IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2024] EWCA Crim 225
CASE NO 202202671/B2-202301522/B2

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 28 February 2024

Before:

LORD JUSTICE MALES

MR JUSTICE LINDEN

MR JUSTICE WALL

REX

V

JOHN MYLREA CAINE

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MR M COTTER KC appeared on behalf of the Applicant.
MR P JARVIS and MR J WILSON appeared on behalf of the Crown.

J U D G M E N T

(Approved)

LORD JUSTICE MALES:

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

2. This is an application for leave to appeal against conviction which the single judge has referred to the full court and a renewed application for leave to appeal against sentence following refusal by the single judge.

3. The proposed appeal against conviction relates to events which are said to have occurred in the late 1970s when the applicant, John Caine, was working as a journalist and radio presenter for BBC Radio Merseyside. He also appeared from time to time on television. He is now aged 70 but at the time was in his mid-20s.

4. On 22 July 2022, in the Crown Court at Caernarfon, the applicant was convicted by a jury on counts 1, 2 and 4 on an indictment containing a total of four counts. The trial judge (HHJ Petts) had directed the jury to find the applicant not guilty on count 3 following a successful submission of no case to answer at the close of the prosecution case. The offences of which the applicant was convicted were all offences of indecent assault on a male person, contrary to section 15 of the Sexual Offences Act 1956. That was the applicable legislation because the offences took place between 1 September 1977 and 31 December 1978.

5. The victim in each case was a boy (to whom we will refer as "C") who was aged either 13 or 14 at the time of these offences. The applicant would have been aged either 24 or

25 during the same period.

6. Counts 1 and 4 charged specific occasions on which the applicant indecently assaulted C. Count 1 concerned an occasion when the applicant first touched C's genitals over his clothing, in the applicant's car. Count 4 concerned an occasion when the applicant penetrated C's anus with his finger in a tent. Count 2 was described as a specimen count and particularised a further occasion on which the applicant touched C's genitals over his clothing in a car.
7. On 3 August 2022, the applicant was sentenced to a total term of 8 years' imprisonment. This comprised concurrent sentences of 4 years on counts 1 and 2 and 8 years on count 4. He was also made subject to a sexual harm prevention order for 20 years.

The facts

8. The incidents happened when C was still at school and living with his parents on the Wirral. At the time, the applicant was working for the BBC at Radio Merseyside and on weekends he presented a youth show which publicised youth activities. C's parents were involved in putting on charity shows and activities for the Scouts in the Ellesmere Port area of the Wirral. C was a member of his local Scout group while the applicant had been a leader of a different group. C's parents got to know the applicant as he would publicise and feature such charity shows on his radio programme. The applicant became a family friend and C got to know him. C said that he was star struck and in awe of the applicant.
9. As a schoolboy, C was interested in broadcasting and the applicant, knowing of this interest, invited him to the radio station in Liverpool. The applicant would pick him up in a distinctive two-seater green Fiat X19. This happened, according to C, on about 10 occasions. On the first occasion, the applicant had put equipment on the passenger seat

and in the footwell of his car. This meant that C had to sit on the central console and so was physically close to the applicant. The prosecution case was that the applicant took this opportunity to assault C sexually as he drove, by touching his genitals over his clothes. This was alleged to have happened on two or three occasions.

10. Subsequently, the applicant invited C to stay at his cottage near Mold. When he arrived, there were others present but the only person that C knew was the applicant. C said he felt uneasy. That night he stayed in a tent. His evidence was that, at some point, the applicant and another male entered the tent. There were other boys also sleeping there but C was closest to the entrance. One of those who had entered laid beside him and he was held down. He said that the applicant opened his sleeping bag, he was physically turned on his side and he described it as an attempt being made to rape him. He was touched over his genitals, body and backside. His anus was penetrated either with a finger or a penis or both. He could not say which. But there was no ejaculation. He objected strongly, the assault stopped and the two men left. Following this incident, the applicant did nothing else to him.
11. It was because of the possibility that penetration had been by the applicant's penis that count 3 was included on the indictment, but because C could not say that that was the position the judge withdrew that count from the jury. The remaining case therefore was that it was penetration by the applicant's finger.
12. Although these matters were said to have taken place in 1977 and 1978, C did not report matters until 2017. He was then interviewed, both in 2018 and later in 2020. The applicant was traced and was initially interviewed on 8 November 2019. He confirmed that in the late 1970s he lived in Heswall on the Wirral with his parents and that his mother had a cottage in the Mold area. He said that he started at Radio Merseyside in

