Neutral Citation Number: [2024] EWCA Crim 463

Case No: 202302770 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM ON APPEAL FROM THE CROWN COURT AT READING
HHJ NOTT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 May 2024

Before :

LORD JUSTICE SINGH
MR JUSTICE GOSS
and
THE RECORDER OF SOUTHWARK (HHJ KARU),
sitting as a Judge of the Court of Appeal (Criminal Division)

- -

Between :

REX	**Respondent**
- and -	
EDWARD PRICE	**Appellant**

- -
- -

Matthew Scott (instructed by the **Registrar of Criminal Appeals**) for the **Appellant**
Hannah Squire (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 12 April 2024

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on 3 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh:

Introduction

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

2. This is an appeal against conviction brought with the leave of the Single Judge.

3. On 18 July 2023 in the Crown Court at Reading the appellant was convicted by the jury of indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956 ("the 1956 Act") (Counts 3 and 4, which related to a time when the complainant was aged 15). He was acquitted on Counts 1 and 2 (also allegations of indecent assault but at a time when the complainant was aged 14).

4. On 6 September 2023 the appellant (then aged 78) was sentenced by Her Honour Judge Nott ("the Judge") to concurrent sentences of five years' imprisonment on Count 3 and seven years' imprisonment on Count 4, making a total sentence of seven years.

5. Having been convicted of an offence listed in Schedule 3 to the Sexual Offences Act 2003 ("the 2003 Act"), the appellant was required to comply with the provisions of Part 2 of the Act (Notification to the police) indefinitely. Having been convicted of an offence specified in the Schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009, the appellant will or may be included in the relevant list by the Disclosure and Barring Service.

The Facts

6. At all material times, the complainant, who was born on 20 December 1976, lived with her mother and stepfather (the appellant). In January 1991, when she was 14 years of age, the complainant had an epileptic fit and was taken to hospital, where she remained for many months. Following the complainant's discharge from hospital in September 1991, the appellant slept in the complainant's bedroom with her.

7. In December 1991, the complainant celebrated her 15th birthday. In February and May 1992, the complainant was admitted to hospital for two further short stays.

8. Whilst sharing a bedroom with the complainant, the appellant was alleged to have touched her vagina with his finger (Count 1) and asked her to give him oral sex, which she did (Count 2). The appellant continued to regularly ask the complainant to perform oral sex upon him when she was 15 years of age (Counts 3 and 4).

9. In April 1994 and June 1996, the complainant gave birth to her two sons; the appellant is their father.

10. In November 2017, the complainant contacted the police and said that the appellant had raped her when she was a teenager. The complainant retracted the allegation before confirming, in June 2018, that she wished to pursue the allegation. On 19 July 2018, the appellant was arrested and interviewed in the presence of a solicitor; he declined to answer any questions.

11. The Prosecution case in relation to Counts 3 and 4 was that the appellant invited the complainant to perform oral sex on him when she was 15 years of age; although no threat or force had been used, it was clear that the indecent assault took place quite some time before the complainant's 16th birthday. To prove the case, the Prosecution relied on the evidence of the complainant and the evidence of another witness to whom she had made a complaint.

12. The Defence case was that no sexual activity took place before the complainant was 16 years of age. Moreover, the passage of time since the alleged events made the complainant's memory unreliable. The Defence pointed to inconsistencies in the complainant's evidence. The appellant did not give evidence and called no evidence in his defence.

13. The issue for the jury in relation to Counts 3 and 4 was whether the complainant was under 16 years of age when the appellant asked her to perform oral sex on him.

The indictment

14. As we have said, the relevant counts on the indictment were Counts 3 and 4. Each alleged the offence of indecent assault, contrary to section 14(1) of the 1956 Act.

15. Section 14(1), which was repealed by the Sexual Offences Act 2003 with effect from 1 May 2004, made it an offence for a person "to make an indecent assault on a woman." Section 14(2) provided that a girl under the age of 16 could not give any consent which would prevent an act being an assault for the purposes of that section.

16. Count 3 alleged that the Appellant had, between 21 December 1991 and 21 December 1992, indecently assaulted the complainant, a female person under the age of 16 years. The subject matter of this Count was making her perform oral sex on him.

17. Count 4 alleged that, between the same dates, the Appellant had on at least eleven occasions other than in Count 3, indecently assaulted the complainant, a female person under the age of 16 years. This Count was a multiple incident count and also referred to making her perform oral sex on him.

18. The offence of indecent assault requires proof that there was an assault and that it occurred in indecent circumstances. There was no dispute at trial that, if the assaults occurred, the circumstances were indecent. There was, however, and remains a dispute as to whether what occurred could amount in law to an assault. Since the alleged acts occurred in 1991-1992, the appellant could not have been charged under section 1 of the Indecency with Children Act 1960 ("the 1960 Act"), which did not require an assault, because that section only applied to children under the age of 14.

That section was amended by section 39 of the Criminal Justice and Court Services Act 2000, to increase the age to 16, but only with effect from 11 January 2001.

Directions to the jury

19. The Judge gave the jury written directions of law, including directions on the elements of the offence which the prosecution had to prove. In relation to Counts 3 and 4 she said the following, at paragraph 24:

> "On counts 3 and 4 the prosecution must prove that,
>
> (i) [the complainant] was aged 14
>
> (ii) [the appellant] deliberately penetrated her mouth with his penis.
>
> If you are sure of both those things, your verdict on the count you are considering is guilty, subject to paragraph 26 below; if you are not sure of both those things your verdict is not guilty."

20. In relation to the multiple incident count in Count 4, the Judge gave the following direction, at paragraph 26:

> "Count 4 is a multiple incident count, alleging that [the appellant] penetrated [the complainant's] mouth with his penis on at least eleven occasions. [The complainant] has told you that [the appellant] did this to her many times from the age of 14 or 15 through to her 16th birthday, although she cannot specify exactly how often. She says that to the best of her recollection this activity occurred at least on a weekly basis, but with no pattern – it could be twice a day or twice a week, depending on [the appellant's] wants and needs at the time. Where, as here, the prosecution is not able to say exactly when or how often offences were committed, they may bring a charge which covers more than one incident, as they have in count 4. If you are sure that [the appellant] penetrated [the complainant's] mouth on at least 11 occasions when she was aged 15 – in addition to the occasion alleged in count 3 – your verdict on count 4 will be 'guilty'. If you are not sure that he did, your verdict will be not guilty, even if you are sure that he did so, but on fewer than eleven occasions."

21. In taking the jury through the written directions during her summing up, the Judge gave an oral direction to similar effect, at page 8B-F.

Ruling on Submission of No Case to Answer on Counts 2 to 4

22. On 17 July 2023 the Judge gave a ruling on a submission by the Defence that there was no case to answer on Counts 2 to 4. Counsel for the Defence submitted that there was no case to answer in relation to those counts on the basis that there was no evidence of an "assault." The evidence was that the appellant had "invited" the complainant to "kiss or suck his willy" without any threats or force being used. Defence counsel (Mr Scott) relied on a line of authorities starting with *Fairclough v Whipp* (1951) 35 Cr App R 138.

23. Counsel for the Prosecution (Ms Squire) accepted the line of authority from *Fairclough* but sought to distinguish the instant situation, relying on *R v Brooks* [2021] EWCA Crim 1468.

24. The Judge was satisfied that, despite the appellant asking the complainant if he could penetrate her mouth with his penis before doing so, the act itself constituted an indecent assault. She rejected the application that there was no case to answer and ruled that Counts 2 to 4 would remain before the jury.

25. Counsel for the Defence further submitted that, in relation to Count 4, there was no evidence of oral sex having taken place on at least 11 occasions.

26. The Judge ruled that, whilst it was not abundantly clear how often oral sex took place, the jury would be entitled, based on the complainant's evidence, to conclude that it took place on at least 11 occasions. The evidence was not so weak that it required the Judge to withdraw Count 4 from the jury.

