Neutral Citation Number: [2011] EWCA Crim 1608

Case No: 2011/00281/C1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
HIS HONOUR JUDGE ROOK QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2011

Before :

LORD JUSTICE THOMAS
MRS JUSTICE DOBBS
and
RECORDER OF REDBRIDGE - HIS HONOUR JUDGE RADFORD

- -

Between :

Regina	**Respondent**
- and -	
Christopher Killick	**Appellant**

- -
- -

Mr Anthony Arlidge QC and **Ms T J Mylvaganam** for the **Appellant**
Miss Johannah Cutts QC and **Miss E Smaller** for the **Respondent**

Hearing date: 31 March 2011

- -

Judgment

Lord Justice Thomas:

Introduction

1. In February 2006 Mr Andrew Hardy and Mr Bill Robins, who both suffer from cerebral palsy, complained to the police of sexual assaults made upon them by the appellant; Mr Robins alleged the assault occurred in 2005 and Mr Hardy alleged he had been anally raped in 1996. They had received the assistance of an employee of the Greenwich Association for Disabled People, Mr Bowater. Mr Bowater was told by Mr Hardy that another man had also been subjected to sexual assault by the appellant; Mr Bowater saw that person, Mr Peter Edwards. A little later in February 2006 a complaint of non-consensual buggery of Mr Edwards by the appellant in the early 1990s was then also reported to the police.

2. Each of the complainants was interviewed by means of an ABE interview in early March 2006. Cerebral palsy had not affected their mental capacity; each was severely physically disabled and used a wheel chair; none could move or communicate with ease; Mr Edwards communicated through his personal assistant who interpreted what he said in a more audible way; Mr Hardy communicated through an electronic speech machine and body language; Mr Robins communicated by use of a personalised book or BLISS symbols. It was the case of each that the appellant knew of his disabilities and had exploited these to force his unwanted sexual attentions on him.

3. The appellant also suffers from cerebral palsy, though to an extent that is accepted to be considerably less than that of the complainants. An issue related to the extent of his disability which we consider further at paragraph 65. He was arrested and interviewed on 3 April 2006. He provided a prepared statement in place of answering the questions. He denied any form of sexual activity with Mr Edwards or Mr Robins; he accepted that he had had anal intercourse with Mr Hardy but said it was consensual.

4. Although the arrest followed within a relatively short period of the making of the complaints, the decision on whether to prosecute was not made until June 2007, a year later, when the CPS decided that the appellant should not be prosecuted. A complaint was then made about that decision which resulted in a review; the decision to prosecute was not made until 9 December 2009, 3½ years after the arrest. In the meantime, the appellant had been told he would not be prosecuted. He was informed of the decision to prosecute when he was summonsed to appear at the Magistrates Court on 22 February 2010.

5. The case was sent to the Central Criminal Court in September 2010. His Honour Judge Rook QC heard an application by Mr Arlidge QC for the appellant that the proceedings should be stayed for abuse of process. It lasted 3 days. In a careful and detailed written ruling, he dismissed the application. The trial commenced in November 2010. After the prosecution evidence had been heard, the judge affirmed his decision and also held that there was a case to answer. The appellant did not give evidence.

6. The jury retired to consider its verdict on Thursday, 16 December 2010. On Tuesday, 23 December 2010, the jury convicted the appellant by majority of:

i) buggery of Mr Edwards without his consent between 1 January 1991 and 1 January 1993, contrary to s.12(1) of the Sexual Offences Act 1956;

ii) sexual assault on Mr Robins in April 2005.

The jury acquitted him of the anal rape of Mr Hardy in November 1996.

7. The appellant was sentenced on 28 January 2011 to three years imprisonment for the offence of non-consensual buggery with a concurrent sentence of six months imprisonment for the sexual assault.

8. His application for leave to appeal against conviction was referred to the Full Court. It gave rise to three issues.

i) Whether the judge's decision to allow the matter to proceed and to dismiss the application for a stay for abuse of process was wrong.

ii) Whether fresh evidence should be admitted under s.23 of the Criminal Appeal Act 1968;

iii) Whether the conviction was unsafe in all the circumstances.

9. We will consider each issue in turn, but it is necessary first to explain the factual background and the respective cases of the Crown and the appellant.

(i) The complainants' knowledge of each other

10. The complainants are all of similar age to the appellant who was born in 1963. Mr Edwards was born in 1963, Mr Hardy in 1964 and Mr Robins in 1968. The complainants had known one another since they attended a school for the disabled. Mr Edwards and Mr Robins each described Mr Hardy as their best friend. All three were determined to live independently; with the help of the Greenwich Association for Disabled People they were all able to do so, though each had an assistant who lived with him.

(ii) The complaint of Mr Edwards and the appellant's case

11. Mr Edwards lived in south east London and met the appellant through Mr Hardy. It was his evidence that the appellant came to visit him at his flat. They knew they were both gay and had engaged in sexual game play. On one occasion in the early 1990s, when they were alone the appellant had anal intercourse without his consent. In his account to the jury he said that the appellant had kissed him and he had kissed him back; he had consented to that. The appellant had asked if they could go to his bedroom. Mr Edwards said "no" on several occasions. The appellant then tried to push him in his wheelchair into the bedroom, but he dug his feet into the ground to stop it. The appellant nevertheless forced Mr Edwards into the bedroom, pushed him onto the bed, took his clothes off, despite his resistance, and then took his own clothes off. The appellant then fondled his penis and testicles; he had not ejaculated. The appellant then turned him on to his back and had anal intercourse with him. In his statement to the police Mr Edwards gave a different account; he had said that, after the appellant had kissed him, the appellant then suggested that they go into the bedroom; Mr Edwards agreed, thinking that they might kiss again. The appellant then

masturbated Mr Edwards and himself to ejaculation. He had felt guilty because he ejaculated. The appellant had then gone further and had anal intercourse. When these different accounts had been put before the jury, he said that the correct version was that given to the police. He had not told anyone then as the appellant had said he would kill him if he did. It was his evidence that he told others later; evidence was called to support that. We consider that at paragraphs 71 and 83.

