

ENGLAND AND WALES / JUDGMENT

R v APZ

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[2025] EWCA Crim 152 Royal Courts of Justice Strand London WC2A 2LL Thursday 23 January 2025 Before: LORD JUSTICE JEREMY BAKER MRS JUSTICE STACEY RECORDER OF CARDIFF (Her Honour Judge Tracey Lloyd-Clarke) REGINA v APZ (1992 Sexual Offences Act applies)

Computer Aided Transcript of Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MS JACQUELINE CAREY KC appeared on behalf of the Applicant

J U D G M E N T MRS JUSTICE STACEY:

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

2. On 14 October 2022 in the Crown Court at Woolwich, the applicant (who was then aged 53) was convicted by a majority of 10 to 1 of the oral rape of his second son (a child under the age of 13) between March 2012 and March 2014 (counts 1 and 2) ("Complainant 1"). The jury were unable to reach a verdict in respect of count 3, an allegation of oral rape of Complainant 2, the applicant's youngest son (a child also under the age of 13) between the same dates. The Crown withdrew its request for a retrial and a not guilty verdict was entered after the prosecution offered no evidence against the applicant on count 3.
3. On 18 November 2022 the applicant was sentenced to a Special Custodial Sentence of 14 years, comprising a custodial term of 13 years' imprisonment and an Extended Licence of 1 year, with all the usual ancillary orders.
4. He renews his application for an extension of time of 375 days and for leave to appeal against conviction following refusal by the single judge. The facts
5. The applicant and his wife had three sons - Child A born in 1999; Child B, who is Complainant 1 who was born in 2009; and Child C, Complainant 2 who was born in 2010. They separated from each other in 2014 and the applicant did not see C1 and C2 for many years. On a family visit to Scotland in 2019 by the applicant's wife, C1 and C2, C1 disclosed to his mother that when he was much younger the applicant had put his "private parts" into his mouth. The mother reported the matter to the police, and at an achieving best evidence (ABE) interview on 21 December 2019 at their home when he was then aged 10, C1 described how, when he was around 4 years old in their home in Gravesend, his father orally penetrated him. He described his father's penis as being 'hard' and he would take it in and out of his mouth until he ejaculated and C1 would then spit out the ejaculate into the sink. He explained that it was watery and tasted salty. He said it happened three to four times. No one witnessed it and he told no one about it. These formed counts 1 and 2 on the indictment, with count 2 framed as a specimen offence.
6. The ABE interview was relied on at trial and in pre-recorded cross-examination C1 said that his mother did not tell him what to say in the ABE interview and he did not talk to her about it afterwards. He did not remember telling anyone else about it when he was around 5 years old. He did not witness the same thing happening to his brother, C2, and his brother did not see it happening to him. It had been agreed at the ground rules hearing that it should not be put directly of C1 that what he had alleged happened did not occur.
7. C2 was present when C1 told his mother about the abuse in Scotland and told her that the same thing had happened to him. He also gave an ABE interview on 21 December 2019 when he was aged 9, in which he said that his father had put tweezers up his bottom and put his penis into his mouth. His cross-examination was also pre-recorded under the section 28 procedure two years later on, on 13 December 2021. In cross-examination he said that no one had told him what to say; he had not heard C1 talking about what had happened to him, and the first person he told what his father had done to him was his mother.

8. The applicant's defence was denial: he did not commit any of the offences. The allegations were fabricated by the complainant's mother and she had coached her two youngest sons to repeat false fabrications. If there was any abuse of the boys, which the applicant could not say whether or not had occurred, it was perpetrated by the complainant's mother's boyfriend, referred to by the boys as "Uncle Charles", who the applicant said had had regular contact with the boys and about whom the youngest child, C2, had made an allegation in 2016 which was not proceeded with. The applicant said that in 2019 the complainant's mother had manipulated the boys to say he had abused them to assist her in financial remedy proceedings against him that were ongoing in the Family Court.
9. The complainant's mother was cross-examined at trial. She denied having coached her sons and manipulated them into making false allegations against their father.
10. The proposed ground of appeal is that the convictions were unsafe since, in the context of there being no corroborating evidence whatsoever, matters were put and evidence adduced at trial which resulted in the defence case being misrepresented and the jury hearing irrelevant and/or prejudicial material adverse to the applicant that rendered the convictions unsafe. Criticism was made of trial counsel. Privilege was waived by the applicant, trial counsel and her solicitor's comments were obtained and supporting documents provided by them.
11. There were five evidential matters relied on in support of the grounds of appeal:
 - (1) The admission of the applicant's caution for domestic abuse against the complainant's mother in 2004;
 - (2) The cross-examination of C1 was said to have overstated and misrepresented the applicant's case;
 - (3) The cross-examination of the complainant's mother was said to have been flawed;
 - (4) The treatment of the evidence of complaints made by the boys in 2016 was criticised; and finally,
 - (5) the treatment of the evidence relating to the person referred to as 'Uncle Charles' whom it was suggested could have been the perpetrator of any abuse, if indeed any had taken place. Items (1) - (4) above were matters of judgment by trial counsel in consultation with her client and thus amount to an allegation of alleged incompetence by trial counsel. The fifth matter is similarly framed, although the position is more complicated. It was the trial judge who prohibited cross-examination about 'Uncle Charles' in the complainants' mother's cross-examination and ruled against defence trial counsel. The grounds of appeal, however, do not seek to criticise any of the judge's rulings or his legal directions or the accuracy and fairness of his summing-up.

