Neutral Citation Number: [2024] EWCA Crim 1150

Case Nos: 202304010 B4 & 202400919 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM MAIDSTONE CROWN COURT
His Honour Judge Robert Lazarus
Ind. No. T20217216

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/10/2024

Before :

LORD JUSTICE DINGEMANS
MR JUSTICE JOHNSON
and
MR JUSTICE LINDEN

- -

Between :

PRP	**Appellant**
- and -	
Rex	**Respondent**

- -
- -

Paul Addison (instructed by the **Registrar of Criminal Appeals**) on behalf of the **Appellant**
Tanya Robinson (instructed by the **Crown Prosecution Service**) on behalf of the **Respondent**

Hearing date : 19 September 2024

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Approved Judgment

This judgment was handed down remotely at 14.00 hrs on 04.10.24 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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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.

Lord Justice Dingemans :

1. This is the hearing of an appeal against conviction; and, if that appeal is dismissed, an appeal against sentence. The appellant is now aged 47 years. He was born in November 1976. The complainant is his sister, and she is 44 years old, having been born in May 1980. The complainant has the benefit of lifelong anonymity pursuant to the provisions of the Sexual Offences (Amendment) Act 1992. In order to preserve the complainant's anonymity the appellant's name has been anonymised.

2. On 22 January 2024 the appellant was convicted after trial in the Crown Court in Maidstone of four counts of indecent assault and three counts of rape against the complainant. On 22 January 2024 the appellant was sentenced to an overall sentence of 18 years imposed on one of the counts of rape, with concurrent sentences for the other rapes and indecent assaults.

3. The offences occurred from about 1991, when the complainant was aged 11-12, until about 1996 she was 16 years old. The appellant was about three and a half years older.

4. There are two grounds of appeal against conviction. These are: (1) that the judge wrongly excluded evidence of the complainant's complaints of sexual abuse and domestic violence against her former husband; and (2) that the judge wrongly failed to give a direction on doli incapax in relation to the appellant, in respect of incidents related by the complainant which did not form part of the indictment.

5. The ground of appeal against sentence is that the total sentence of 18 years is manifestly excessive. In support of that overarching ground the appellant says that the judge had wrongly considered that a weapon had been used for the five rapes which were the subject of count 6; although the judge found that the appellant's offending had made a material contribution to the complainant's extreme psychological harm, the judge said the appellant must, as a matter of law, take responsibility for all of the harm which was wrong; and the judge failed to take account of the appellant's mental health difficulties, made obvious by the fact that the complainant referred to the appellant cutting himself, threatening to commit suicide, and attendance at a special school.

The events leading up to the trial

6. It is not necessary to set out many details of the facts of the case. The complainant reported to the police sexual abuse and domestic violence and sexual abuse by her husband, as well as sexual abuse from the appellant. The complainant told the police how, many years before and over a period of years, her brother had sexually assaulted her. The appellant had demanded to see her vagina, he had moved on to lying on top of her with his penis out, and in the final event had raped her on numerous occasions.

7. In the course of preparation for the trial, and before the recorded section 28 cross-examination of the complainant, Mr Addison made an application on behalf of the appellant for the judge to admit evidence of the complainant's allegations against her husband, on the basis that these allegations were false. This application was resisted by the Respondent, who disclosed further material in relation to those matters. In the light of the further disclosure, the appellant abandoned the application as it was conceded that there was no sufficient basis for finding that the allegations were false.

The respective cases at trial

8. The complainant stated on one occasion that the offending which was the subject of the indictment started from about the age of 13 years, when the appellant was aged 16 years. On another occasion the complainant said that all of this had started when she was at primary school. She said that he used to come in at night and put his hand under the covers. He would start to come in when her mum went out to work. Their mother would lock the back door and take the key with her. He would touch her vagina with his hand, though did not penetrate her. The judge had summed up to the jury the references to the earlier dates, and they had been referred to as inconsistencies in the complainant's account about the offending.