1977 and left at the start of 1979. His radio show publicised youth activities but he denied having any connections with the Scouts. Subsequently, however, in his Defence Statement, he accepted that he had been a club leader at Heswall for 2 years before he joined Radio Merseyside. He said that he had a blue Mini Clubman and did not recall having a green Fiat X19. He was never known as "Jonathan Caine" - always "John". He denied every knowing a person with C's name or knowing the family.

13. The applicant was interviewed again on 12 December 2019. On that occasion, he said that he did have a green Fiat X19 and provided photographs. He suggested that it would not have been possible for C to sit on the centre console because there was not one. He maintained that he did not know C and denied the allegations.

14. In his Defence Statement and also in his evidence, he said that he never knew C. He did not take him into the studio, invite him to a party or meet his parents. C had simply invented the allegations.

Previous convictions

15. On 8 February 1999, the applicant had been convicted, following a trial in the Crown Court at Manchester, of six counts of indecent assault on a male person under 16, for which he received a total sentence of 3 years' imprisonment ('the Manchester convictions'). The earliest of those indecent assaults occurred between April and December 1977, at about the same time as the matters with which we are concerned, while the remaining assaults occurred some years later, between December 1989 and June 1995.

16. The prosecution applied to adduce evidence of these convictions for indecent assault on the ground that they demonstrated that the applicant had a tendency to commit sexual offences against young boys and certainly a sexual interest in them. The defence resisted

this application, saying that it would be unfairly prejudicial to the applicant. They pointed out that, in view of the age of the convictions, the Crown had been unable to retrieve any details of the offences. Not even a case summary was available owing to the passage of time. There were newspaper reports, as the matter had attracted some publicity at the time, although those were potentially inaccurate. The defence said that the jury would be unable to establish the degree of similarity with the current allegations, including the circumstances of the offences and whether there was an element of consent to the Manchester offences, although that would not have been a defence where the complainant was under 16, under the 1956 Act.

17. The defence were able to obtain a report from the Birmingham Post in which the trial judge in 1999 (HHJ Humphreys) had observed in sentencing that the applicant 'had not forced himself onto the boys', so that the allegations differed in that respect from the current allegations where it was not suggested that C had in any way consented to what he said had happened to him. It was submitted that, in view of the fact that the defendant continued to deny the offences, and these involved multiple victims, the issue would generate considerable satellite litigation, which would be rendered more complex by the absence of any surviving prosecution papers and would distract the jury from the current allegations. In these circumstances, the defence submitted that the prejudicial effect of the convictions would exceed their probative value pursuant to section 101(3) of the Criminal Justice Act 2003, and that for that reason they ought not to be admitted.

18. The judge ruled that the convictions were admissible. In his Defence Statement the applicant said that he still maintained his innocence in relation to all of the previous allegations; his defence was that none of the sexual incidents described actually took place.

19. The bad character evidence was then put before the jury in the form of Agreed Facts that set out the number and nature of the offences, the period over which they had been committed and the date and the location of conviction. Because that is the way in which the offences were described in the 1956 Act, the Agreed Facts referred to convictions for indecent assault.

The applicant's evidence at trial

20. The applicant gave evidence at his trial. He denied that he had committed the offences of which he had been convicted in 1999. He did not call any further evidence to support his denials. As a result of that denial, the applicant was cross-examined, essentially to emphasise that, although he had given evidence denying his guilt, his account had not been believed by the jury at his previous trial. The applicant gave also some evidence as to the nature of the sexual activity alleged against him, as he remembered it, which was an allegation of consensual mutual masturbation although, as we have said, in view of the age of the complainant, consent could not have been a defence. But his case was that, although that was the allegation against him, in fact the incidents had not happened.