12. The appellant's case at trial was that there had been consensual kissing and masturbation of Mr Edwards but there had been no anal intercourse; in his prepared statement made in April 2006, he had denied any sexual activity with Mr Edwards.

(iii) The complaint of Mr Hardy and the appellant's case

13. Mr Hardy met the appellant in the mid-1980s when Mr Hardy lived at a home for the disabled, Good Neighbours House in Camberwell, and the appellant lived nearby. In 1990 the appellant moved to live in East Anglia; Mr Hardy visited him there.

14. On 29 November 1998 the appellant came to stay with Mr Hardy whilst he was attending a conference in London. Mr Hardy went to bed. A little later, the appellant came to his room and asked him if he wanted sex. His evidence was that, as the machine through which he communicated was switched off, he had used his eyes to indicate that he did not want sex. However the appellant got into his bed, kissed and fondled him and then had anal intercourse. It was his evidence that immediately the rape was over, he alerted his personal assistant, Edwin Mahinda, who came in and saw the appellant naked in his bed. They gave differing accounts of the state in which the appellant was when he entered. The police were called, though a complaint was only made of a common assault on Mr Mahinda which Mr Mahinda agreed he had embellished; Mr Hardy's explanation for not telling the police of the anal rape at that time was that he was stressed, afraid and he did not want his mother to know. Although Mr Hardy subsequently told the police he had never had anal sex before with the appellant, his evidence was that the sexual relationship he had enjoyed with the appellant was for several years up to 1990.

15. It was the appellant's case that he had had a consensual sexual relationship with Mr Hardy; however there was no intercourse on the occasion in 1998. His case was that, when they had consensual intercourse, he had been the passive party as he always was when engaging in anal intercourse; he said this was supported by MSN and Yahoo messages exchanged between Mr Hardy and the appellant in 2005 in which Mr Hardy had said, "I liked penis, your bottom" and the appellant had replied, "My bottom is very nice as you may know far too well".

(iii) The complaint of Mr Robins and the case of the appellant

16. Mr Robins met the appellant in 2005. His evidence was that the appellant had visited him at his flat in Crayford one day in April 2005. When his assistant, Miss Webberson, was away, the appellant started to talk about sex; he tried to kiss Mr Robins and put his hand on Mr Robins' penis over his clothes and had other contact. Mr Robins said he could see that the appellant was aroused. He said nothing when Miss Webberson returned as he was too embarrassed to complain. When Mr Robins went to bed that night, the appellant was given his assistant's room to sleep in and his assistant slept downstairs. In the night the appellant came into Mr Robins' room, put

his hand over his mouth, then took it off and tried to climb onto the bed but did not succeed. Mr Robins cried out and Miss Webberson came up, but by then the appellant had left. Miss Webberson said that she had found the appellant on two occasions in Mr Robins' room. On the first occasion she saw nothing to indicate that anything untoward had happened; on the second occasion she heard the appellant going to the toilet. Mr Robins had said nothing about the incident in the night, but complained the following morning. He told Mr Hardy of this later in 2005. Mr Robins said that it was his idea subsequently to go to the police.

17. The appellant's case was that no sexual contact at all had occurred with Mr Robins.

Issue 1: Should the proceedings have been stayed for abuse of process?

18. The application made for a stay on grounds of abuse of process was advanced on two distinct bases:

    i) An unequivocal representation had been made to the appellant on 27 June 2007 that the matter would be discontinued. Another similar representation was made in May 2009. In all the circumstances, particularly having regard to the age of the complaint made by Mr Edwards, it would be an abuse of process to allow the prosecution to proceed.

    ii) Given all the delay from the time two of the offences had allegedly taken place in the 1990s and what had happened, a fair trial was not possible. It was therefore an abuse of process to allow the matter to proceed.

19. We grant leave to appeal on this issue. We will consider the first basis after setting out what happened between the appellant's arrest in April 2006 and his first court appearance in February 2010.

(i) The representations made to the appellant

(a) The decision not to prosecute in June 2007

20. Although Mr Philip Fernandez, the Borough Crown Prosecutor, received the file from the police in May 2006, it was not until 25 October 2006 that he reached a decision; some of the delay was attributable to a request to the police to obtain further evidence. He decided against charging the appellant on grounds that there was no realistic prospect of conviction. The decision of Mr Philip Fernandez was approved by Ms Judith Reed, the District Crown Prosecutor for South East London. At the request of the police made in May 2007, that decision was then reviewed by Mr Simon Clements, then Sector Director of the CPS for South London with overall responsibility for 10 London boroughs. On 21 June 2007 he concluded that he was satisfied that Mr Fernandez had approached the evidential test correctly; he did not see on the papers any grounds to interfere with the decision. In a statement prepared for civil proceedings brought by the complainants, he made clear that he was unaware of any formal CPS guidance for undertaking a review of the file and had approached the matter on the basis of a test for judicial review, namely whether the decision was a reasonable decision for the lawyer to make.