Grounds of Appeal

27. On behalf of the appellant Mr Scott advances two grounds of appeal. He submits that the Judge erred in rejecting the submission of no case to answer for the following reasons:

    (1) The Judge was wrong in law to rule that the appellant had assaulted the complainant by asking her to suck or kiss his penis, and then permitting him to insert it into her mouth.

    (2) In relation to Count 4, the Judge erred in ruling that there was sufficient evidence of at least 11 indecent assaults in addition to that in Count 3.

Ground 1

The appellant's submissions

28. In developing the first ground of appeal, Mr Scott notes that, on the facts of this case, there is no evidence that the appellant ejaculated when the victim performed oral sex on him. The ABE (achieving best evidence) interview is silent on this point. He submits that, as there was no evidence that the appellant ejaculated or moved, there is

no evidence that indicates that he was anything more than passive when his penis was penetrating the mouth of the complainant. Everything that occurred during oral sex was done to him by the complainant. Without ejaculation and any evidence of movement by the appellant, there was no force used by him, however slight. Mr Scott suggests that the situation is analogous to one where a man asks a girl to suck his finger and she does so: in neither case is there an assault by the man on the girl.

29. In support of his submissions Mr Scott relies on a line of authority from *Fairclough*, which has been approved by this Court and which, he submits, is therefore binding on this Court.

The Crown's submissions

30. On behalf of the Crown Ms Squire submits that the fact of the penetration of the complainant's mouth is an assault, and it is without question indecent. The complainant's consent is irrelevant in law because she was under the age of 16: see section 14(2) of the 1956 Act. Ms Squire submits that the evidence is that the appellant was not passive. He asked the victim to perform oral sex and she did. She made clear in her ABE interview that she did not like it. It defies common sense to suggest that, in the circumstances as described by the complainant, the appellant was entirely passive throughout. The mechanics of such an act would be impossible without some active participation by the appellant. Ms Squire submits that it is a matter of common sense that the act of oral sex, the penetration of the complainant's mouth with the appellant's penis, must have required some degree of force, however slight. The act must by its very nature involve some application of force; to argue otherwise does not reflect physiological reality.

Fundamental principles

31. It is important to recall some fundamental principles in this area of law. Although section 14(1) of the 1956 Act refers to "assault", it is well-established that this includes both an assault in the strict sense (which does not require any touching) and a battery or, as it is sometimes put, an assault by beating.

32. The distinction between an assault and a battery was explained by Robert Goff LJ in *Collins v Wilcock* [1984] 1 WLR 1172, at 1177:

> "An assault is an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person; a battery is the actual infliction of unlawful force on another person."

He continued later that, in the case of battery:

> "The fundamental principle … is that every person's body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery."

He cited Holt CJ in *Cole v Turner* (1704) 6 Mod 149 and Blackstone's Commentaries (17th Edition, 1830), volume 3, page 120. He concluded that:

> "The effect is that everybody is protected not only against physical injury but against any form of physical molestation."

33. Robert Goff LJ recognised that a principle so widely drawn must inevitably be subject to exceptions, which he then went on to summarise, for example nobody can complain of the jostling which is inevitable from their presence in a supermarket, an underground station or a busy street. These fall within the general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life, even if it is not necessary to describe these as examples of "implied consent".

34. What is perhaps of more immediate interest is that the Divisional Court rejected the suggestion, which had been made in earlier times, that a battery is only committed where the action is "angry, revengeful, rude, or insolent": see Hawkins' Pleas of the Crown (8th Edition, 1824), volume 1, chapter 15, section 2.

35. The position therefore is that the present case is strictly speaking an example of an alleged battery rather than assault in the non-physical sense.

The main authorities

36. *Fairclough* was an appeal by way of case stated heard by the Divisional Court comprising Lord Goddard CJ, Hilbery J and Slade J. The respondent was not represented at the hearing and Lord Goddard CJ gave an unreserved judgment, with which the other members of the Court agreed. The facts are only briefly set out in the judgment as follows:

> "The respondent was apparently making water by the bank of a river or canal where there were some four young girls varying in age from six to nine. Just as he was making water the girl in question passed him and he, with his person exposed, said to her, 'Touch it', and she did touch it. He then got into his cab and drove off. The question is whether that conduct amounts to an indecent assault."

37. At page 139, Lord Goddard CJ said that:

> "An assault can be committed without there being battery, for instance, by a threatening gesture or a threat to use violence made against a person, but I do not know of any authority that says that, where one person invites another person to touch him, that can amount to an assault."

He also said that the question of whether there had been consent or not only arises if there is something which, without consent, would be an assault on the latter. That is plainly correct as a matter of logic.

38. When Lord Goddard CJ said that there was a need for some hostility, that was because he was focussing on the concept of an assault in the strict sense. He said that a mere invitation to touch the body of the invitor could not amount to an assault in that strict sense.

39. In any event, there is no need for any hostility when it comes to battery. It suffices that there is the least touching. Although some of the authorities speak of the use of force, there need be no use of force in the sense of violence. The slightest use of force which is inherent in touching will suffice. Accidental touching will not constitute a battery but this will be because there is no *mens rea*. The intentional or reckless application of any force, i.e. touching, will constitute a battery.

40. As we have said, the decision in *Fairclough* was a decision of the Divisional Court and would not by itself be binding on this Court. Nevertheless, the Court of Criminal Appeal followed *Fairclough* in *R v Burrows* (1951) 35 Cr App R 180. It was again followed by the Divisional Court in *DPP v Rogers* (1953) 37 Cr App R 137 and, most importantly, was followed and applied by this Court in *R v Dunn* [2015] EWCA Crim 724; [2015] 2 Cr App R 13.

41. *Rogers* was another appeal by way of case stated heard by the Divisional Court, this time comprising Lord Goddard CJ, Parker J and Donovan J. The facts were that the appellant, being alone in the house with his little daughter, put his arm around her and said “come upstairs”. She made no objection or resistance and no force was used on either of the two occasions. On the first occasion, when the child was upstairs, the appellant exposed his person and told her to masturbate him which she did not want to do. The child obeyed the respondent but apparently did not show outwardly any dissent from doing it and at any rate there was no finding that the appellant had forced her to do it. On the second occasion, the child did not wish to accompany the appellant upstairs but nevertheless neither objected nor resisted but submitted to her father’s request.

42. At pages 139-140, Lord Goddard CJ said:

> “Before a man can be found guilty of an indecent assault, it has to be found that he was guilty of an assault, for an indecent assault is an assault accompanied by indecency, and if one could show here that the respondent had done anything towards his child which by any fair use of language could be called compulsion, or acted, as I have said in other cases, in a hostile manner towards her, that is, with a threat or a gesture which could be taken as a threat, or had pulled a reluctant child towards him, that would undoubtedly be an assault, and if it was accompanied by an act of indecency, it would be an indecent assault.”

43. The Divisional Court dismissed the appeal on the ground that the case could not be distinguished from *Fairclough*.

44. In *Dunn* the defendant had asked the complainant, who was a 15-year old girl, to masturbate him, and she had done so. He was charged with an offence of indecent assault, contrary to section 14(1) of the 1956 Act. His appeal was allowed by this Court on the ground that an invitation to another person to touch the invitor could not amount to an assault on the invitee. This Court followed the decision in *Fairclough* and noted that the 1960 Act had been enacted on the very premise that, as the law stood before that Act, there was no indecent assault without some form of threat or show of force to the victim: see paragraph 10 (Laws LJ). The Court described the position as "settled law" ever since *Fairclough* was decided in 1951.

45. It appears from paragraph 11 that Laws LJ was under the impression that the defendant in that case could have been charged under section 1 of the 1960 Act but that cannot have been so, as the acts alleged in that case occurred in the period March 1999-March 2000, at a time when the complainant was aged 15. As we have mentioned above, section 1 of the 1960 Act applied only if a child was under the age of 14 until this was increased to 16 with effect from 11 January 2001. This error may be explicable by the fact that the judgment of Laws LJ (like almost all the judgments in this area) was unreserved.

46. Be that as it may, the parties before us have not questioned the correctness of the decision of this Court in *Dunn*. What divides them is that Mr Scott submits that *Dunn* is indistinguishable from the present case, whereas as Ms Squire submits that it can be distinguished. For reasons that we shall explain, we agree with Ms Squire.

47. The decision of this Court in *Brooks* was a refusal of leave to appeal against conviction on a renewed application. The applicant had sexually abused the complainant in the early 1980s when she was aged between 13 and 15. The abuse included digital penetration of her vagina, the touching of her breasts, masturbation of the applicant by the complainant and the complainant performing oral sex on the applicant to ejaculation. This last activity was the subject matter of Counts 5 and 6. The offences were charged as indecent assaults, contrary to section 14(1) of the 1956 Act. The applicant applied to dismiss Counts 5 and 6 on the ground that the evidence did not allege facts which would amount to an assault. Reliance was placed on the decisions in *Fairclough* and *Rogers*. This Court rejected the argument.

48. At paragraph 9, Popplewell LJ said:

> "An assault by battery is committed by the intentional or reckless application of unlawful force. The act of ejaculation into a person's mouth involves an intentional and voluntary act, which is an act of application of bodily fluid to a part of that person's body. It involves some force being applied to that part of the body with which the ejaculate makes contact by the very fact of that contact. There is no requirement that the force need be substantial. A person who spits on another's face commits an assault notwithstanding that the force applied may be very slight. This is true of the application of any fluid. An assault

> may be committed as much by applying a droplet of water as by using a water cannon. … "

49. At paragraph 11, Popplewell LJ distinguished the case from the facts of *Fairclough*, *Rogers* and *Dunn*, in each of which "there was no such act which involved any application of force by the defendant on the victim." Popplewell LJ continued:

> "In those cases, there was reference in the judgments to an absence of any show or threat of force. This was not because a show or threat of force is necessary for any assault, but rather because an assault may be committed not only by the application of force, but also without any application of force if a person intentionally or recklessly causes another to apprehend personal violence. A show or threat of force would be necessary for an assault to occur where no force was applied or sustained, which was the situation on the facts of those cases. By contrast, in the current case [the complainant] sustained an actual application of force, which is sufficient to amount to an assault by battery if unlawful."

50. Mr Scott submits that what is significant about the reasoning in *Brooks* is that the Court did not simply hold that the act of penetration of the complainant's mouth was enough to constitute a battery; this is why the Court focussed on the fact that there had been ejaculation inside the mouth. In our judgement, this is to read too much into that decision. First, it was not a substantive appeal; it was a renewed application for leave to appeal. Secondly, the judgment was unreserved (as they usually are on applications for leave). Thirdly, and most importantly, the Court dealt with the argument as it was presented to it, no more and no less: that is usually what courts do, as it is often unwise to address issues of law which are not before the court and which may be important in other cases. The decision in *Brooks* should not be read as deciding the issue of law which now arises on this appeal.

51. In *R v J* [2004] UKHL 42; [2005] 1 AC 562 the complainant, a 17-year old girl, alleged that at various times when she was between the ages of 13 and 15, the defendant had consensual sexual intercourse with her. He was indicted on three counts of indecent assault, contrary to section 14(1) of the 1956 Act. He made a pre-trial application for those counts to be stayed as an abuse of process on the ground that the alleged conduct amounted to unlawful sexual intercourse with a girl under 16, contrary to section 6(1) of the 1956 Act, which was subject to a 12-month time limit for prosecution, and it was an abuse of process for the prosecution to circumvent the time limit by bringing charges of indecent assault. The trial judge refused the application and the defendant was subsequently convicted. The Court of Appeal dismissed his appeal but the House of Lords allowed his appeal by a majority (Baroness Hale of Richmond dissenting).

52. The majority held that the clear intention of Parliament that there should be a 12-month time limit for the offence of unlawful sexual intercourse with a girl under 16

could not be circumvented by prosecuting the offence as an indecent assault instead. At paragraph 11, Lord Bingham of Cornhill noted that, after 1956, Parliament had enacted statutes relating to sexual offences in 1960, 1967, 1976, 1985, 1992 and 1993 but it did not abrogate or amend the 12-month time limit enacted in paragraph 10(a) of Schedule 2 to the 1956 Act until the Sexual Offences Act 2003.

53. At paragraph 84, Baroness Hale said:

> "[It might be suggested] that the offence of indecent assault does not include the indecent touching involved in vaginal sexual intercourse. This too is quite untenable. Vaginal sexual intercourse is rarely if ever the sort of passive invitation involved in *Fairclough v Whipp* [1951] 2 All ER 834 and *Director of Public Prosecutions v Rogers* [1953] 1 WLR 1017 which necessitated the Indecency with Children Act 1960. It was decided in *R v McCormack* [1969] 2 QB 442 that a charge of unlawful sexual intercourse necessarily included an allegation of indecent assault; it was also decided in that case that penetration of the vagina with something other than a penis is an indecent assault unless done with valid consent, even if there was no evidence of compulsion or hostility. Penetration of other orifices with a penis is either an indecent assault or buggery. No rational distinction can be drawn between the different sorts of penetration for this purpose. There is nothing in the words 'indecently assaults' to suggest that it should be."

54. The decision of this Court in *McCormack*, to which Baroness Hale referred in that passage, was given by Fenton Atkinson LJ. At page 445, he distinguished the decisions in *Fairclough* and *Rogers*, summarising them as:

> "cases which have shown that where the accused adult invites a child, for example to touch his private parts, but exercises no sort of compulsion and there is no hostile act, the charge of indecent assault is not appropriate. But, in our view, that line of authorities has no application here, and, in the view of the members of this Court, it is plain beyond argument that, if a man inserts a finger into the vagina of a girl under 16, that is an indecent assault, in view of her age, and it is an indecent assault however willing and co-operative she may in fact be."

55. In our judgement, the decision of this Court in *McCormack* and the dicta of Baroness Hale in *R v J* support the approach that was taken by the Judge in the present case.

Conclusion on the first ground of appeal

56. The decision and reasoning in *Fairclough* have been subjected to academic criticism: see C Sjolin, 'The need to kill off zombie law: indecent assault, where it went wrong and how to put it right' (2017) 81 J Crim L 50. But this is not the time or place to consider whether it should be overruled. It was recently approved by this Court in *Dunn*. It was not submitted to us that that line of authority was wrongly decided. Nevertheless, we have reached the conclusion that that line of authority is distinguishable from the present case.

57. This is because that line of authority was concerned with touching of the defendant by the complainant and not with penetration by the defendant of any orifice of the complainant. In contrast, the present case concerns the penetration by the appellant of an orifice, namely the complainant's mouth.

58. Furthermore, this conclusion seems to us to accord with common sense. The outcome is both just and workable. It is important that the law in this area should be stated with reasonable clarity and certainty because it needs to be administered not only by judges at first instance, who have to give directions to juries which are workable in practice, but also has to be applied by juries and, before a case ever gets to trial, by police officers and others on the ground when dealing with both victims of crime and those accused of crime.

59. In our judgement, Mr Scott's suggested analogy with a person sucking another's finger at their invitation is not a good one. The reality of penetration of a person's mouth with the penis is materially different. We agree with the Judge that the suggestion that all that happened in this case was the "envelopment" by the complainant of the appellant's penis rather than penetration of her mouth by the defendant's penis, was "dancing on the head of a pin": see the Ruling of 17 July 2023, pages 9H-10A.

60. In any event, the Judge gave both written and oral directions of law to the jury that they had to be sure that the appellant had "deliberately penetrated" the complainant's mouth before they could convict on Counts 3 and 4. The jury were sure of that, as is clear from their verdicts.

61. Accordingly, we reject the first ground of appeal.

<u>Ground 2</u>

62. The second ground of appeal relates only to Count 4 on the indictment. Essentially it raises a complaint that the Judge should have stopped Count 4 going before the jury because, if properly directed, a jury could not convict the appellant on the evidence before it.

63. The classic authority on submissions of no case to answer is *R v Galbraith* [1981] 1 WLR 1039, where Lord Lane CJ said, at 1042:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has

> been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.
>
> There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

64. In our judgement, the issue raised by Count 4 was one of fact which was for the jury to determine and not the Judge. The Count was carefully drafted so that it did not require proof that the appellant had acted as alleged every day, every week or even necessarily every month. The Prosecution contended that, over a 12-month period from December 1991 to December 1992, the appellant had engaged in the conduct alleged on at least 11 occasions. That was clearly intended to be an average of at least once a month but it did not require the jury to be sure of anything more than that the appellant had done the acts complained of on at least 11 occasions in that 12-month period.

65. Furthermore, the Judge was careful in her summing up, in particular at pages 8-9, to stress to the jury that they must not convict the appellant on Count 4 if they were not sure of at least that number of occasions, for example if he had done the act complained on eight or nine occasions.

66. We have set out above how Ground 2 was formulated and that is what the Appellant has had leave to appeal about under this ground. At the hearing before us, Mr Scott also sought to develop Ground 2 by making a distinct criticism of page 8 of the summing up. In particular, Mr Scott complained that the Judge had not accurately summarised the Complainant's evidence in her ABE interview to the jury on this matter. Even if that argument were open to Mr Scott in this appeal, we are not persuaded by it.

67. At page 8E-F of the summing up, the Judge told the jury that the prosecution framed Count 4 on the basis that the complainant had told the jury that the appellant did this to her many times, although she could not specify exactly how often. "She says that to the best of her recollection this activity occurred, at least, on a weekly basis, but

with no pattern." Mr Scott submits that there was no evidence before the jury that oral sex had taken place on at least a weekly basis.

68. Returning to the summing up, the Judge continued that the complainant said that it could have been twice a day, or twice a week, depending on the appellant's wants and needs at the time. The Judge directed the jury that:

> "If you are sure that [the appellant] penetrated [the complainant's] mouth on at least 11 occasions, when she was aged 15, in addition to that specific occasion alleged in Count 3, then your verdict on Count 4 will be guilty."

But the Judge made it clear that, if they were not sure that he did on at least 11 occasions in the relevant time period, their verdict had to be not guilty. In particular she said:

> "You have to be sure that it happened, and that it happened, at least, on a monthly basis, when she was 15."

69. There are two answers to Mr Scott's criticism of page 8 of the summing up. The first is that, when that passage in the summing up is read fairly and as a whole, the Judge made it clear to the jury that they had to be sure that the indecent assaults alleged in Count 4 had happened at least on a monthly basis. The earlier summary of the complainant's evidence that she had said that the activity occurred at least on a weekly basis was not part of the direction given to the jury as to what they had to be sure about.

70. Secondly, and in any event, we do not accept that that was an inaccurate summary of the ABE evidence of the complainant. It was not an unreasonable way of summarising the evidence which the jury had heard at length. At K121 in the Digital Case Summary, the complainant could not say when the first time oral sex happened but it would happen "as often as he felt like it". At K89 her evidence was, after she returned home from a serious operation at hospital, "he would ask me to dress up in certain clothes, perform oral sex before normal sex …" At K90 she said "… and before I knew it, daily things was happening of sex". At K125 she said that the frequency of sex was sometimes a couple of times a day, at other times it might be a couple of times a week. It was reasonably open to the Judge to summarise that evidence in the way that she did.

71. Accordingly, we also reject the second ground of appeal.

<u>Conclusion</u>

72. For the reasons we have given this appeal is dismissed.