9. The complainant described how, when she was about 14 years old, the appellant had a pair of handcuffs which he had bought at a jumble sale which he used to keep her hands together, and pin her down. Mostly, when she was handcuffed, her hands were above her head. When he came into her room at night sometimes she would shout which sometimes worked, other times he put his hand over her mouth. She remembered that sometimes their mum would see him leave the room, and he would just say that she had a bad dream and he had come in to comfort her. On occasions she would put a chest of drawers against the door.

10. The complainant was scared of telling her mother. She described a difficult relationship with her mother, explaining how her mother used to hit her. She said she had tried many times to tell her but then one time, aged about 14 years, she spoke to her mum about what the appellant had been doing. Her mother questioned her and she recalled her mother speaking to him and sending him to his room, but it seemed to be forgotten. It did stop for a few months, but started again.

11. The complainant described self-harming and wanting to kill herself. When her mother was out, the same activity would happen elsewhere in the house – on the hall floor and in the living room on a sofa. She would scream hoping someone would hear. Then the appellant began to use a knife, which he held to her throat and she was too scared to move in case he cut her. She thought this was when she was about 15 years old. She explained that when she was about 15 she told a teacher at her school. She did not think she said about her brother having sex with her, she said she was too scared to say what he had actually done but said that it was no longer happening, although it was. She explained how she had told her mother that she had spoken to a teacher. Her mother started screaming at her, saying how could she do this to them, that she would pay for this. Her mother went to the school, and the complainant recalled they had a meeting where her mother said that the complainant had let the appellant, and they were 'experimenting'. After that, her mother told her she was not part of the family anymore, and she wanted her to be adopted. She stayed in the family home and the appellant's behaviour resumed after a while.

12. The complainant had told some friends about the appellant's abuse, one of whom gave evidence. The appellant's sexual behaviour towards her continued until she was 16 years, when she started a relationship with a boyfriend. She described how her brother was scared she would tell her boyfriend. He used to beg her not to tell him. Later the complainant had had some discussion with family members. After the appellant married, the complainant had been friendly with her brother's then wife.

13. It was common ground on the appeal that the jury had been told that the complainant had been hit and abused by her mother. That had been said to be part of the problems which had led to her mental health difficulties.

An application to adduce evidence about the complainant's sexual history with her husband

14. In the course of the trial Mr Addison made an application, pursuant to section 41 of the Youth Justice and Criminal Evidence Act (YJCEA) to adduce evidence of the complainant's husband's sexual abuse of her. This was on the basis that the allegations were true, and because it would help explain to the jury why the complainant was so upset and affected during the section 28 cross examination. Mr Addison asked that the prosecution agree a fact that on 24 April 2018 "the complainant told PC Laycock that throughout her 19 year relationship with her husband, he repeatedly raped her, controlled her throughout the relationship and coerced her into performing sexual acts. She said her husband would not work and pestered her for money and she had to do 3 jobs to keep afloat financially. They have 4 children and a grandson that they have 3 days a week." Ms Robinson had suggested to the trial judge that defence concerns in relation to the complainant's appearance at the ABE interview and during section 28 cross examination could be met by saying that the complainant said that she was the victim of abuse by her husband, but Mr Addison wanted the jury to know that the complainant said that she had been raped by her husband.

15. In submissions before this court, Ms Robinson pointed out that the application had not properly been made as a section 41 application, but that the trial judge had treated it as such an application in any event. The judge refused to admit the evidence about the complainant's allegations against her husband.

The trial continued

16. After the ruling the trial continued. The appellant's ex-wife had given evidence for the prosecution saying the complainant had told her things had gone on, that the appellant had touched her chest and touched her "down there" and that she could not be in the same room as him because she was scared of him. The ex-wife recalled that one night the appellant got drunk and told her he had done things with his sister that he "wasn't proud of".

17. The appellant was arrested and interviewed. When the allegations were put to him he maintained that the incidents had never happened.

18. As part of the prosecution case there was evidence from Detective Constable Eileen Cox. This was edited by agreement and read. It detailed the first account given by the complainant on 22 February 2018. In the original statement reference had been made to the domestic abuse she was suffering from her husband but this was edited out by agreement.

19. The appellant gave evidence and denied any offending. He said that he did not make any confession to his ex-wife as alleged. He had no handcuffs nor did he use or see the distinctive knife described by the complainant. He said that he was unable to attain an erection until he was aged 16 years due to a medical condition.

