The order referred to in paragraph 2 of this judgment has ceased to have effect, and this anonymised judgment may now be reported. The reporting restrictions referred to in paragraph 3 remain in force.

Neutral Citation Number: [2019] EWCA Crim 875

Case No: 201702557C3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SNARESBROOK
Her Honour Judge Kamill
T2016 7866

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2019

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE JAY
and
HIS HONOUR JUDGE PICTON

- -

Between:

A.B.	**Appellant**
- and -	
The Queen	**Respondent**

- -
- -

Trevor Siddle for the **Appellant**
Andrew Collings for the **Respondent**

Hearing dates: 9th May 2019

- -

Approved Judgment

Lord Justice Holroyde:

1. On 5th May 2017, in the Crown Court at Snaresbrook, the appellant, to whom we shall refer as AB, was convicted of 9 sexual offences against his sister and his wife, to whom we shall refer as BM and CB respectively. He was sentenced to a total of 14 years' imprisonment. He appealed against his convictions by leave of the single judge. At the conclusion of the hearing we allowed his appeal, quashed the convictions and ordered a retrial. We indicated that our reasons would be given in writing at a later date. These are our reasons.

2. Having heard submissions, we were satisfied that it was necessary to postpone any reporting of the appeal hearing until after the conclusion of the retrial. That departure from the important principle of open justice was necessary because there is a substantial risk of prejudice to the administration of justice if this appeal is reported before the retrial, in particular because the appeal has involved consideration of evidence which may not be before the jury at the retrial. Postponement of reporting will avoid that risk, and no less restrictive means of avoiding it were suggested to the court. An order has therefore been made, pursuant to section 4(2) of the Contempt of Court Act 1981, postponing the report of the appeal hearing until after the conclusion of the retrial.

3. In addition, BM, CB and a third complainant KM are entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes, no matter may be published which is likely to lead members of the public to identify either of them as a victim of any of the offences.

4. The appellant is now 34 years old. He had no previous convictions. BM complained of sexual offences during the period 1999-2004, when she was aged between 10 and 15 and the appellant was aged between 15 and 20. She also complained of a further offence, committed in 2006 or 2007 when she was aged 17 and he was 22. CB complained of sexual abuse, including rape and digital penetration, throughout her relationship with the appellant, which began in 2004 and ended when the appellant left the matrimonial home in 2013.

5. CB first reported her allegations to the police on 23rd April 2015. In the course of giving her account of the sexual abuse which she had suffered, CB alleged that the appellant had also raped BM. The police accordingly contacted BM. CB's younger sister KM was present when CB was making her complaint to the police and she too complained that she had been the victim of a sexual offence.

6. At trial, the prosecution was represented by Mr Collings, the appellant by Mr Siddle. We were assisted by the submissions of both counsel on this appeal.

7. In very brief summary, BM's evidence at trial was that as a child, she had been the victim of repeated sexual offences at the family home, the appellant's actions ranging from masturbation to full vaginal intercourse, and a later offence of rape. Her allegations were the subject of six counts in the indictment. Count 1 alleged sexual intercourse with a girl aged under 13, contrary to section 5 of the Sexual Offences Act 1956. Counts 2 and 3 alleged indecent assault on a female, contrary to section 14 of the 1956 Act, when BM was aged 10. Count 4 was a multiple incident count alleging at least 5 offences of rape, contrary to section 1 of the 1956 Act, when BM was aged under 16. Count 5 was similarly a multiple incident count, alleging at least 5 offences

of indecent assault on a female, contrary to section 14 of the 1956 Act, when BM was aged under 16. Count 6 alleged rape contrary to section 1 of the Sexual Offences Act 2003 when BM was aged 17. The jury convicted the appellant of all of these offences.

8. CB, who is a few months younger than the appellant, began a relationship with him in 2004. They married in November 2007. CB's evidence was that sexual abuse started soon after their relationship began, and continued throughout the marriage. She said that there had been consensual sexual activity between them throughout their relationship, but she alleged that there had been occasions when the appellant had raped her vaginally, anally and orally, and had digitally penetrated her vagina without her consent, including on occasions when she was asleep, or pretending to be asleep. These allegations were reflected in six counts of the indictment. The appellant was convicted on 2 counts of rape contrary to section 1 of the Sexual Offences Act 2003: count 7, which alleged anal rape in August 2004, and count 12, which alleged vaginal rape in 2012. In respect of the digital penetration of CB's vagina, he was convicted of count 10, a multiple incident count alleging assault by penetration contrary to section 2 of the 2003 Act on at least 5 occasions between 2007 and 2013. He was acquitted of other allegations of rape.

9. KM gave evidence about an offence of sexual assault (count 13) alleged to have been committed when she was aged 15 and was staying overnight at the home of the appellant and her sister. The appellant was acquitted of that offence.

10. When interviewed by the police, and in his evidence to the jury, the appellant stated that the allegations against him were all untrue. He said that all sexual activity between him and CB had been consensual, and that he had never been involved in any form of sexual activity with either BM or KM. He alleged that each of the complainants was maliciously giving false evidence against him, and that they had colluded to do so.