The summing up

21. At the conclusion of the evidence, defence counsel submitted that the issue whether the applicant was guilty of the Manchester offences should be left to the jury. The judge rejected that submission. In his summing up he directed the jury as follows:

> 'You have heard that the Defendant has previous convictions... and you have details of them in the agreed facts document. Although he denies that he was correctly convicted, for your purposes, you must work on the basis that he was correctly convicted of those offences. However, that does not mean he must have lied to you about the offences with which he is charged in these proceedings.'

22. The judge went on to explain the ways in which the evidence might be relevant. One was

that it was capable of showing that the applicant had a tendency to commit sexual offences against young boys. The other was that it was the applicant's case that C had invented the allegations against him and it was his case that C had found out about his previous convictions from the publicity which they had received at the time and had used them to make up allegations of his own against the applicant, although the applicant was unable to suggest any motive which C may have had for doing so.

Procedural History

23. Trial counsel advanced a single ground of appeal against conviction, namely that the judge had failed to direct the jury correctly on the approach to be taken to the bad character evidence. The point was that the judge had failed to recognise the rebuttable nature of the presumption of guilt created by section 74(3) of the Police and Criminal Evidence Act 1984 and had directed the jury that the applicant was guilty of the bad character offences ('you must work on the basis that he was correctly convicted') despite his evidence to the contrary. There was no criticism by trial counsel of the judge's original decision to allow the evidence to be admitted, or of the other aspects of the bad character direction which he had given once it was admitted. There was no application to appeal against sentence.

24. On 5 April 2023, fresh counsel instructed by the applicant, Mr Mark Cotter KC, served new grounds of appeal against both conviction and sentence. By then, of course, the application for leave to appeal against sentence was substantially out of time. As to conviction, five new grounds of appeal were advanced:

    (1) The judge should not have permitted the prosecution to adduce the bad character evidence at all.

    (2) That having decided to permit the prosecution to adduce that bad character evidence,

the judge did not properly judicially case manage the fact of the applicant's denial that he had committed those offences.

(3) That previous trial counsel did not cross-examine C in relation to material that undermined his credibility.

(4) That the judge should have withdrawn count 4 from the jury because there was insufficient evidence to sustain it.

(5) That the judge erred in the direction he gave to the jury on count 4 because he should have warned them of the special need for caution in cases of voice identification.

25. On 18 July 2023, the single judge considered all six grounds of appeal against conviction, both the single ground advanced by trial counsel and the five new grounds advanced by Mr Cotter. The original ground advanced by trial counsel had not been formally abandoned and therefore it was treated as still being live. The single judge refused leave to appeal in respect of all of the new grounds and referred the application for leave in respect of the original ground of appeal to the full court, along with the application for an extension of time. In doing so, he remarked that the ground of appeal as formulated by trial counsel was 'the most arguable' of all the grounds. He refused leave to appeal against the custodial sentence and the sexual harm prevention order which had been imposed.

26. The applicant now renews his application for permission to appeal on all grounds. We will take them in what appears to us to be a logical order.

Ground 1, the judge should not have permitted the bad character evidence to be adduced

27. Mr Cotter submits that the admission of the bad character evidence caused substantial prejudice to the applicant because the absence of information as to the facts and

circumstances of the offences in question meant that the applicant had no opportunity to distinguish them factually from the present allegations against him and put unfair pressure on him to give evidence as to the circumstances of those offences which would in turn expose him to cross-examination on the previous offending. He submits, by reference to cases going back to *R v Hanson* [2005] EWCA Crim 824, [2005] 1 WLR 3169, that there needs to be a demonstration of the relevance of the bad character convictions to the issues in the case, that the potential prejudice to a defendant needs to be weighed, and that only offences which have sufficient similarities with the current allegations to have probative value ought to be admitted. He submits that that is not the case here where, under the 1956 Act, indecent assault on a male under 16 may encompass a wide range of sexual activity, including both consensual and non-consensual activity, in contrast with the position under the current law in the 2003 Act, where there is a greater distinction between different kinds of activity in the various offences which are there set out. He submits that the issue in the present case is whether non-consensual sexual activity occurred but that that was not necessarily the subject matter of the Manchester convictions and that there was no sufficient degree of similarity shown to render those convictions safely admissible. At the highest, he submitted, those convictions show a disposition for consensual activity with males under the age (and possibly only just under the age) of 16. He submits that these matters were insufficiently considered.

28. We reject these submissions. The prosecution were entitled to rely on the fact of the convictions as demonstrating a sexual interest on the part of the applicant in boys under 16 and a willingness to engage in unlawful activity with them. That was as far as it went. But that was plainly a highly relevant matter in view of the issues in the present case where there was a complete denial that anything at all had occurred or indeed that the

applicant even knew C. The judge was therefore entitled to rule that the Manchester convictions were admissible and we refuse permission to argue this ground.

Ground 3, defence counsel did not cross-examine C properly

29. We turn next to ground 3, that defence counsel did not cross-examine C in relation to material that undermined his credibility.

30. It is right to say that there were some weaknesses and inconsistencies in the accounts given by C, including as to the dates on which the alleged offences had taken place. C had also said that he had been a victim of another abuser, a practising barrister.
Mr Cotter submits that trial counsel did not cross-examine appropriately as to these matters. In fact, C was cross-examined about inconsistencies in his account, both as to the dates when offences were said to have occurred, the layout of the BBC Merseyside building where C had been taken by the applicant, the applicant's appearance and description and whether he had been known as 'John' or 'Jonathan'.

31. In all of these respects C's account had not been entirely consistent. However, it is not surprising, after such a long lapse of time, that C was unable to be precise about such matters and, in our view, defence counsel made sensible tactical decisions as to the extent to which it was appropriate to cross-examine the applicant. It was also a sensible tactical decision not to cross-examine further about alleged incidents with another abuser. We refuse permission to argue this ground.

Grounds 4 and 5, count 4

32. Grounds 4 and 5 can conveniently be taken together. They are that the judge should have withdrawn count 4 from the jury, alternatively, should have given a direction concerning voice recognition. Count 4 was the allegation that C's anus had been penetrated by the applicant at night, while C was sleeping in the tent. During this incident, it was dark and

C had his back to the assailants he described, and therefore did not see them. His evidence was that he had been invited to the applicant's cottage and, despite not wanting to go, had been encouraged or persuaded by his parents that he should go. There was nobody else there that he knew apart from the applicant and people were camping, including people from Scout troops. There were other people in the tent but he did not know them. He was in his sleeping bag. It was late and dark. He was by the door of the tent. At some time in the night the applicant and another person came in. One of them laid down beside him and the other held him down, while the first person opened his sleeping bag and penetrated his anus. As we have said, he was unable to say whether this person had penetrated him with his penis or his finger and accordingly the case was treated as an allegation of penetration by finger. C objected strongly and loudly and the two people left. C said that the person who had penetrated him was the applicant, whose head had been adjacent to his. He did not see him because it was dark but he recognised his voice. Mr Cotter submits that this issue should have been withdrawn from the jury.

33. We do not agree. There was evidence here on which the jury was entitled to convict. We reject also the submission that the absence of a modified *Turnbull* direction dealing with voice recognition renders this conviction unsafe. It is necessary to bear in mind that the issue was whether this incident happened at all rather than an issue of identification. The applicant's case was that C had never been to his cottage and was making the whole thing up. This was an incident which, if the jury accepted that C was not making it up, took place in the applicant's own garden and placed him firmly at the scene. We refuse permission to appeal on grounds 4 and 5 also.

Trial Counsel's Ground of Appeal

34. We come finally to the ground of appeal identified by trial counsel, that the judge

misdirected the jury as to their approach to the issue whether the applicant was guilty of the bad character offences together with the new ground 2 which in some ways is the other side of the same coin.

35. Section 74(3) of the Police and Criminal Evidence Act 1984 provides as follows:

> "In any proceedings where evidence is admissible of the fact that the accused has committed an offence, ... if the accused is proved to have been convicted of the offence—
>
> (a) by or before any court in the United Kingdom; or
> (b) by a Service court outside the United Kingdom,
>
> he shall be taken to have committed that offence unless the contrary is proved."

36. It is therefore open to a defendant to prove, on the balance of probabilities, that despite his conviction, he did not commit the offence in question.