21. Although the appellant's solicitors had pressed on occasions for a decision, nothing was communicated to the appellant until an e-mail on 27 June 2007 which a detective constable sent to the appellant's solicitors. It said:

> "I am writing to inform you that following a further review by the CPS of the allegations against you, they have decided that the matter will now be discontinued. Your bail has now been cancelled accordingly. I thank you for your patience and co-operation throughout this investigation."

22. At the time the e-mail was sent on 27 June 2007, it was the usual practice of the CPS to enclose with the letter informing a defendant that proceedings would not be taken some form of qualification about the effect of that decision: the terms of the type of letter usually sent are set out in the judgment of Phillips LJ in *R v Burk* (12 December 1996, CO/2286/96, unreported). As no communication was made by the CPS but rather by the police, nothing was said in relation to the possibility of the matter being reviewed. However, as we discuss at paragraph 44 below, the appellant's solicitor must be taken to have been aware of the various rights of review.

(b) The first review under the CPS "complaint" process: 2007-2009

23. When the decision not to proceed was communicated to the complainants, they sought advice from solicitors, Fisher Meredith. In August 2007, Fisher Meredith sought a review by making a complaint to the CPS in accordance with the CPS complaints procedure, as the CPS deal with requests for a review as a "complaint", which their process manual described as:

> "any expression of dissatisfaction about any aspect of service provided by the Crown Prosecution Service."

The complaints process had three tiers.

24. The provision of the manual in relation to decisions not to prosecute treated a request for the review of the decision not to prosecute in a manner very similar to other "complaints":

> "Where the complaint relates to the decision not to prosecute and a time limit applies to any of the offences under consideration, the complaint should be fast tracked through the complaints procedure so that the deadline for bringing a prosecution is not missed. If the complainant remains unhappy with the reply sent in accordance with the first tier, the relevant Chief Crown Prosecutor/Headquarters Director should review all the available evidence. If they are content that the correct decision was made, they should submit a report, along with the case papers and all the correspondence to the Correspondence Unit, who will arrange for the matter to be referred to a senior member of the staff (for example a Chief Crown Prosecutor/Sector Director in London/Headquarters Director/ Senior Civil Servant) immediately."

25. In addition to these provisions of the manual, the Code of Practice for Victims of Crime (October 2005) also made clear that victims were "eligible for an enhanced service" which included being informed of charging decisions, providing reasons where there was considered to be insufficient evidence to prosecute and offering to meet victims of sexual offences where a decision not to proceed was made.

26. Internal CPS Guidance on judicial review of prosecutorial decisions made clear that where a decision not to prosecute was challenged and likely to be the subject of judicial review:

> "the decision should be re-reviewed. Where on a re-review, it is decided that the original decision was wrong, immediate action should be taken (if possible) to rectify the decision."

27. Fisher Meredith also advised the complainants that there should be an application for judicial review of the decision not to prosecute and sent a pre-action protocol letter to the CPS on 27 August 2007; the letter set out the grounds for contending that the decision was unreasonable, in breach of the Code of Practice for Victims of Crime and contrary to the provisions of the Disability Discrimination Acts 1995 and 2005. In addition in early 2008 Fisher Meredith issued proceedings against the CPS under the Disability Discrimination Acts on the basis that the CPS's decision not to prosecute discriminated against the complainants by reason of their disability.

28. The "complaint" by Fisher Meredith led to a decision to conduct a completely fresh review of the case by one of the CPS Special Casework Lawyers; it was not concluded until nearly two years later in July 2009. It appears that the delay occurred in part because the CPS sought the advice of an independent QC experienced in the prosecution of sexual offences, Miss Sally Howes QC. In a very detailed written advice, she advised in November 2008 that the CPS reviewing lawyers had approached the matter correctly and that applying the *Wednesbury* test, the decision not to prosecute took into account all relevant considerations and was wholly reasonable. There were therefore no grounds for disturbing the decision not to prosecute. When, in May 2009, she was asked to advise further in the light of further evidence, she confirmed on 29 May 2009 her view that the evidential test for prosecution was not met; that advice was confirmed in writing at the end of July 2009.

(c) Further information given to the appellant about the position in 2007 and 2009

29. During the whole of that two year period there appears to have been only two communications between the CPS and the solicitors acting for the appellant. On 13 November 2007 the special case work lawyer, Mr Matthew McCabe, wrote to them a short letter explaining that, following a further request to review, the CPS was conducting a further review of the case in accordance with the Code for Crown Prosecutors. The solicitor was asked to advise the appellant that the decision not to prosecute was again under review. The second occasion was when the Special Casework lawyer wrote on 24 July 2008 to state that he had not completed his review; this was because the police were conducting further enquiries.

30. The appellant's Member of Parliament became involved in April 2009. He wrote to the Chief Crown Prosecutor for London and explained that he had been contacted by the appellant; that he had been told that the appellant was still being investigated by

the CPS and police and that the issue was having an adverse effect on the appellant's health. He asked for a full response. It does not appear that the CPS replied to that letter. Instead, on 13 May 2009, an Inspector in the Metropolitan Police wrote to the Member of Parliament to state that the CPS had initially advised that the appellant should be released on bail and no further action should be taken against him. The letter continued:

> "The police lodged an appeal which was eventually overturned and the original CPS decision stood. This decision is dated 23 June 2007. The officer in the case has updated the crime report to show that an e-mail was sent to both [the appellant] and his solicitor stating that no further action was to be taken. The entry is recorded on 27 June 2007.
>
> I can confirm the investigation has been closed and no further action is being taken against [the appellant]."

31. We were provided with an explanation by the Inspector who wrote the letter; it appears that he looked at the custody record and crime report and responded without consulting the CPS.