20. The appellant had also called as a witness his and the complainant's mother who described her understanding of what happened between the appellant and the complainant. She understood that the complainant did not want to pursue allegations against the appellant, and had said at a meeting that they "were just messing around on the bed as children do". The mother said that she understood that nothing had happened. The father of the appellant and complainant gave evidence for the appellant to the effect that he had little to do with the children, that he did not want children and had said to his wife that they could have children as long as his wife looked after them. He said he was not aware of his wife hitting the children.

The summing up

21. The judge summed up to the jury. So far as is material to the issues on the appeal the judge directed the jury: "Indeed, we have heard that [the complainant] had anorexia and had seen a psychiatrist and been in counselling. You have not, primarily to preserve [the complainant]'s privacy as much as we can, heard anything about the cause of the anorexia or the reason she was undergoing counselling and treatment and, in the circumstances, it would be pure speculation for you to consider why she was behaving as she did in the video recorded interviews. There are, to put it simply, multiple different reasons why she may have been distressed during those interviews."

22. The judge highlighted the inconsistences in the complainant's accounts as to when the appellant had first initiated sexual activity with the complainant, but did not give a specific direction on the use of the evidence about any incidents which had occurred between the appellant and complainant before the indictment, or any direction on the appellant's capacity to commit crimes.

The exclusion of evidence about the complainant's sexual abuse by her husband (ground one)

The respective cases on ground one

23. Mr Addison, on behalf of the appellant, submitted that the judge erred in law by refusing to allow the defence to introduce evidence concerning the allegations made by the complainant against her ex-husband of rape and domestic violence over a 19 year period. The convictions were therefore unsafe.

24. Mr Addison submitted that the complainant's reliability and credibility were of substantial importance in the trial. She had a history of mental illness and had been detained under the Mental Health Act on an occasion by the police. There were prosecution witness statements from consultant psychiatrist, Dr Knynenburg, and Dr Payne, a clinical psychologist which were served in support of the use of the section 28 procedure and the appointment of an intermediary. They set out the background to the complainant being diagnosed with complex post-traumatic stress disorder. It was reported that she had suffered blackouts, flashbacks, nightmares and dissociation. When the police were called to speak to the complainant on 24th April 2018 by a third party, her first complaint was that her ex-husband had committed sexual abuse and domestic violence against her for a 19 year period. She alleged that he had controlled her, repeatedly raped her and coerced her into committing sexual acts. The defence wanted the jury to know about this offending by her husband. It was submitted that this was a relevant consideration for them when assessing the complainant's demeanour,

reliability, credibility and potential cross-contamination. In her first ABE interview on 12 July 2018 it was very obvious that the complainant was troubled. She would not look at the camera or the interviewing officer. She appeared withdrawn, disturbed and mentally unwell. The obvious question that would occur to anyone viewing the ABE interview was why she was so disturbed. The answer that the jury were never given, was that she was potentially traumatised as a result of the serious sexual and domestic abuse by her husband that had continued until recently. The alleged offending by her brother had last occurred some 27 years previously.

25. Mr Addison submitted that the jury did not have all of the detail of the complainant's mental health background to place into context and consider. In fact they had a partial and incomplete summary. All the jury were permitted to be told about her background was that she had suffered from anorexia and had been for counselling sessions. In her ABE interview, the complainant gave the impression that the defendant was responsible for the onset of her anorexia and counselling and there was no mention about her ex-husband.

26. Mr Addison accepted that the jury were directed not to speculate about what caused her demeanour displayed in the first ABE, but said that this direction was insufficient and that the defence should have been allowed to adduce further evidence about her husband's violent behaviour towards her. It was noted that the trial judge had expressed his increasing concern about the jury being ignorant of the complaint against the ex-husband, before later ruling that it was not admissible.