37. In the present case, the applicant gave evidence that he did not commit the offences of which he had been convicted in the Manchester proceedings. It was open to him to do so and, if the jury believed him, he would successfully have proved the contrary for the purpose of section 74(3). Accordingly, counsel submitted in his written submissions in support of the appeal, that the judge ought to have left this issue to the jury and to have directed them that, if they accepted the applicant's evidence, they should treat the previous convictions as being incapable of providing any evidence supporting the prosecution allegations in the present case.

38. We accept this submission. Instead of giving such a direction, the judge directed the jury that they must work on the basis that the applicant was correctly convicted of the bad character offences. That necessarily carried with it, not only that the previous convictions were capable of being evidence against the applicant, but that the applicant

had lied to the previous jury in his evidence to them, and indeed that he was lying to the present jury in saying that he was not guilty of the previous matters of which he had been convicted.

39. Realistically, Mr Paul Jarvis, who appeared before us but was not trial counsel has accepted that this was a misdirection. Mr Jarvis draws attention to what was said by Lord Judge CJ in *R v C* [2010] EWCA Crim 2971, [2011] 1 WLR 1942 [9]:

> 'Section 74(3) is uncomplicated and it means exactly what it says: once it is proved (whether by agreement or otherwise) that the defendant was and remains convicted of a criminal offence and assuming that evidence of that fact is admissible, the prosecution is not required, merely because the defendant denies guilt, to prove that the defendant was guilty of the offence, or to assist him to prove that he was not guilty, or indeed to call witnesses for either purpose. The evidential presumption is that the conviction truthfully reflects the fact that the defendant committed the offence. Equally, however, it is clear that the defendant cannot be prevented from seeking to demonstrate that he did not in fact commit the offence and therefore, that the jury in the current trial should disregard the conviction. If so, it follows that he should be entitled to deploy all the ordinary processes of the court for this purpose, and in particular to adduce evidence that will enable him to prove, whether by cross-examination of prosecution witnesses or calling evidence of his own that he was not guilty and that the conviction was wrong. It also follows that if the defendant does adduce evidence to demonstrate that he is not guilty of the offence, it remains open to the Crown then to call evidence to rebut the denial.'

40. We would refer also to what was said by Lord Justice Hughes in *R v Carter* [2007] EWCA Crim 1307. That was a case where the appellant faced a number of charges alleging dishonesty in the making of insurance claims relating to a car repair business. He had previously pleaded guilty to four other indictments charging similar offences. He gave evidence, however, that he had not committed those other offences and had pleaded guilty in the hope that this would avoid the necessity for criminal proceedings against his

brother. The trial judge directed the jury that the convictions were conclusive evidence of the appellant's guilt so far as those offences were concerned. When the terms of section 74(3) were pointed out to him, he ruled that in order to rebut the presumption of guilt, a defendant must adduce evidence other than or, in addition to, his own bald assertion that he did not commit the offences. That was held to be a misdirection. Lord Justice Hughes LJ said:

> 'In that ruling, we are satisfied, and indeed the Crown concedes, that the judge remained in the error which he had previously adopted. There is no warrant in the statute for the proposition that evidence to rebut the presumption created by conviction must be of any particular kind. There is no warrant for the proposition that as a matter of law the defendant's own assertion cannot ever rebut the presumption. The correct position was that the decision whether the defendant had proved the contrary in accordance with subsection (3) of section 74 was a question not of law for the judge but of fact for the jury and it should have been left to the jury. That said, it is quite apparent that, had it been left to the jury in the way that it should have been, the judge would have been entitled, and on the facts of this case virtually bound, to offer the jury strong comment about the limited nature of the evidence that the defendant had put forward.'

41. It may be that the judge in this case was under the mistaken impression that because the applicant had not called any evidence beyond his own statement, he was legally unable to discharge the burden of proving his innocence of the earlier matters to the civil standard, with the result that the jury were required to proceed on the basis that he had committed those other offences. If so, he was wrong about that. As Mr Jarvis submitted, the true position is that where a defendant fails to call any evidence to prove that he did not commit some earlier offence that the prosecution has adduced in evidence against him, then the trial judge is not required to direct the jury in the terms argued for by the applicant because the defendant will not, in those circumstances, be able to discharge the

burden upon him; but when the defendant does call evidence, whether that is his own evidence or evidence from another source, and thereby makes a case that he did not commit the earlier offences, then the trial judge should direct the jury that they can only hold those convictions against him if he fails to persuade them (to the civil standard) that he did not commit those offences.