32. On 19 June 2009, the Member of Parliament wrote to the appellant enclosing a copy of that letter and concluding that he was pleased to see that there was a very clear answer to the concerns raised by the appellant. The letter concluded:

> "I also hope that this will clarify the position with you and that you will no longer have to worry about having this case hanging over you."

(d) The review by Miss Levitt QC in late 2009

33. As we have noted, the Inspector who wrote to the Member of Parliament on 13 May 2009 was entirely unaware of the fact that the review was taking place within the CPS.

34. As we have set out at paragraph 28, that review was concluded in July 2009. On 13 July 2009, the day before the final deadline given by Fisher Meredith for commencing judicial review proceedings expired, Mr McCabe, the Special Case Work Lawyer wrote to Fisher Meredith explaining that there had been a fresh review of the evidence and of further ABE interviews conducted in January 2008 and August 2008; on the basis of that review, he had concluded that it could not be said that a jury was more likely than not to convict the appellant. It followed the decision not to prosecute was correct.

35. On 16 September 2009 Fisher Meredith, on behalf of the complainants, wrote a pre-action protocol letter indicating their intention to commence judicial review proceedings on the basis that the decision not to prosecute was irrational and on other grounds, including that the decision was arrived at unlawfully by taking into account the complainants' status as disabled persons.

36. The response of the CPS was to initiate a third tier review. This was carried out expeditiously by Miss Alison Levitt QC, the Principal Legal Adviser to the Director of Public Prosecutions. On 9 December 2009, she reached her conclusion; she had not restricted herself to deciding whether the previous decisions were reasonable, but considered the matter afresh. She concluded that the earlier decisions were wrong (though not unreasonable), that there was a realistic prospect of conviction and that it was in the public interest that there should be a prosecution. The complainants were informed of the decision on 18 December 2009 and an unreserved apology was made for the distress and frustration caused. There was then a delay because the officer in the case was on holiday from 21 December 2009 until 11 January 2010; arrangements had then to be made to prepare summonses, as the view was taken that there was no power to arrest the appellant. He was then summonsed to appear in the Magistrates' Court on 22 February 2010.

37. There seems to have been no communication to the appellant of what was happening until the appellant was summonsed to appear before the Magistrates' Court. These circumstances, together with the fact that the complaint in respect of Mr Edwards dated back to the period 1991-1993, were the foundation of the appellant's claim that there had been an unequivocal representation which in all the circumstances made it unjust and an abuse of process to proceed with the prosecution.

(e) The authorities

38. Mr Arlidge QC, who appeared for the appellant, contended that the decision of the Divisional Court in *R v Croydon Justices ex parte Dean* [1993] QB 769 made clear that the prosecution of a person to whom it had been represented that he would not be prosecuted would generally amount to an abuse of process. In that case, the applicant had been arrested in connection with a murder; he admitted assisting in the destruction of evidence. He was released without charge on the basis he was to be a prosecution witness. He duly provided a witness statement for the prosecution; he continued to assist the police voluntarily for a period of over five weeks. The CPS then decided that he should be charged. It was submitted that to proceed with the prosecution was an abuse of process. The court was referred to Commonwealth authorities where consideration had been given to whether there should be a stay when a defendant had been promised "immunity or something of that sort". Staughton LJ concluded at page778:

> "In my judgement the prosecution of a person who has received a promise, undertaking or representation from the police that he will not be prosecuted is capable of being an abuse of process. [Counsel for the prosecution] were eventually disposed to concede as much, provided (1) that the promisor had power to decide and (2) that the case was one of bad faith or something akin to that. I do not accept either of the requirements as essential."

Applying that principle, the court held that he had been given the impression that he would not be prosecuted over a five week period during which he had given repeated assistance to the police. It was therefore an abuse of process to prosecute him.

39. The decision in *ex parte Dean* was considered by the House of Lords in *R v Horseferry Road Magistrates' Court ex parte Bennett* [1994] AC 42. The correctness of the decision was not doubted by any of those who referred to it; indeed, although he did not expressly refer to it, Lord Lowry said at page 74:

> "It would, I submit, be generally conceded that for the Crown to go back on a promise of immunity given to an accomplice who is willing to give evidence against his confederates would be unacceptable to the proposed court of trial, although the trial could itself be fairly conducted."

40. In *R v Bloomfield* [1997] 1 Cr App R 135, the defendant's counsel was told by prosecuting counsel in court that no evidence would be offered; the case was adjourned, as it was not possible to make that clear in open court. However by the time the case was fixed for that to be done, different prosecution counsel had been instructed. He took a different view and wished to proceed. The court concluded:

> "The statement of the prosecution that they would offer no evidence at the next hearing was not merely a statement made to the defendant or to his legal representative. It was made *coram judice*, in the presence of the judge. It seems to us that whether or not there was prejudice it would bring the administration of justice into disrepute if the Crown Prosecution Service were able to treat the court as if it were at its beck and call, free to tell it one day that it was not going to prosecute and another day that it was."

41. Later the same year in *R v Townsend* [1997] 2 Cr App R 541, the Vice-President, Rose LJ, accepted at page 551 the three propositions advanced by counsel for the appellant at page 548:

> "First, where a defendant has been induced to believe he will not be prosecuted, this is capable of finding a stay for abuse: see *Bloomfield*. Secondly, where in addition, a defendant has been told he will called for the prosecution, the longer he is left in that belief the more unjust it becomes for the prosecution to renege on their promise. Thirdly, where, as here, the defendant, co-operating as a potential prosecution witness, was interviewed without caution and made a witness statement, and steps were then taken which resulted in manifest prejudice to him, it becomes inherently unfair to proceed against him."