12. Item (1). It was the applicant who wished for the jury to know about his caution for domestic violence against the complainants' mother, and in doing so he went against both his counsel and his solicitor's firm advice not to disclose it. His counsel was sufficiently concerned about the matter to discuss it with the Ethics Department of the Bar Council, who advised that, since she had firmly warned her client of the risks of disclosing the caution and he had refused to take her advice for fear that the jury would imagine his bad character was worse than it was, she should follow her client's instructions. If it was a grave error to admit it, as submitted by Ms Carey, it was an error entirely of the applicant's own making. Having followed her client's instructions against her advice, on express further instruction from her client, trial counsel for defence sought to present the complainant's mother as having exaggerated her injuries from the assault in 2004 and manipulated her children by telling them that their father used a knife on her. Those questions were on instruction from her client were also against her advice about admitting the caution.
13. Item (2). The cross-examination of C1 was pre-recorded and conducted in advance of the trial. The applicant was very proactive in the preparation for his trial and approved the questions to be put to the complainants and was present at the section 28 cross-examination and at the time was pleased with the questions asked and answers given by C1.
14. The criticism made today is not borne out by the transcript of the cross-examination of C1. It was agreed at the ground rules hearing on the advice of the intermediary that it should not be put to C1 that the events did not happen, in order to minimise the risk of him closing down completely and refusing to answer questions, as is clearly noted and agreed at the ground rules hearing in the transcript.
15. Items (3) and (4) overlap. In 2016 the complainant's mother reported to the police that C1 and C2 had disclosed to her that their father made them kiss his private parts, but when the police and social workers interviewed the children at home, they did not repeat the allegations. However, a week later, C1 told a social worker on a home visit that his father had been horrible to him and to his mother and had assaulted her, and that he had picked black stuff out of his bottom with tweezers.
16. The complainant's mother was not asked about it at the trial by the applicant's counsel or by the prosecution. The evidence was double edged and it was a judgment call for counsel as to whether or not it would likely do more harm than good to the applicant's defence.
17. The applicant had volunteered in his evidence and in his police interview that in 2006 social workers were involved with his eldest child and that there had been allegations of a sexual nature. His trial counsel would be entitled to conclude that, as a matter of tactics, it would be best not to be dwelt on, so as not to draw attention to it. It is hard to see how his counsel can be criticised for not drawing the jury's attention to it.
18. As part of his defence strategy to portray his wife as a problem drinker and unreliable witness, the complainant's mother was cross-examined about her allegation that her husband had forced her to drink alcohol. These questions were in accordance with the

applicant's specific instructions. Other topics were introduced with the same purpose. The fact that the jury may have concluded that it bolstered the applicant's wife credibility more than it supported him, was a risk the applicant took and one he was warned about when he instructed counsel to ask those questions against her advice. Counsel was also entitled to consider that the matters raised in the evidence of the children should be put to the mother to avoid criticism for not challenging issues raised in the evidence of others.