27. The evidence presented at the trial indicated only two possible causes, or a combination of both, for the complainant's demeanour in the ABE and her mental health issues. Firstly, it was caused by the alleged sexual abuse by her brother and secondly the cruel treatment administered by her mother. Both of these causes were advanced by the prosecution as part of their case. The defence case was handicapped in rebutting the impression that her demeanour and mental health issues were caused by the appellant's alleged sexual offending. The defence was prohibited from submitting to the jury that there was another significant, long-lasting, traumatic life experience that should be taken into account. In oral submissions Mr Addison specified that he was relying on section 41(3) and (5) in support of the application to adduce the evidence about one of the reasons for the complainant's mental health issues.

28. Ms Robinson on behalf of the respondent submitted that the trial judge was right not to allow evidence of the complainant's allegations of rape and domestic violence against her husband to be admitted into evidence. The evidence that the appellant sought to admit was of the complainant's sexual behaviour with another man and section 41 of the YJCEA applied. The evidence was not admissible under section 41. The resurrected application to admit this evidence at trial, this time on the basis that it was true, did not arise until part way through the trial. The prosecution disputed that the evidence was relevant or admissible, said that it required a section 41 application, and argued that in any event it would be unfair to adduce such evidence without having raised it with the complainant in cross examination if the appellant was going to deploy it to undermine her credibility.

29. Ms Robinson noted that the prosecution did not address the jury to suggest that the distress of the complainant in her ABE interviews was because of the abuse at the hands of her brother. The trial judge approached the application with great care. He heard

extensive argument from both sides and retired to consider his decision before ruling against the application. Notwithstanding the absence of an application and the effect of section 41(2) of the 1999 Act, barring leave in the absence of an application, the judge gave the appellant the benefit of treating the application as having been made under that provision. He then applied his mind to the correct question (either under section 41 or the comparable general common law rules as to admissibility of evidence), namely was the evidence admissible as relevant to a matter in issue in the case. The trial judge was right to reject Mr Addison's submissions that demeanour in interview, context, background, reliability and the "two limbs" of what caused her to develop psychiatric problems, were matters in issue in the case. The trial judge was also right to conclude that having this material would not help the jury in deciding whether they could be sure that the acts alleged had been committed by the appellant. The judge's directions were proper. There was no evidence available at trial that the PTSD from which the appellant suffered made her unreliable. The judge rightly concluded that absent evidence of some psychiatric condition that affected the complainant's reliability, such as a psychosis or delusions, evidence from a psychiatrist of his or her opinion about the complainant's reliability as a witness was not admissible.

Relevant statutory provisions

30. Section 41 of the YJCEA 1999 provides:

Restriction on evidence or questions about complainant's sexual history.

(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—

(a) no evidence may be adduced, and

(b) no question may be asked in cross-examination,

by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—

(a) that subsection (3) or (5) applies, and

(b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—

(a) that issue is not an issue of consent; or

(b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or

(c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,

that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subsection applies if the evidence or question—

(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).

(7) Where this section applies in relation to a trial by virtue of the fact that one or more of a number of persons charged in the proceedings is or are charged with a sexual offence—

(a) it shall cease to apply in relation to the trial if the prosecutor decides not to proceed with the case against that person or those persons in respect of that charge; but

(b) it shall not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge.

(8) Nothing in this section authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section.

31. In *R v A (No.2)* [2001] UKHL 25; [2002] 1 AC 45 the House of Lords considered section 41 of the YJCEA 1999. It was held that the legislature had pursued a legitimate objective to protect complainants in sexual offence cases from indignity and humiliating questioning and to correct myths that a woman who had had previous sexual intercourse was more likely to consent and was less credible. So far as consent was concerned, the House of Lords decided that the test of admissibility under section 41, when read in light of the Human Rights Act 1999 and paying due regard to the importance of seeking to protect the complainant from indignity and humiliating

questions, is whether the evidence is so relevant to the issue of consent that to exclude it would endanger the fairness of the trial.

Evidence about husband's sexual abuse properly excluded

32. We agree that the trial judge was right to exclude the evidence about the complainant's husband's sexual abuse of her. As to the first application, it was common ground before us that the judge was right to refuse to admit evidence of the complainant's allegations against her husband on the suggested basis that the complainant had made false allegations. This is because there was no evidential basis to contend that the allegations were false.

33. As to the application made in the course of the trial, again we agree that the trial judge was right to refuse to admit evidence that the complainant had been raped by her husband. This is because the evidence was not relevant to any issue in the trial, and so did not fall within section 41(3)(a) of the YJCEA 1999. The husband was not on trial, but the appellant was. It is common ground that the complainant appeared troubled in her evidence, and that the jury knew about her mental disorders. The jury however knew that there were at least two possible causes of the disorders, namely the mother's treatment of the complainant as she was growing up, and if they were sure about the appellant's sexual assaults and rapes of the complainant, those sexual assaults and rapes. The judge directed the jury that they were not told of the reasons for the complainant's mental disorders and they could not speculate about them. This was a strong and clear direction. If it had been relevant to give to the jury another possible cause of the complainant's mental disorders (and it was not) the prosecution had made clear that evidence about the complainant's allegations of domestic abuse by her husband could have been admitted by agreement. As it was, admitting evidence that the complainant had been raped by her husband would have served no purpose and might have risked the jury accepting one of the twin myths referred to in *R v A*.

34. The evidence was not admissible pursuant to section 41(5) of the YJCEA. We note that reliance on section 41(5) had not been advanced before the trial judge. The short answer is that the evidence did not relate to any evidence adduced by the prosecution about any sexual behaviour of the complainant. The prosecution adduced some limited evidence about the complainant's mental health, in circumstances where it was apparent from the complainant's appearance in her evidence that she suffered from mental health issues. There was no evidence to suggest that the complainant was not competent to give evidence. The prosecution had not adduced evidence about sexual behaviour. Mr Addison's attempt to suggest that evidence of mental illness which, unknown to the jury might have been caused in part by sexual offending by another person, was evidence of sexual behaviour of the complainant is not sustainable. This is because evidence about the appellant's mental health was not evidence about sexual behaviour.

35. We are sure that the refusal to allow Mr Addison to adduce evidence about the complainant's rapes by her husband did not render the conviction unsafe. This is because it was not relevant to any issue which the jury had to decide.

Directions on doli incapax (ground two)

Respective cases on ground two

36. Mr Addison submitted that a direction on doli incapax should have been given, or that directions should have been given in accordance with the approach in *R v M* [2016] EWCA Crim 674; [2016] 4 WLR 146 (*R v M*). It was relevant to note that the appellant went to a special school when a child as he was dyslexic. He had self-harmed by cutting himself and threatening to commit suicide during the relevant period. His parents had asked the complainant, his younger sister, to chaperone him.

37. Ms Robinson submitted that the trial judge was right to decline to direct the jury on the presumption of doli incapax. The presumption of doli incapax did not apply as the appellant was not facing a criminal charge in relation to any offending that pre-dated his 14th birthday.

Relevant provisions of law

38. "Doli incapax" (incapable of evil) was the rebuttable presumption under common law that a child of not less than 10 years but under 14 years of age was incapable of committing a criminal offence. The presumption was rebutted only if the prosecution proved to the criminal standard, not only that the child caused the actus reus with the appropriate mens rea, but also that the child knew that the particular act was "seriously wrong" and not merely naughty or mischievous. The common law presumption for children of not less than 10 years was abolished on 30 September 1998 by the Crime and Disorder Act 1998.

39. In *R v M* [2016] EWCA Crim 674; [2016] 4 WLR 146 the Court, when addressing bad character evidence adduced of the defendant's sexual offending against his half-sister when aged between 10 and 14 years, confirmed that there was no need to address the issue of doli incapax. That approach was followed in *R v AYS* [2023] EWCA Crim 730; [2024] 1 Cr App R 3 at paragraph 25 where the court held that doli incapax had no direct application. What was required as a direction to the jury that they must be sure that the earlier incidents occurred and, if they were, how the incidents might help them decide whether the defendant had committed the indicted offences.

No need for directions on doli incapax

40. The appellant was born in November 1976. The complainant was born in May 1980. The earliest counts on the indictment commence on 30 April 1991 when the complainant was aged a day before her 11th birthday, and the appellant was aged 14 years and 5 months. In these circumstances there was no obligation on the trial judge to give a direction on doli incapax.

41. The complainant did give evidence that the offending had first started when she was aged 13 years. She later gave evidence that events had started when she was at primary school, which pre-dated the indictment. It seems that this evidence was relied on by the defence at trial to show that the complainant was not giving reliable evidence. The judge gave careful directions to the jury about the inconsistencies in the complainant's evidence, and their approach to the inconsistencies.

42. It is right to record that, as Mr Addison submitted, the judge did not give a direction similar to that suggested in *R v AYS* that the jury must be sure that the earlier incidents occurred and, if they were, how the incidents might help them decide whether the defendant had committed the indicted offences. It is only fair to the judge to record

that it was not submitted to him at trial that he should do so. We do not consider that the failure to give such a direction in this case made the appellant's conviction unsafe. This is because the most important feature about the dates when the appellant had started to put his hand under the complainant's bed covers and touched her vagina were that they were inconsistent with the dates given in other accounts given by the complainant. It was therefore important that the judge give a full and fair direction about those inconsistencies and the judge did so. The real question for the jury was whether, notwithstanding these inconsistencies and the appellant's evidence denying any wrongdoing, they were sure that the complainant's evidence about the sexual assaults and rapes was reliable. We are sure that the convictions are safe.

The sentencing remarks

43. When sentencing the judge related that counts 1 and 2 dealt with six incidents of indecent assault between 30 April 1991 and 1 May 1993, when the appellant was aged between 14 and 16 years, and the complainant was aged between 11 and 13 years. Counts 3 and 4 involved six incidents of indecent assault between 30 April 1993 and 1 of May 1996, when the appellant was aged between 16 and 19 years, and the complainant was aged between 13 and 16 years. Counts 5 and 6 reflected six incidents of rape between 30 April 1993 and 1 May 1996, when the appellant was aged between 16 and 19 years, and the complainant was aged between 13 and 16 years. Count 11 involved one incident of rape between 30 April 1996 and 1 May 1997, when the appellant was aged between 19 and 20 years, and the complainant was aged between 16 and 17 years.

44. The trial judge rehearsed the sentencing restrictions arising from the appellant's offending as a youth. He acknowledged, however, that he could not impose a sentence greater than would have been the maximum sentence available to the court had the appellant been sentenced on the date the offences were committed. The appellant was a minor throughout much of the period on the indictment, and there were maximum sentences consequent upon his age at the time. The maximum adult sentence for rape was, at all of the times covered by the indictment, one of life imprisonment. By operation of section 53(2) of the Children and Young Persons Act 1993, that maximum period of detention for life was available at all times, regardless of the ages that the appellant committed the offences. The trial judge confirmed he had taken into account the guidelines for historical sexual offences and the guidelines for Sentencing Children and Young People. He confirmed he would apply the principles in the guidelines but the reductions may not be as great as those set out in the guidelines because they were not fully applicable to an adult offender being sentenced for offences committed as a child.

45. The trial judge then rehearsed the facts of the case and referred to the complainant's victim personal statement in which the complainant explained how she suffered from Post-Traumatic Stress Disorder, panic attacks, flashbacks, an eating disorder and episodes of self-harm. The judge referred to the fact that the complainant had stated that she has been subject to extreme abuse from others, and that she had indicated that the harm suffered as a result of the behaviour of one of those others, was greater than that caused by the appellant. The judge then went on and said: "I am aware that [the complainant] has stated that she has been subject to extreme abuse from others, and that she has indicated that the harm suffered as a result of the behaviour of one of those others, was greater than that caused by you. However, I am bound to conclude that your

offending made a material contribution to the harm from which she now suffers, and is therefore to be treated, as a matter of law, as causing that harm" (emphasis added).

46. The judge referred to the sentences for the other offences before turning to count 6. He described this count as involving the appellant having raped his sister on at least five occasions, in a period of time when he was aged between 16 and 19, and his sister aged between 13 and 16. The judge said that the evidence was that there were not five rapes, but that it was a routine occurrence although the judge acknowledged that he could not sentence the appellant for offences for which he had not been convicted. Therefore in respect of count 6 the sentence must be one for five rapes.

47. The judge clarified that he must sentence the appellant on the basis that the incidents contained within count 6 occurred throughout the time period specified within the indictment. It followed that these offences occurred at times when either handcuffs or the knife was being used, but he highlighted that the complainant was not able to identify any occasion when both were in play. The judge confirmed his reference to the sentencing guidelines for rape but acknowledged that the assistance provided was limited, as they did not deal with an offence as extreme and as unusual as that with which he was dealing. Harm for count 6 undoubtedly fell into category 1, because the psychological harm set out in the complainant's statement was extreme and still having a major impact on her day-today activities, over 30 years after the offending ceased. The complainant was extremely vulnerable, with no means of escaping, disbelieved by her parents and at times was aged 13 years. The offending was sustained over several years, and there was repeated use of either restraint in the form of handcuffs, or threats of violence with the production of a knife. Culpability remained in category A. This meant that the starting point for sentence was one of 15 years imprisonment, with a category range of 13 to 19 years. The judge concluded that a sentence of 15 years would be insufficient for five incidents of rape and that a sentence of 22 years imprisonment was appropriate. As with the other offences, the judge was of the view that the aggravating and mitigating factors had no meaningful impact on the overall sentence. In terms of the appellant's age and maturity the judge applied an overall reduction in sentence of 25 per cent. The sentence imposed for count 6 was therefore 16 and a half years.

48. The judge announced he did not intend to rehearse his detailed reasoning relevant to counts 1 to 4 as these shorter sentences, to be served concurrently, would have only minimal impact on the overall sentence. The judge confirmed that in reaching his sentences for counts 1 to 4, he had considered the sexual assault and sexual assault of children under the Sentencing Guidelines, the statutory limits and the general approach to sentencing referred to in respect of counts 5, 6, and 11.

49. Turning to the subject of dangerousness, the judge acknowledged the requirement for him to identify whether or not the appellant was a dangerous offender within the meaning of the Sentencing Act 2020. The judge confirmed that he had taken into account the risk assessment carried out by the author of the pre-sentence report but was unable to conclude that there was a significant risk to members of the public, including people within a familial setting, of serious harm occasioned by the commission by the appellant of further sexual offences. Such a conclusion would be at odds with the fact that there had been no convictions, charges or cautions for any sexual matters in the past 30 years. Given the length of the determinate sentence he was imposing, he was not of the view that extension of that sentence was required.

50. Returning to count 6, the judge confirmed that this was the most serious count, and covered most of the serious offending. He determined that 16 and a half years was insufficient to reflect the totality of offending covered by the jury's verdict and in his judgment, a sentence of 18 years in total would be just and proportionate. The judge concluded by confirming that the appellant would be subject to statutory notification requirements by signing the sex offenders register for life when released from prison.

51. The judge outlined the terms of the Restraining Order which would remain in effect until further order of the court.

The ground of appeal against sentence

Respective cases on the appeal against sentence

52. Mr Addison submitted that the total sentence of 18 years imprisonment is manifestly excessive. The judge had remarked that these five rapes occurred at times when either handcuffs or a knife was used, and Mr Addison submitted that there was no evidence that they were used at the same time, and noted that the judge sentenced on the basis that each of the rapes involved the use of a weapon. This aggravating feature did not occur throughout the period of the count. The evidence from the complainant was that the items were used for approximately 12 months of the three year period alleged in the indictment occurring between 30 April 1993 and 1 May 1996.

53. Secondly Mr Addison submitted that the judge placed all of the responsibility and causation for the psychological harm now suffered by the complainant on the appellant's offending. That was inaccurate and must have increased the length of the sentence imposed. There was no explanation as to what the phrase used by the trial judge that the appellant was responsible for all the harm 'as a matter of law'.

54. Thirdly Mr Addison submitted that the judge failed to take into account the appellant's mental health at the time of the alleged offending because he concluded that there was insufficient evidence for him to conclude that the appellant had mental health problems. On the contrary, there was ample evidence heard at the trial from the complainant about the appellant's mental health at the time of the alleged offending. There was evidence that he went to a special school separate from his sister, because he had dyslexia. Secondly the complainant said that her brother would harm himself by cutting his arms, he would threaten to commit suicide and that she was made to chaperone him when he went out for periods of time due to their parent's concern for him and his behaviour. The reduction of 25 per cent to take account of the appellant's age and immaturity at the time of the offending was also insufficient.

55. Ms Robinson submitted that the sentence was appropriate. The total sentence of 18 years' imprisonment is not manifestly excessive. The judge was entitled to make the findings that he did about the weapons. As to harm, the judge acknowledged that the complainant had been subject to extreme abuse by others, which must have been a reference in particular to the subsequent serious sexual abuse by her husband. To attempt to apportion psychological damage to different traumatic events which may have occurred during the complainant's life was highly problematic. Ms Robinsons submitted that the judge was correct not to make any reduction for the asserted mental health problems of the appellant. The judge correctly concluded that even if he had the features asserted, he was not in a position to find that they impacted on his culpability.

The appeal against sentence

56. Any sentencing exercise for historic sexual offending involving both a young complainant and youth offender becoming an adult will always be difficult. It is apparent that the judge carefully identified the respective ages and had proper regard to the sentences which might have been imposed if the appellant had been sentenced shortly after the commission of these offences. Count 6 concerned the rape of the complainant on at least five occasions between 30 April 1993 and 1 May 1996. The complainant would have been aged between 13 and 16 years and he aged between 16 and 19. The judge determined that this was category 1A offending for the purposes of the offence specific guideline and that therefore the starting point was 15 years with a category range of 13-19 years. It was common ground that the category was correct.

57. As to the judge's finding about the use of weapons, the judge heard the evidence about the use of the handcuffs and knife at trial, and was sure that one or other was used on at least five occasions of rape under count 6. This was a finding of fact based on the evidence and there is no basis for interfering with it.

58. As to the findings in relation to harm, as we have noted it was common ground that the judge was entitled to find that the complainant had suffered severe psychological harm as a result of the appellant's offending for the purposes of the offence specific guideline, justifying the categorisation found by the judge. That, however, did not mean that the appellant was responsible in law for all of the complainant's severe psychological harm. There was evidence from the complainant and some medical evidence about severe psychological harm caused by her husband, and some evidence about the harm caused by her mother's treatment of the complainant. The law has recognised that psychiatric harm can be apportioned between causes, see *Barber v Somerset* [2002] EWCA Civ 76; [2002] ICR 613 and [2004] UKHL 13; [2004] 1 WLR 1089. It is not entirely clear what the judge meant when he said that the appellant was responsible in law for all of the complainant's harm, but this statement, which was not a fair reflection of all the evidence about the causes of the complainant's severe and continuing psychological harm, must have had an upward effect on the sentence.

59. Finally we turn to mental disorder and immaturity. Count 6 spanned the period when the appellant was aged 16 to 19 years. It is apparent that there was not much medical evidence about the appellant's historical mental health problems, but in a case involving historical offending the difficulty of obtaining such evidence is obvious. As it is, it was common ground that the appellant was at a special school because of dyslexia. We do not consider that the evidence showing that the appellant threatened to commit suicide assists him. This is because the evidence suggests that this was as a reaction to his own offending against his sister and his guilt for that. This is part evidenced by the fact that the appellant and complainant's mother sent the complainant to talk the appellant out of jumping from a window and say that she forgave the appellant.

60. That said, it is apparent that at the time of the offending the appellant was immature, demonstrated by the evidence about his behaviour, his schooling, his concentration only on his own desires and failure to take any account of the complainant's distress. All in all this should have justified a greater reduction for age and immaturity in relation to count 6 than the judge gave. Although the appellant had crossed the threshold of becoming an adult during the course of the offending, it did not mean that he had become any more mature.

61. We consider that, to reflect both the judge's attribution of all of the complainant's severe psychological harm to the appellant, and the appellant's continuing immaturity, a reduction from the sentence of 18 years to 16 years is merited. All of the other concurrent sentences will remain as they are. To this extent, the appeal against sentence succeeds.

Conclusion

62. For the detailed reasons set out above the appeal against conviction is dismissed, and the appeal against sentence is allowed. The sentence on count 6 is reduced from 18 years to 16 years. All other sentences remain as they were and concurrent.