42. In the light of that concession by the prosecution, the real issue on this application is whether, despite the misdirection, the conviction is nevertheless safe or the judge ought to have case managed the position so that the problem never arose.

43. Mr Jarvis submits that, if the judge had directed the jury to consider whether the applicant had proved, on the balance of probabilities, that he had not committed the earlier offences, the only conclusion reasonably open to the jury was that the applicant had failed, by what was in effect no more than a bare denial, to discharge that burden.

44. In considering that submission, it is helpful to take account of the way in which Mr Cotter puts his second ground of appeal, which is that the judge ought to have case managed this issue by ruling that the applicant's denial of having committed the bad character offences was inadmissible or, ought to have warned the applicant that if he were to assert his innocence of the other offences, he would open himself up to cross-examination about them and the judge would be entitled to comment on them in his summing-up. It is said that this would have meant that the applicant would not have been cross-examined on the facts of the earlier convictions, or the fact that he was convicted by a jury after having given evidence, which that jury did not believe, all of which was prejudicial to him.

45. The premise for this submission, from which Mr Cotter did not shrink, is that, in the absence of any other evidence about the facts or circumstances of the bad character

offences, apart from the applicant's own denial, it would in practice be impossible for the jury to come to any conclusion about whether the applicant was in fact guilty of those offences, so that the applicant was in effect and, in our words rather than Mr Cotter's, walking into a trap.

46. Mr Cotter refers to what was said by Lord Judge in the case of *C*, to which we have already referred, as follows:

> '14. In our judgment it is essential that the defendant should provide a more detailed defence statement in which, quite apart from setting out his case in relation to the offences with which he is presently charged, he should identify all the ingredients of the case which he will advance for the purposes of discharging the evidential burden of proving that he did not commit the earlier Huntsman offences. That may enable the prosecution to prepare draft admissions of fact, and also to collate the necessary evidence. The bare assertion that the defendant did not commit these offences is inadequate.
>
> 15. Informed by the defence statement the Crown will prepare its case. It is a broad rule of practice that the Crown should call all the evidence it intends to adduce to establish the defendant's guilt before the end of its case. If that principle were to apply in a case like the present, it would in effect mean that the Crown would be obliged to re-present the evidence which led to the jury to convict the defendant of the Huntsman offences. That would nullify the statutory provisions which enable the Crown to rely on the fact that he was convicted. It would be satellite litigation indeed. Although in the ultimate analysis it will be for the trial judge to make whatever decisions are appropriate for the proper conduct of the trial, as it seems to us, it would at the very least be open to him to consider permitting the Crown to postpone its decision whether to call any evidence to confirm the guilt of the earlier offences and the correctness of the convictions until after the close of the defendant's case.'

47. As we read these paragraphs, they are dealing with the position which ought to be adopted by the defendant, in fairness to the prosecution, so that the prosecution can consider what evidence it needs to call and whether that should appropriately be called as

part of its own case or by way of rebuttal after the defence has concluded its case. These are all matters which would require appropriate case management by the judge.

48. In the present case the Defence Statement did make clear the defendant's denial of the correctness of the earlier convictions, on the basis that the incidents in question never happened. However, there was no further discussion with the judge about how that would play out in the evidence or what directions might be given. Mr Cotter submits that there ought to have been, and that was a failure of case management by the judge who ought to have spelled out the consequences of the appellant giving such evidence, unsupported by other evidence, and drawn attention to the directions which he would then be likely to give to the jury.

49. The difficulty with these submissions, however, is that the applicant had a right to give evidence that he was not guilty of the Manchester offences. That is implicit in section 74(3) of the Police and Criminal Evidence Act. In our judgment, the judge was not required to warn the applicant about the consequences of evidence which the applicant might choose to give in exercising that right. While such discussion with counsel may be helpful, it can hardly, in our judgment, be regarded as a necessity, the absence of which will render the conviction unsafe as a result of the applicant's own decisions as to the evidence which he wished to give. Once the applicant said in evidence, as he was entitled to do, that he was not guilty of the Manchester offences, that was then evidence which could not realistically be unsaid. However, as section 74(3) makes clear, the burden was on the applicant to prove that he was not guilty of the bad character offences.

50. Mr Cotter accepts, however, indeed in some respects positively asserts for the purpose of his argument on case management, that 'no jury properly directed could reasonably conclude that A was innocent of the earlier offences based on the evidence A could give'.

Elsewhere in his skeleton argument he submits that 'No jury properly directed could come to a reasoned and rational conclusion as to whether A was guilty or innocent of the six earlier offences based only on A's evidence.' That is a realistic assessment of the position but, in effect, is simply another way of saying that the applicant was incapable of discharging the burden upon him in the particular circumstances of this case.

51. If the judge had given a proper direction, leaving to the jury the issue whether the applicant had successfully rebutted the presumption of guilt in respect of the Manchester offences, the judge would have been entitled, and probably bound, to explain to the jury that, although little was now known about the circumstances of those offences, they had been the subject of the trial in Manchester, at which the prosecution would have called evidence, and the applicant had denied his guilt, and that the verdict of the jury indicated that they found that the applicant was guilty, despite his evidence that the incidents in question never happened. He would then have directed the jury in the present case that it was for them to decide whether they were satisfied, on the balance of probabilities, that the applicant was not guilty of those earlier offences. In those circumstances, we agree that the only rational conclusion which the jury could reach was that the applicant had failed to discharge the burden upon him and therefore that he was guilty of the previous offences.

52. The only aspect which has caused us some disquiet is that the judge's direction to the jury in the present case amounted in effect to directing them that they should disbelieve the applicant's evidence that he had not committed the bad character offences or, in other words, that he was lying to them in his evidence when he said that he was not guilty. That was also a concern in *Carter*. Lord Justice Hughes said (emphasis added):

> 'Mr Leonard's submission is that nevertheless this misdirection

was a critical one. His submission is this: the learned judge's direction carried the necessary implication that this jury was told on the authority of the judge that the defendant had lied to it when he said that he was not guilty of the Ferrari offences. That, in a case which depended very largely on whether the jury accepted or recommended the defendant's evidence in relation to all the counts that he faced, meant, says Mr Leonard, that the jury was given an improper steer which is bound to have affected its decision on the primary question of guilt.

For the Crown, Mr Mandel counters that the defendant was on any view a self confessed liar. Even if the defendant's present assertion were correct, it would follow, says Mr Mandel, that he had lied to the court in the solemn matter of entering pleas of guilty to serious offences of dishonesty. As to that, we agree, of course, that the defendant was on his own account someone who had lied in relation to that serious matter to the court on the earlier occasion. We think, however, that Mr Leonard is right to draw a distinction between a jury being faced, on the one hand, with a defendant who is shown to have lied on the previous occasion to the court and who offers some sort of reason for having done so, and, on the other, with a defendant in relation to whom it is told by the judge "He has lied to you in this case on his oath". In the first case the jury can address the question of whether the explanation offered is good enough or not. In the second, the question of the defendant's credibility is concluded by the judge's direction. So the answer to the misdirection is not sufficiently given by the fact that even on the defendant's own account he was a self confessed liar.

That, however, leaves, as it seems to us, two propositions which simply cannot be contradicted. The first is that the difference between what the judge said to the jury and what he should have said is in the end relatively small. That is so but it is significant because it is the difference between a direction of law and strong comment as to evidence. That is a difference which is of importance. *Much more important is the second proposition. We have asked ourselves whether there is any basis upon which this jury, had it been properly directed, could have concluded that this defendant had successfully rebutted the evidence of guilt which was given by his previous pleas of guilty. The short answer to that is that he could not possibly have done so.* He had given no explanation beyond the fact that he wished to save his brother. That, of course, was equally consistent with his being guilty as with his not being guilty. ..."

53. For that reason, despite the misdirection, the appeal in *Carter* was dismissed.

54. In our view, similar reasoning applies here. The difference between the direction which was given and that which ought to have been given was, in the end, relatively small, albeit for the reason given by Lord Justice Hughes, it was a significant difference. However, while it is unsatisfactory for a judge to direct the jury in effect that a defendant's evidence is untrue, the more important question, as in *Carter*, is whether there is any basis upon which the jury, had it been properly been directed, could have concluded that the appellant had successfully rebutted the evidence of guilt which was given by his previous conviction. As in *Carter*, the short answer here is that it could not possibly have done so. It follows that the conviction is safe.

55. Therefore, although we will grant leave to appeal on the ground advanced by trial counsel, because there was a misdirection, the appeal is dismissed.

The sentence

56. We turn to the renewed application for leave to appeal against sentence. The judge noted that he was required to look at the guidelines for the modern offences and pay them measured regard, bearing in mind in particular the differences in maximum sentences between offences then and offences now. He said that the most serious offence (count 4) would either be charged today as assault by penetration, which carries a maximum life sentence, or as sexual activity with a child, which carries a maximum of 14 years, as opposed to the old offence of indecent assault which carried a maximum of 10 years. He said that count 4 was a category 1A offence, category 1 for penetration and culpability A for many factors, including acting with another, grooming and abuse of trust. The applicant had become a family friend, trusted by C's parents to look after him on many occasions, not only to go to the radio station but on this particular occasion to look after him overnight. Coupled with that abuse of trust there was targeting of a particularly

vulnerable child, away from home that night, and a disparity in age. Under the modern offence, with a maximum of 14 years, the starting point would be 5 years with a range of 4 to 10 years. The judge said that it would be high in that range given the number of culpability factors present.

57. Counts 1 and 2, he said, would these days be charged as sexual assault, with the same maximum sentence of 10 years. He found that there was severe psychological harm caused to C. There was again abuse of trust and these were category 1 cases, with a starting point of 4 years. The judge said that he would not treat the Manchester convictions as an aggravating factor, although they did mean that the applicant was not a person of good character. He had regard to the applicant's age, although there was no evidence of any health issues, and to the lengthy delay which had occurred in bringing the case to trial, although, as he pointed out, that amounted to less mitigation in circumstances where the applicant had denied the allegations throughout.

58. Overall, the judge treated count 4 as the lead offence and passed a sentence of 8 years on that count to reflect the entirety of the applicant's offending. He also imposed a sexual harm prevention order, which would last for a period of 20 years or, in other words, until the applicant was 89 years old, although as he also said: 'In reality, age makes any remaining risk very small', while the fact that the applicant would be on the sex offender register would prevent him working with children.

59. Mr Cotter submits that the sentence was manifestly excessive. Assuming some reduction for delay and personal mitigation, a final sentence of 8 years meant that the judge had started from a point very close to the maximum sentence for the comparator offence and this was not the most serious offence of assault by penetration. Developing those submissions, he submits that the judge, although no doubt trying to be fair to the

applicant, had chosen the wrong comparator; this would, in modern times, have been charged as assault by penetration, with a maximum of life imprisonment. There was, therefore, he submitted, a greater disparity between the maximum sentence available then and now and this should have affected the way in which the judge calibrated the sentence for the present offences, leading to a greater reduction from that which would be applicable to a modern offence.

60. We do not accept those submissions. As the judge explained, the sentence of 8 years passed on count 4 was to reflect the entirety of the applicant's offending and, viewed in that light, was, in our judgment, a sentence which the judge was entitled to pass.

61. However, we do accept Mr Cotter's submission that the sexual harm prevention order was unnecessary in circumstances where the applicant has not offended for many years and, in any event, will be barred from working with children once he is released. We note that defence counsel did not challenge the imposition of the sexual harm prevention order, but nevertheless such an order should only be imposed where it is necessary to do so. In this case, the judge gave no explanation why he considered this to be necessary, if he did, and his comment that the applicant's age meant that any remaining risk was very small suggests that there was no real necessity for such an order.

62. Accordingly, we grant an extension of time for leave to appeal against sentence and we grant leave limited to the challenge to the sexual harm prevention order. The appeal against that order will be allowed and the sexual harm prevention order will be quashed.

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