19. A further criticism is made of the evidence from the eldest son, Child A, and trial counsel's treatment of his examination-in-chief. Trial counsel has explained that he had not come up to proof. In an unexpected turn of events, Child A's evidence-in-chief was not that his mother had implanted false memories in him as per his proof of evidence, but that it was his father's solicitor who had put that in his statement, which he had then signed. It was therefore his father's solicitor who had said that the mother had implanted a false memory but that he, Child A, had no recollection of his mother having done so. After this evidence was given, trial counsel was understandably wary of asking more questions of Child A that risked undermining his father's defence still further.
20. It therefore follows that we do not agree with the submission that the applicant was failed by his counsel or that the allegations of incompetence are justified. The decisions were reasonably made in the circumstances, on the basis of the very clear instructions given by the applicant to his counsel and were a matter for his counsel's judgment.
21. Item (5). As to the criticism about the evidence of 'Uncle Charles', it is necessary to set out a little of the background. In 2016 at a play therapy session following concerns raised about C2's sexualised behaviour at his primary school, C2 made a number of troubling comments and referred to being "naked" and the touching of private parts by or of 'Uncle Charles'. When asked directly he withdrew into himself and denied that he touched 'Uncle Charles's' private parts. Social workers made some enquiries to identify who 'Uncle Charles' might be. A possible candidate was the complainant's mother's partner whose first name was Charles, but he was not considered to be a suspect.
22. In her comments in response to the appeal, trial counsel explained that at the ground rules hearing the judge had ruled that cross-examination about C2's disclosure would be allowed, but despite defence counsel's best efforts, prosecuting counsel would not agree a fact about the complaint to go before the jury, nor would he agree a chronology of disclosures. During the trial the judge changed his position on the admissibility of the 'Uncle Charles' complaint on the basis that it was hearsay evidence. The applicant's trial counsel applied for the evidence to be admitted, but the judge ruled against her and would not permit cross-examination of the complainant's mother to continue along those lines. It is clear from the transcript that trial counsel fought hard to allow the cross-examination to be put, but the judge prevailed. Counsel then diligently took steps to trace the social worker to whom the comments had been made and the Crown also sought to track down the police officer; but the officer had retired and could not be found and the social worker failed to answer emails and phone calls.

23. The judge also decided that the allegations against 'Uncle Charles' were of interference with C2's anus whereas the allegation against the applicant was of oral rape. As well as being inadmissible because they were hearsay, the allegations had little relevance as they were sufficiently different for the allegations against 'Uncle Charles', the judge concluded.
24. There is no challenge by the applicant to the judge's ruling as it does not form part of the grounds of appeal nor does not amount to an allegation of a failure of advocacy by trial counsel.
25. Overall even if another advocate might have approached some evidential matters differently, the applicant has not shown that the decisions under challenge led to identifiable errors or irregularities at the trial that led to unsafe convictions.
26. Fundamentally this was a case where the question for the jury was whether they could be sure of each of the complainant's accounts against the applicant's denials. The jury heard about the possible motive their mother might have for manipulating the boys into giving a false account in order to benefit her in her financial remedy proceedings or because of the falling out between the two parents. That could include perhaps revenge for the assault that occurred in 2004, which resulted in the caution. That may have been part of the applicant's reason to inform the judge of his caution.
27. The judge heard the applicant's evidence criticising his ex-wife - that she exaggerated, had made things up and had an alcohol problem and a motive. The jury also had the evidence of the oldest boy that did not support his father's assertion that his son's mother was controlling the two complainants' account and the eldest son made no allegations of abuse by his father. But it was for the jury to assess the credibility of the competing accounts given in accordance with the directions given to them by the judge, whose legal directions and summing-up are not criticised.
28. The jury was discerning. It distinguished between the counts against each of the two complainants. It was only C2 and not C1 who had at one point suggested sexual abuse by 'Uncle Charles', which may well explain why the jury was unable to reach a verdict in relation to count 3 which concerned C2 and could not be sure that the applicant had committed an alleged offence against C2. The point is reinforced by the jury question on the timing of when the complainant's mother was in a relationship with 'Uncle Charles'. The jury therefore had the point that there may have been another abuser of C2 and any ambiguity about the 'Uncle Charles' person that the jury might have had was therefore resolved in the applicant's favour.
29. We also note in passing that it seemed surprising that it was only after the jury had started its deliberations that the applicant first considered that 'Uncle Charles' may have been a reference to his former brother-in-law, whose first name was also Charles, rather than the complainant's mother's partner in the West Country, but by then it was too late to introduce new evidence.

30. The delay in seeking leave to appeal was explained by it taking four months to change his legal representation whilst he was in prison, the work needed to be done by his new legal team in reviewing all the evidence and obtaining relevant transcripts, whilst also preparing for the retrial on count 3 that the Crown had requested. Preparation for the retrial included obtaining further evidence. It was decided to await the outcome of the retrial before finalising the grounds of appeal and it was only on 24 October 2023 that the prosecution offered no evidence on count 3 and a not guilty verdict was entered. The Form NG was lodged one month later on 23 November 2023, twelve months out of time.
31. The explanation for the length of the delay in seeking leave to appeal does not amount to a sufficient reason to justify such a lengthy extension of time that will be required. But in any event since we find that it is not reasonably arguable that the conviction was unsafe, it is not in the interests of justice to extend time to bring the application for leave to appeal.
32. For the above reasons, the applications are refused. Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof. Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE Tel No: 020 7404 1400 Email: Rcj@epiqglobal.co.uk

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