstances affecting the appellant and his desire to placate his wife, and that the test was hypothetical (paragraphs 27 and 28 of the ruling).
- 33 She found that the relevant circumstances were that a police investigation would not ruin the appellant's son's career (paragraph 29), that the appellant did not trust the complainant not to report her allegations to the police even if he confessed, so there was no concrete inducement to confess (paragraph 30), that the appellant was calm and considered at the time of the confession, and was not psychologically vulnerable (paragraph 31).
- 34 The answer to the question which the judge posed to herself (paragraph 26) was that the wife's distress was not likely, in the circumstances as the judge found them to be, to render the confession unreliable (paragraph 31).
- 35 We can see no flaw in the judge's approach, reasoning or conclusion. She applied the approach in *Re: Proulx* and the other cases to which we have already referred. The

conclusion she reached was open to her on her findings of fact about what the circumstances were and, specifically, that the reason the appellant made the confession, on his case, was because of his wife's distress.

36 Mr Newton and Mr O'Brien have suggested that the appellant made the confession to placate the complainant in the hope that she would not repeat her false allegation to the police and others (paragraph 22 of the grounds of appeal). But that is not what the judge found after hearing evidence from all concerned, and there is no appeal, nor could there be, from the judge's findings of fact. The appellant's case, on his own evidence, involved no or little reliance on the suggestion that the complainant would not take the case to the police because all along he suspected that she might. It seems to us that Mr Newton and Mr O'Brien may be seeking to argue a case based on facts as they might have wished them to be rather than as they were found.

37 We are not with Mr Newton when he submits, as he did at the hearing of this appeal, that the reasons for the wife's distress and the wife's possible belief in her daughter's assurances were a material factor which the judge should have taken into account when assessing the reasons why the appellant made the confession. The wife, he says, did believe her daughter's promises. But the problem in the way of this submission is that the appellant did not believe the complainant. He accepted that the complainant might go to the police anyway. Thus, there was little causative potency in the complainant's promises, even if they were believed by the wife, when considering what had motivated the appellant to make the confession. We do not doubt that the appellant hoped that the complainant would not go to the police; but that hope was, in our judgment, not a reason which the judge was obliged to take account of as a basis to doubt the reliability of the confession, when she was assessing reliability in accordance with section 76(2)(b).

38 On the facts as they were found, we can see precisely why the judge decided as she did. These were extremely serious offences for the appellant to admit to, and this confession

would not have been made lightly. The judge could be sure, on the evidence, that the fact that the wife was upset and requesting the appellant to confess, in circumstances where he was calm and collected, not psychiatrically vulnerable, and speaking to his step-daughter on the phone, he having called his step-daughter as part of a series of calls that day, was not likely to render the confession unreliable. This was not a confession obtained by oppression, threat or inducement. Whether the confession was true or not was for the jury to assess.

39 Further, we agree with the Crown that the proposition contained at paragraph 27 of the appellant's grounds is not sustainable. For a start, that proposition does not reflect the facts as they were found in this case, a point we have already dealt with. But, further, to meet the general point: there is no inevitability of any outcome where section 76(2)(b) is in issue.

The outcome will always be specific to the facts of the case. It will depend on the judge's findings about the things said or done, the circumstances prevailing at the time, whether the confession was consequential on those things, and whether the judge is sure that, taking all that into account, it was or was not likely that the confession was unreliable.

40 We are not persuaded that the judge wrongly focussed on whether this confession was true or false, far from it. She concentrated on the issue of reliability, judged through the lens of section 76.

41 It follows that we reject the first ground. This appeal must be dismissed.

42 Even if we had thought that there was some defect in the judge's reasoning such that the confession should not have been admitted, we share the prosecution's view that this was, confession aside, still a strong case against the appellant. The complainant gave detailed evidence and was cross-examined. There was evidence from several witnesses with whom she had shared her complaint before going to the police. There was evidence from other witnesses as to what they had witnessed, containing details which corroborated the complainant's account. The jury clearly considered the evidence with care, delivering

mixed verdicts on the indictment. We are satisfied that this conviction is safe and we would have dismissed the appeal on the second ground if it had arisen.

43 In those circumstances, and with thanks to counsel, we dismiss this appeal.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

*Transcribed by **Opus 2 International Limited**
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital*