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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

ANTHONY PATRICK DRAKE

CARSWELL LCJ

The appellant Anthony Patrick Drake was convicted at Downpatrick Crown Court on 4 October 2000 after a trial before His Honour Judge Gibson QC and a jury on the two counts in the indictment, the rape of one young girl and an indecent assault upon another. He was sentenced by the judge on 17 November 2000 to concurrent terms of imprisonment of twelve years and two years respectively on these counts. He applied for leave to appeal against conviction and sentence, and the single judge gave leave to appeal against sentence but refused leave to appeal against conviction.

The Crown case was that the offences were committed against two sisters, G, now aged 20 years, and her elder sister D, who is some twelve years older. G's evidence was that when she was aged seven years, at the time of her brother's christening (which would have been about 1989), she went to stay for a couple of days with her aunt in Downpatrick. The day after the christening the appellant, who lived with G's aunt, asked G to go to the shop

with him. On the way he took her into the buildings of a school and down steps into a boiler room. There he pulled down her trousers and pants and had intercourse with her. It was the only occasion on which this took place. G did not tell anyone at the time, as she knew that it was wrong and was afraid of getting into trouble. She told her boyfriend about it around 1997; he wanted to go to the police, but she would not let him. Then in January 2000 she told her sister D about the incident, and D rang the Rape Crisis Centre and contacted the police, to whom G made a statement of complaint.

D's evidence was that when she was ten or eleven years of age (which would place the incident about 1979) the appellant asked her to go with him to a football match in Drumaness. On the way to the match he took her into an alleyway, where he held her close against him, kissed around her neck and face and fondled her breasts and genital region over her clothing. She could feel his erect penis against her. She did not tell anyone about the incident at the time, because she did not want to upset her family. She informed her boyfriend, to whom she is now married, some years later. Then about December 1999 she told her mother about it, following which G told her a short time later about what the appellant had done to her. After thinking it over for some time she decided to inform the Rape Crisis Centre, because of her concern for the welfare of children in the care of her aunt, with whom the appellant was still living.

The appellant entirely denied in his evidence that either of these incidents had ever occurred. He averred that he had never been in any school

grounds with G and that he had never called at her house, let alone committed the rape of which he was accused. He did not take D to any football match, and the entire incident of the assault was untrue. He said that he could think of no reason why they should have made the allegations against him.

Counsel for the appellant (who did not appear in the court below) argued, with the leave of the court, the four new grounds contained in the amended notice of appeal, which differed from those contained in the original notice of appeal:

> "1. The trial and conviction was a nullity because the two counts on the indictment were improperly joined together in breach of Rule 21 of The Crown Court Rules (Northern Ireland) 1979 in that:
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> i. The two offences were not founded on the same facts.
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> ii. The two counts did not form a series of offences of the same or similar character.
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> 2. If the two counts were properly joined in the indictment according to Rule 21, the learned trial judge should have intervened and ordered the indictment to be severed pursuant to Rule 5(3) of The Crown Court Rules (Northern Ireland) 1979 in that the Appellant was prejudiced and embarrassed in his defence by reason of there being more than one offence in the same indictment.
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> 3. If the two counts properly remained on the indictment and were properly left to the jury, the learned judge erred in the manner of his summing up to the jury in that:

i. He did not warn the jury that the evidence of one count was not admissible as evidence against the other.

ii. He did not sufficiently distinguish between the evidence of one count and the other.

iii. He failed to direct the jury that his lies in relation to one allegation could only possibly be evidence to support a conviction relating to that allegation.

4. The learned judge erred in directing the jury on the Appellant's lies in that he failed to give a full and clear direction in accordance with R v Lucas (1981) QB 720.

5. The sentence of 12 years' imprisonment was manifestly excessive in that it did not adequately reflect the Appellant's previous good character."

The first ground was that the two counts were improperly joined together, in breach of Rule 21 of the Crown Court Rules (Northern Ireland) 1979, which provides:

> "21. Charges for any offences may be joined in the same indictment if those charges are founded on the same facts or form or are a part of a series of offences of the same or a similar character."

The effect of misjoinder of disparate offences is that the indictment is invalid, proceedings on that indictment are a nullity and convictions based on it must be quashed: *R v Newland* [1988] QB 402.

Manifestly the two offences charged in the present indictment are not founded upon the same facts, and it is therefore necessary for its validity that

they should be classified as forming a series of offences of the same or a similar character. The House of Lords held in *Ludlow v Metropolitan Police Commissioner* [1971] AC 29 that two offences can constitute a series. To make a series there has to be some nexus between the offences. The rule should not, however, be given an unduly restricted meaning. Lord Pearson, with whom the other members agreed, at page 40 approved a statement of the Court of Appeal in *R v Kray* [1970] 1 QB 125 at 131 that –

> "All that is necessary to satisfy the rule is that the offences should exhibit such similar features as to establish a prima facie case that they can properly and conveniently be tried together."

It is not restricted to cases where the offences are so connected that evidence of one would be admissible on the trial of the other, though that would be a sufficient nexus to justify joinder. Both the law and the facts should be taken into account in determining whether the requisite nexus exists.

Mr Kerr QC for the appellant submitted that there was no sufficient nexus in law or on the facts in the present case, because one offence was rape and the other indecent assault and the incidents complained of had taken place a long time apart. As against that Mr Lavery QC submitted for the Crown that the nexus could be found in the facts that the victims were sisters, the appellant had been in a position of trust towards each of them and had employed a similar *modus operandi* in each case of taking the girl out and inducing her to come with him into a secluded place. We consider that the Crown contention is correct, and that for those reasons there is a sufficient

nexus, even with the separation in time, and the counts were not improperly joined in breach of Rule 21.

The next issue argued was that even if the indictment was not invalid the counts ought to have been severed under section 5(3) of the Indictments Act (Northern Ireland) 1945. It is to be observed that the appellant's counsel did not ask the judge to sever the counts. A trial judge has nevertheless the duty to sever the counts of his own motion if he thinks it necessary in the interests of justice, but Mr Kerr did not go so far as to argue that he should have done so in this case. He did submit, however, that in the absence of severance the conviction was unsafe. It is well established that there are inherent risks in cases involving sexual offences of the jury being prejudiced in considering each count by allegations of misconduct relating to another count: see such cases as *Ludlow v Metropolitan Police Commissioner* [1971] AC 29, *R v Sims* [1946] KB 531 and *Director of Public Prosecutions v Boardman* [1975] AC 421. On the other hand, as the House of Lords held in *R v Christou* [1997] AC 117, it is not an absolute rule that an indictment must be severed where an accused is charged with sexual offences against more than one person, even where the evidence on one count is inadmissible against him on other counts.

Mr Kerr submitted that an application should have been made at trial to sever the indictment, but we can readily suppose, as Mr Lavery suggested, that the experienced counsel then appearing for the appellant deliberately did not ask the judge to do so. They may well have taken the view that the presence of both complaints gave them more material on which to found

the/their defence that the allegations were an invention on the part of the sisters. Be that as it may, we do not consider that if asked to sever the counts the judge would have been bound to accede to the request. In our view it would have been an arguable matter, and it appears to us doubtful now whether we would have set aside his decision if he had refused severance. In these circumstances, where no request for severance was made, we do not regard the conviction as unsafe on that ground.

The third ground of appeal was that the judge had failed to direct the jury that in considering each count they were to take into account only the facts relevant to that count and were to leave out of account the facts relating to the other count. The Crown had not made any application to adduce the facts of one incident as evidence admissible on the other count on the ground that they constituted similar facts, and the judge had not given any ruling to that effect. Mr Kerr accordingly submitted that it was clearly established that the judge had to give the jury a warning to leave them out of their consideration when dealing with the other count.

In support of that proposition counsel cited such cases as *R v Christou* [1997] AC 117, *R v Cannan* (1991) 92 Cr App R 16 and *R v Flack* [1969] 2 All ER 784. Counsel for the Crown did not, however, dispute the proposition that unless the facts were admissible as similar facts a direction to the jury was required. His contention was that the directions given by the judge were sufficient to constitute an implied warning that they had to confine themselves in considering each count to the facts admissible on that count.

Early in his charge, at page 2, the judge stressed to the jury the importance of considering each count. He went on at pages 5-6:

> "The next matter is that there are two counts. You must consider the evidence in relation to each count. A warning was given by Mr Orr, and I agree with it. If, for example, you were to reach a Guilty verdict on say, for example, Count 1 it does not follow that you should automatically bring in a Guilty verdict on Count 2. You must consider the evidence on each count separately."

At page 8 he said:

> "If you are sure about the evidence you have heard from either complainant you can convict and it is your duty to convict the Defendant of the offence or offences with which he is charged."

Mr Lavery submitted that these directions were sufficient to convey to the jury that the evidence on one charge should not be taken into account in considering the other. The appellant's counsel disputed the validity of this implication, pointing out also that in several places in cross-examination of the appellant prosecuting counsel referred to his activities in relation to both complainants without making any distinction between the cases.

We feel constrained to accept the validity of the appellant's case on this issue. However difficult it might have been for most jurors to understand the nature of the subtle mental process involved and put it into effect, the judge was in our view bound to give them the necessary warning and we are not satisfied that what he said in the course of his charge was quite sufficient to satisfy this requirement. Not without hesitation, we feel bound to hold that the conviction is not safe in these circumstances.

This conclusion makes it unnecessary to consider in any detail the fourth ground of appeal, the absence of a *Lucas* direction about the lies attributed to the appellant. It is sufficient to say that if this had been the only ground of appeal we should have been prepared, in the light of the passage contained at page 8 of the judge's charge, to hold that his direction to the jury on this issue was sufficient.

We must hold accordingly that the conviction cannot stand and must be set aside. We shall order a new trial of the appellant on both counts. In these circumstances we do not propose to express any opinion on the length of the sentences.

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