42. The authorities were all considered by the court in *R v Abu Hamza* [2007] QB 659 where the court concluded at paragraph 54:

> "These authorities suggest that it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts

> come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation."

43. It is, in our judgement, plain on the authorities that if a clear unequivocal representation has been made and upon which the defendant relies to his detriment, it will be open to a court to find that to proceed against him will be an abuse of process. We do not think it necessary to go further, because we agree with the observation of the court in *Abu Hamza* that there can be circumstances where even in that situation, it would not be an abuse of process to proceed.

(f) The representation

44. We do not consider that the e-mail of 27 June 2007 amounted to a representation that there would be no prosecution; the e-mail was sent to the appellant's solicitors who would have been well aware of the rights of the complainants to seek a review. No doubt in passing on the information they would have told the appellant of that possibility; we draw that inference because when on 13 November 2007, as we have set out at paragraph 29, Mr McCabe wrote to tell the solicitors of the further review, nothing was said by the solicitors to indicate that they considered the matter closed. We agree therefore with the view of the judge that there was no representation.

45. The letter from the police inspector to the appellant's Member of Parliament in May 2009 stated that the matter had been closed; the Member of Parliament communicated this to the appellant. It was argued that as there had only been two letters to the appellant's solicitors in relation to the second review (the last of which was in July 2008), it would have been reasonable to take this letter as a representation that the matter had in fact been closed, given the clear terms of the letter and the passage of time. We cannot accept that argument. It is clear from the terms of the letter that the Inspector was confirming the position as at June 2007; there was no reference to the further review (about which the appellant's solicitors had been made aware) and no statement that no further action would ever be taken. Given that it was known there was a further review, the letter did not amount to a representation to the appellant that that further review had been resolved in favour of no prosecution. We agree with the view of the judge. We will nonetheless consider whether in all the circumstances, it would be unjust and an abuse of process to continue the prosecution in the light of the e-mail and letter, even if it did not amount to a representation.

(g) The right to a review

46. It is clear that the policy of the CPS set out in the Code is that the public should be entitled to rely on the decisions of the CPS. If the CPS tells a suspect or defendant that there will not be a prosecution, that should be the end of the matter and the case will not start again. However the Code makes clear that there may be good reason to start a case again; one of the examples given is where a new look is taken at the original decision and it is shown that that was wrong. The first question to consider is whether the decision to look again was wrong and the conclusion reached on that review was wrong.

47. The CPS, as the independent prosecutor, in our view had to respond to the request made by the complainants for a review of the decision not to prosecute, just as the

CPS had done in *R v Burke*. As we have set out, the request was made as "a complaint", as that is what the procedure of the CPS requires as we have described at paragraphs 23 to 26 above. This procedure applied until April 2010. The new procedure appears still to treat requests for review of a decision not to prosecute as "a complaint" about a "level of service", though as appears from the document to which we referred at paragraph 26, a threat of judicial review brings about a re-review more in the nature of a re-review of the prosecutorial discretion.

48. Although in form the request was made as "a complaint", what was sought was a reconsideration by an interested person of the decision. Far from the CPS being able to refuse to do this, it was bound to do it. In the first place, the CPS has made clear that it will review decisions (as set out in paragraph 25 above) if a "complaint" is made. Second, it has for some time been established that there is a right by an interested person to seek judicial review of the decision not to prosecute (see *R v DPP ex p C* [1995] 1 Cr App 136); it would therefore be disproportionate for a public authority not to have a system of review without recourse to court proceedings. Third, it is clear that in considering whether to prosecute the prosecutor has to take into account the interests of the State, the defendant and the victim – the three interests in a criminal proceeding as identified for example by Lord Woolf CJ in *R v B* [2003] 2 Cr App R 197 at paragraph 27. As a decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision, particularly as the police have such a right under the charging guidance.

49. Thus, although it was contended by the Crown that complainants had no right to request a review of a decision not to prosecute in contradistinction to the ability to make "a complaint", we can discern no reason why what these complainants were doing was other than exercising their right to seek a review about the prosecutor's decision. That right under the law and procedure of England and Wales is in essence the same as the right expressed in Article 10 of the Draft EU Directive on establishing minimum standards on the rights, support and protection of victims of crime dated 18 May 2011 which provides:

> "Member States shall ensure that victims have the right to have any decision not to prosecute reviewed."

See also the Explanatory Memorandum of the Ministry of Justice dated 2 June 2011.

50. Thus in determining whether in the circumstances there was an abuse of process, regard must be had to the rights of the complainants to have the decision reviewed. This was not "a complaint" about "service" by the CPS, but a request to have the discretionary decision to prosecute reviewed. Indeed the use of the term "complaint", can lead to the suggestion (as was made in *Burke)* that the prosecutor is influenced by a complaint being made in contradistinction to a request for a review. The court is therefore bound to take into account in determining whether the proceedings were an abuse of process the fact that in reviewing the decision not to prosecute, the CPS was responding to the rights of the complainants in the prosecution process.

(h) The review.

51. Although in our judgment a complainant has a right to a review, it is for the independent prosecutor to reach a decision impartially, subject only to review by the courts under well established principles.

52. We are entirely satisfied that the review conducted by Miss Levitt QC was impartial and uninfluenced by any extraneous considerations. Her analysis was clear and correct. There is no basis at all for any criticism of it.

(i) Delay

53. However the fact that the CPS was responding to the exercise of a right inherent in the prosecution process, does not mean that the prosecutor was not under an obligation to conduct the review within a reasonable timescale. Until the review was entrusted to Miss Levitt QC, there can be no doubt the delay was lamentable. It appears that the Sector Director did not examine again the decision, but merely whether the original decision had been made reasonably. The second review for inexplicable reasons took two years. The question is whether that delay was such that in itself it amounted to an abuse of process or whether it caused some detriment to the appellant because he had relied on it. We will assume that detriment is not always required (as did the judge), despite the observations in *Abu Hamza*.

54. There was evidence before the judge from the appellant's parents as to the effect the initial arrest and the decision to proceed in February 2010 had had on the appellant; there was also evidence from a counselling co-ordinator that the appellant was suffering from anxiety attacks and the effect these attacks had on him. It was also the case that the disclosure of a note made in 1993 by one of Mr Edwards' social workers, Mr Windle to whom we refer at paragraph 71 below, was not made until 2010. In his prepared statement the appellant denied any sexual contact with Mr Edwards; his case at trial was that there had been touching and masturbation. If that note had been disclosed earlier, the appellant would have been able to give his account with the benefit of that note and not therefore have been open to having to explain a contradictory account.

55. Although no excuse was or could have been put forward for the delay, we do not consider that in itself it amounted to an abuse of process or caused prejudice or detriment. We accept the evidence that there was clear strain, but it did not amount to prejudice or detriment. Nor was the delay in disclosure until 2010 of the note of Mr Windle prejudicial; even if the appellant had been prosecuted immediately, he would not have seen the note until after he had made his prepared statement. Nor could it possibly be said, to accept the statement of Lord Steyn in *Latiff* [1996] 1 WLR 104, that the continued prosecution was "an affront to public conscience".

(j) Conclusion

56. Thus even on the assumption, contrary to our decision, a representation was made, there was good reason why the prosecution had to review the matter; the delay arising out of the review caused no prejudice. There was no abuse of process. In all the circumstances, the judge was right to dismiss the application on this basis.

57. We would simply observe, given the circumstances of this case, that it must be for the Director to consider whether the way in which the right of a victim to seek a review

cannot be made the subject of a clearer procedure and guidance with time limits. As we have explained, the right of a complainant to a review is nothing to do with complaints about the conduct of a level of service provided by the CPS; it is an integral part of the exercise of a prosecutorial discretion and the use of the term complaint has the danger to which we have referred at paragraph 50.

(b) Was a fair trial possible in the light of all the delay?

58. The second way in which the appeal was advanced in relation to abuse of process was that it was an abuse of process to proceed as a fair trial was no longer possible, given the delay that had occurred since the 1990s when the offences involving Mr Edwards and Mr Hardy were alleged to have occurred.

59. In rejecting this submission the judge set out the applicable principles derived from the judgments of this court in numerous cases and in particular *R v S (Stephen Paul)* [2006] 2 Cr App R 23. He concluded that there was a strong public interest that the case should be tried, particularly as the complainants were very vulnerable, subject to the appellant being able to have a fair trial.

60. In the ruling to which we would wish to pay tribute, the judge carefully considered how the communication difficulties of the witnesses could be addressed and the effect of the delay in all the circumstances:

i) In the allegation in relation to Mr Edwards the delay before the complaint was made had been 15 years; Mr Edwards could not identify a date, though medical records helped indicate this was in the latter months of 1992; there were inconsistencies in his accounts.

ii) In the case of Mr Hardy the delay before the complaint had been made was 10 years; a date had been given.

iii) In the case of Mr Robins, the delay was 9 months

iv) Although the witness statements had not been served until May 2010, the appellant had been able to address the allegations when interviewed in 2006.

v) This was a case where there was a single allegation by each complainant; therefore the case was in a different category to those where there were allegations of multiple abuse where the defendant was faced with allegations without any details.

61. Although the delay had caused a huge strain and the delay after the arrest lamentable, the judge was satisfied that the overall delay was not in all the circumstances such that it would be an affront to justice to allow the case to proceed; a fair trial was possible. Although he had no concerns in respect of the allegations by Mr Hardy and Mr Robins, as the defence had material they could deploy, he would monitor the position of the allegations in respect of Mr Edwards in accordance with the principles in *Smolinski* [2004] 2 Cr App R 40 and review the matter at the close of the prosecution case.

62. The judge conducted that review at the conclusion of the prosecution case. In a further detailed ruling he took account of the fact that the difficulties in relation to the

date of the offence involving Mr Edwards had been resolved and there was no significant prejudice relating to the date. He considered again the effect of the age of the complaints and the failure to report immediately, but considered that this and the general effect of the passage of time could be dealt with by appropriate directions to the jury. He noted that Mr Arlige QC had been able to conduct a thorough and professional cross examination of the Crown's witnesses.

Conclusion

63. We have carefully considered all the matters with the benefit of seeing what happened at the trial. We are entirely satisfied that a fair trial was possible and that the effects of the delay that had occurred were properly allowed for in the trial process. The reasons given by the trial judge for dismissing the application were correct. It was possible to have a fair trial and the appellant had a fair trial. It is clear from the papers before us that Mr Arlidge QC conducted clear and searching cross-examinations of the complainants and other witnesses with great skill; all the inconsistencies in the cases were brought out and put before the jury. The judge directed the jury fully on the effect of delay.

64. We therefore dismiss the appeal.

Issue 2: The fresh evidence

65. At trial it was the Crown's case that the appellant was much less severely disabled than the complainants. It was said that he suffered from a limp and that he could move about without the assistance of a chair. Before us an application was made to adduce evidence that the appellant's physical ability was such that he was unable to manoeuvre Mr Edwards from his living room to his bedroom and onto his bed and then to penetrate Mr Edwards forcibly. The appellant had taken the stance at the trial that he did not want his family to attend so they would avoid the distress and embarrassment that this would cause to him and his family. Nonetheless, after the trial, the appellant's brother had written to the appellant's lawyers setting out the fact that the lack of development in the appellant's lower limbs meant that it would be very difficult for the appellant to force himself onto an unwilling victim.

66. We were provided by the appellant's mother with photographs of him at the age of one, two, three, seven, 11 and 23. The photograph of him when he was 23 was taken in Durham in 1986. This clear photograph showed him to be very significantly shorter than his two brothers though his upper body was significantly developed. His mother's evidence was that his physical progress had been slow from birth; he had endured many operations to rectify his severe talipes; he had very abnormal hip joints which severely restricted movement in his hips. The evidence of his brother who was about a year younger than him was that the appellant's legs had always been deformed and under-developed. For the majority of his childhood and into his early teens he had worn orthopaedic leather boots with metal bars from the sole of the boot to his knee without which he was unable to walk. Even with the boots his walking was very laboured. From birth he had little muscular development in his lower body. By the time he became an adult and had stopped growing, his upper body had grown to almost normal size; whilst his legs and lower body remained under-developed and deformed; he had never had any strength in his legs. His balance had always been minimal and his co-ordination, particularly of his lower body, non-existent. He had

always been as disabled as he is now. It was his brother's view that when in a wheelchair seated behind a table, the appellant looked like a large and possibly threatening individual; the fact that he remained in his chair during the court proceedings misrepresented his physical form and movement ability. We were told that a medical report on the appellant's physical condition in 1992 would have been of limited value.

67. The terms upon which the court can consider this evidence are governed by s.23 of the Criminal Appeal Act 1968. The test for the admission of this further evidence is the interests of justice; the court is directed to have regard to a number of factors including the explanation of why it was not adduced at the trial.

68. In our judgement it would not be in the interests of justice to admit this further evidence. Although we understand why the appellant's family were not present at the trial and the information contained in the statement of his brother and mother was not therefore before the court, nor were the photographs, we do not think it would be right to admit the evidence now. There are two reasons for this. In the first place it seems to us clear that evidence as to the appellant's physical condition in 1992 would have been a matter which could have been put before the jury on behalf of the appellant. The principal evidence that would have been required and which would have been material to a consideration of whether the appellant was physically able to do what was alleged by Mr Edwards, would have been medical evidence and not evidence from his family. Evidence from his family would not, in our judgement, have been of any real value. Moreover, it was not disputed that the sexual activity that took place between them was on Mr Edwards' bed. The evidence does not suggest that the appellant was unable to push him into the bedroom nor that he lacked physical strength in the upper part of his body which was what was required to turn him onto his back to have anal intercourse. Secondly, even if contrary to our view, such evidence had been of value, that evidence was available at the time of the trial. Although we understand why it was not adduced, we cannot see that this amounts to a reasonable explanation for not calling it. As this court has emphasised on numerous occasion, the trial court is the forum at which evidence which is available should be adduced and the fact that available evidence was not adduced requires a proper and justified explanation as to why it was not. There was, in our judgement, none in this case.

69. Accordingly we refuse leave to appeal.

Issue 3: The overall safety of the conviction

70. The submission of Mr Arlidge QC was that in all the circumstances the court could not consider the convictions safe. He contended that there was a residual discretion of the court to set aside the convictions if it was felt to be unsafe or unfair to allow the convictions to stand, as explained in the decision in *R v B* [2003] 2 Cr App R 197. It is clear that if a conviction is unsafe it must be set aside; there is no discretion. The court must, particularly in respect of an offence alleged to have occurred many years before, scrutinise the evidence, any discrepancies in it, the course of the trial and the summing up in determining whether the conviction is safe: see for example *R v Robson and Robson* [2006] EWCA Crim 2754. Although we must consider the whole of these matters in determining whether the conviction is safe, it is convenient to highlight certain matters under different headings.

(i) The inconsistencies in the evidence

71. We have set out above the important inconsistencies in the evidence of Mr Hardy and the conflicting account of his assistant at paragraphs 13-15 above. We have referred to the difference in the accounts given by Mr Edwards at paragraph 11. He gave contradictory accounts of the date he said it had happened. The times at which he said he complained and to whom also contained contradictions. For example, he spoke of an occasion when Mr Hardy and he were interviewed on video about being raped, but both had said that they did not want a prosecution bought. No record could be found of this. There were discrepancies in the documentary and other evidence relating to the history of the complaint; for example, he had made an allegation of rape to his social worker, Mr Windle, in January 1993 and then retracted that allegation explaining that they had been on the bed, had touched each other and then masturbated.

72. As to the allegation of sexual assault on Mr Robins, Mr Robins had not complained until the following morning; there was the explanation that he had no easy means of communication and it was late in the night. Mr Robins did see the appellant after the alleged assault and exchanged electronic messages at least until October 2005. For example, on 24 May 2005 Mr Robins sent him a Yahoo message which stated: "Thank you for your e-mail. I am pleased we be friends. You free on Thursday to meet up in the afternoon or night." His explanation was that he was prepared to give him a second chance; the appellant had then tried to put his tongue down his throat.

(ii) The acquittal of the rape of Mr Hardy

73. It was submitted that the acquittal of the appellant of the anal rape of Mr Hardy tainted the convictions on the other two counts and made them unsafe. We do not agree. As we shall explain the judge carefully directed the jury to consider the counts separately and to consider carefully the case that there had been collusion. It was plainly open to the jury, if they were satisfied there was no collusion and if the evidence in relation to the other counts was sufficient to make them sure, to convict on the other counts. The fact that they concluded that the evidence in relation to Mr Hardy led to an acquittal does not in any way undermine the conviction on the other two counts, particularly when the evidence in relation to Mr Hardy is analysed; there were plainly good grounds for the acquittal.

(iii) The Crown's case on the inter-relationship between the three complaints

74. Although it was never the Crown's case that the counts stood or fell together as each was a separate offence, it was the Crown's case that the counts were capable of mutually supporting each other. The Crown pointed to the similarities in the appellant's behaviour as described by each of the complainants; the Crown said that was no coincidence. It contended that the fact that three men had made similar but otherwise unconnected complaints about the appellant's behaviour made it more likely that each of the complaints was true, that therefore each of the three complaints was capable of lending support to the others.

75. The judge in his summing-up clearly directed the jury that they must consider the allegations separately and reach separate decisions about them. However, he directed the jury that in certain circumstances one count was capable of supporting the

Crown's case on another, provided the jury were sure that the complaints were truly independent of one another. The issue was therefore whether there was collusion.

(iv) The case on collusion

76. It was the appellant's case that Mr Hardy had brought about the reporting to the police by Mr Edwards and Mr Robins; Mr Hardy had set about doing this in 2005; Mr Hardy fell out with the appellant over his assistant Mr Manhinda; the sexual relationship between the appellant and Mr Hardy also ended then; Mr Hardy found a new man and wanted to be rid of the appellant. The case was advanced on the basis of diary entries, electronic messaging and other material. It was also contended that there was a financial motivation in reporting the matters, as the complainants would seek compensation. In his evidence, Mr Edwards had said that he went to the police in 2006 as he wanted to support Mr Hardy and Mr Hardy wanted to support him. He also said he told Mr Hardy about it two months after it had happened and Mr Hardy told him that the same had happened to him.

77. The Crown's response was that although, as we have set out, the complainants knew each other, Mr Edwards had complained to his sisters at the time and Mr Robins had complained to Anna Webberson in April 2005. The matter had been reported to the police after Mr Robins had told Mr Hardy about it in late 2005 and after some four months or so they decided to go to the police; Mr Hardy's explanation of the decision to go to the police after the elapse of so much time was because the appellant had tried to "sex" Mr Robins.

78. The determination of the issue on collusion depended on an analysis of the evidence. Their telling each of the complaints given their circumstances could well have been no more than giving each other the strength and confidence to go forward. As the history of the decision to prosecute demonstrates, taking the matters forward to prosecution did in the circumstances of these complainants require courage and determination. It is difficult to understand why they would have pressed twice for the decisions to be reviewed, if the motivation had simply been that suggested on behalf of the appellant.

(v) The time taken by the jury

79. We have carefully considered the significance of the time the jury took to reach their verdicts and whether the fact that they reached their verdicts at the end of the last normal sitting day before the Christmas break put undue pressure on them. The fact that the jury took a long time to reach a verdict is hardly surprising; this was a difficult case and one which because of the particular circumstances required particular care. The judge made it quite clear that they were under no pressure and could return at other times to continue their deliberations. In our experience, jurors in a case of such difficulty as the present would have approached their task conscientiously; we simply cannot infer that they would have acted contrary to general experience and broken their oaths and duties as jurors in reaching a verdict under pressure of time.

(v) Conclusion

80. In the light of the matters to which we have referred and the other material, we turn to set out our conclusions as to the safety of the conviction on the counts relating to Mr Edwards and Mr Robins.

81. We have carefully considered the ABE interviews of Mr Edwards and the transcript of his evidence which was subject to detailed analysis by Mr Arlidge QC in his thorough oral argument and in a detailed and very helpful aide memoire submitted after the hearing by Ms Mylvaganam, the appellant's junior counsel.

82. It is clear that the jury carefully considered the contradictions in the accounts in deciding whether they could be sure the appellant had committed the offences. The fact that there were contradictions in the account given in interview and his evidence about the offence or about the making of the complaint did not mean the jury could not be sure the evidence given by Mr Edwards in respect of the anal intercourse was true.

83. On analysis the evidence of complaint by Mr Edwards, making due allowance for his disability, rebutted the case that he had made up the allegation to support Mr Hardy. He made a complaint to his sister Monica Reed in the early 1990s; she gave oral evidence of what he had told her and that he was too frightened to go to the police. The statement of another sister, Jean Hart, about the complaint to her was read; her husband gave oral evidence about the occasion and of sending the appellant away from the house as Mr Edwards did not want to see him. There was also a statement from the third sister, Frances Kirk, about Mr Edwards telling her she should not wash his bed linen as that was his evidence. In the light of this evidence, the evidence from psychiatrists and Mr Edwards' explanation that he was frightened, there was plainly evidence which on analysis by the jury made safe for them to be sure that the appellant had had anal intercourse with Mr Edwards without his consent.

84. In the light of all the evidence, there was in our view convincing evidence on which the jury could convict the appellant on the count of non consensual anal intercourse of Mr Edwards. The conviction on that count is safe.

85. As to the count of sexual assault on Mr Robins, we have again carefully considered the careful and detailed submissions made by Mr Arlidge QC, but we have also concluded that the conviction is safe. On an analysis of the evidence it was again safe for the jury to convict; there was a clear explanation for the exchange of electronic messages and for the short delay in the complaint to Anna Webberson. There were therefore good grounds on which the jury were entitled to believe the evidence of Mr Robins.

Conclusion

86. We therefore dismiss the appeal on the first issue and refuse leave to appeal on the second and third issues.