11. The issues in the case were therefore stark. It was common ground between the prosecution and defence that, if the evidence of a complainant about a particular charge was true, the appellant was in law guilty of that offence. The jury accordingly had to decide whether they were sure that the alleged conduct had occurred and, in CB's case, that it had occurred when she was not consenting to the relevant sexual activity and the appellant did not reasonably believe that she was consenting.

12. Although none of the offences came to the attention of the police until April 2015, both BM and CB had made earlier complaints to others, on which the prosecution relied as evidence of consistency. BM gave evidence that she had told her husband in about 2008 that she had been sexually assaulted by the appellant, though it was not until April 2015, shortly before she contacted the police, that she told him she had also been raped. Her husband also gave evidence about this. In about 2010, BM told CB, and CB's sister, that she had been sexually assaulted as a child by the appellant. CB gave evidence that she had made complaints of rape and sexual assault to a therapist, Ms Ferrary, who had held counselling sessions with CB on 44 occasions between April 2013 and November 2014.

13. Ms Ferrary gave evidence to the effect that, in the course of the counselling sessions, CB had described incidents of rape and sexual assault by the appellant. Ms Ferrary had made notes of the counselling sessions in two forms: brief bullet point notes, and more detailed notes written after the sessions. Her normal practice was that after her sessions

with a particular client had ended she would shred the detailed notes but retain the bullet point notes for about a year in case the client returned to her. She told the jury that after the counselling sessions with CB had finished, and at a time before CB had made her allegations to the police, she had shredded her own detailed notes, but retained some bullet point notes. After matters had been reported to the police, CB contacted Ms Ferrary to tell her that the police would be coming to interview her. Ms Ferrary asked CB to remind her of the matters they had discussed during the counselling sessions. CB did so, in an exchange of emails which was before the jury, and Ms Ferrary created fresh detailed notes, which she supplied to the police.

14. Shortly before Ms Ferrary was to give her evidence, she informed the police that she had obtained from her supervisor a copy of the original more detailed notes. She supplied these to the police.

15. Ms Ferrary produced six exhibits, which were referred to at trial but not provided to the jury: CF1, her original bullet point notes; CF2, her fresh detailed notes made before the police came to see her, but after she had exchanged emails with CB; CF3, an assessment report which she had prepared in connection with CB undertaking a course at university; CF4, copies of text messages between Ms Ferrary and CB; CF5, a copy of the email exchange between Ms Ferrary and CB, which was the source of the fresh detailed notes, CF2; and CF6, a copy of the original detailed notes obtained from Ms Ferrary's supervisor.

16. There were two features of these documents which she readily accepted when cross-examined. First, her bullet point notes, CF1, contained no reference to CB having reported sexual abuse by the appellant. Secondly, the fresh detailed notes, CF2, which did record such abuse, had been compiled in the light of the email correspondence with CB, though Ms Ferrary said that she also remembered the complaints of sexual abuse having been made by CB. Mr Siddle wished, in cross examination, to go into detail on these points. As we understand it, he particularly wished to take Ms Ferrary through her bullet point notes in order to establish the detail of what was in them, with a view to emphasising what was not in them. One of the matters which had been mentioned to Ms Ferrary, and about which the jury were aware because it had been mentioned in CB's evidence in chief, was that CB complained of having been raped some years earlier by a man otherwise unconnected with this case. Mr Siddle wished to be able to emphasise the point that the topics covered in the bullet points included that sexual allegation, and yet there was no reference to any sexual allegation against the appellant.

17. The learned judge was unhappy about the course which the cross examination of Ms Ferrary was taking or seemed likely to take. In the absence of the jury, she enquired of Mr Siddle what was the point of his cross examination. She was anxious that it should be made clear to the witness if it was being alleged that she was manufacturing false evidence. As to the absence of any reference to any sexual abuse by the appellant, the judge wished Mr Siddle to make his point succinctly, telling Mr Siddle that he should "put it in a sentence". Mr Siddle indicated that he wished to go into much more detail than that. The judge was opposed to that course, and warned Mr Siddle that if he cross-examined at excessive length, she would stop him. However, it is apparent from the transcript which we have seen that Mr Siddle did in fact continue thereafter to cross-examine Ms Ferrary at some length, and was not interrupted by the judge.

18. The appellant gave evidence in his own defence, denying all the charges. He called two witnesses, who knew him through his work as a publican and spoke highly of his character.

19. It seems that in his closing speech, Mr Siddle referred to Ms Ferrary's evidence in terms which accused her of fabricating her notes in order to lend weight to CB's allegations. The judge at an early stage her summing up pointed out that that was not simply an allegation of unprofessional conduct on the part of Ms Ferrary, but a grave allegation of perverting the course of justice.

20. It appears that, before summing up, the judge had discussed with counsel what matters would be the subject of her directions of law. She had prepared for the jury a document which set out the legal ingredients of the offences charged and the factual questions which the jury would have to ask themselves in order to decide whether a particular offence had been proved. No issue has been raised as to the correctness of that document in relation to the matters which it covered. The judge did not give the jury any other written directions as to the law.

21. The judge gave her oral directions of law at different points in her summing up, which extended over parts of three days. The learned single judge, when granting leave to appeal, commented upon the extraordinary length of the summing up given the nature of the case, and expressed concern as to whether it would have helped the jury. He observed that he could not discern an easily identifiable structure and that some of the directions were not easy to follow without a considerable amount of re-reading. He expressed particular concern about the issue of cross-admissibility, about which there was no single succinct, readily understandable direction.

22. The judge's direction on the topic of cross-admissibility of evidence as between the three complainants was given at the start of the second day of the summing up. Most unfortunately, the audio recording of that morning did not start until some time after the proceedings had commenced, with the result that there is no recording, and therefore no transcript, of the first part of what the judge said. It has not been possible for this court to establish how much is missing. From what is available, it can be seen that the judge directed the jury that they could and should consider all of the evidence as a whole. If they found the appellant guilty of a particular count, they could use that decision and take it into account when considering the other charges which he faced. The judge immediately followed that direction with a warning that the jury must first be sure that the evidence of one complainant had not been influenced in any way, whether consciously or subconsciously, as a result of hearing about the allegations made by the other complainants. She emphasised that if the jury could not be sure of that, then the evidence of one complainant could not be relevant to the issue of whether another complainant was telling the truth. She summarised the evidence showing contact between BM, CB and KM and noted that by April 2015 they were all in touch. She continued, at page 7A of the transcript:

> "You may think, therefore, that by the time the police took their statements that each one had been influenced. Was it, though, as has been suggested by [the appellant] and Mr Siddle, deliberately fabricated for you to prove that the defendant is a sex offender, deliberate lies that is?"

23. The judge went on to say, at page 7C of the transcript:

> "if however you conclude, there has been no contamination, in other words, deliberate lies in this case, as alleged, you can go on to consider the different allegations and any degree of similarity between their allegations that you perceive. If you consider there is a significant degree of similarity between the allegations, that [the appellant] has behaved as a sex offender to them individually, then it is open to you, if you think it right to do so, to consider whether it is no coincidence that two, or indeed three, here, females make similar allegations against the defendant, and if you are sure that it isn't a coincidence, whether it is more likely that he is guilty of one or more than one of the offences with which he is charged."

24. Later in her summing up that day, the learned the judge reminded the jury of the evidence of the two character witnesses called by the appellant. She referred to the appellant as a man of good character, used to dealing with the public because of the nature of his work. She summarised the evidence of the two witnesses to the effect that the appellant was a gentle and giving man with a good work ethic who was a very fond father of his children. She went on to say, at page 47G:

> "Well now, not only is he of good character, which means no criminal convictions, we have those personable qualities and people skills which he has. Now as you know, those are confirmed by people who know him, and indeed, that he's been a pub manager for so long speaks of his skills quite highly. This case, of course, is about his private life about which those witnesses can't really tell us much and we know, don't we, as to his private life, that he certainly won the love of two women in this case, even though he wasn't a faithful partner to AR nor a faithful husband to CB. That doesn't affect his ability to tell the truth, that's for you to decide. The fact that he has got no criminal convictions means that he may be less likely to have committed any crimes. Now, remembering though that these allegations go back some years and it may be that if you accept them, that you will be less likely to accept his evidence on oath. But it is for you to judge his character".

25. At about noon that day the judge indicated that she had completed her review of the evidence and enquired if counsel wished to raise any matter. Mr Siddle indicated that he did, and suggested that the jury might not be sent out until after lunch. The judge declined that suggestion, saying that she was going to give the jury five minutes. The jury left court at 1202, and Mr Siddle made submissions on a number of points. In particular, he submitted that the direction as to the appellant's good character was wholly inadequate. The judge accepted his submission in part, and when the jury were brought back into court at 1315 she directed them at page 66B in these terms:

> "I'm sorry, I know I'm keeping you from your lunch, but let's just deal with this. When I told you about perhaps the most important point made which is quite correct, [the appellant] has

> no criminal convictions. That leaves you with two things. Firstly, it doesn't mean he is not guilty of any of these offences, but what it does do is tell you something about him. Firstly, that he's given evidence. You may think that a man with good character, when he gives evidence, is more likely to tell the truth. Secondly, that he has never done anything like this before, and that you may take that into account now that he's got to 32 years of age, and it may make you more likely to accept his evidence on oath. As I said to you earlier, it is for you to judge his character. You take those two things into account, firstly that he has no criminal convictions and you should therefore treat him as a man of good character. You also know a bit more about him than that."

26. The jury retired to consider their verdicts. They were brought back into court at the end of the court day, and gave verdicts finding the appellant guilty on counts 2, 5 and 12 and not guilty on the count relating to KM. The jury were then sent home and the appellant – who until that point had been on bail – was remanded in custody overnight.

27. When the appellant was bought back to court the following morning, he was wearing a prison-issue tracksuit, in contrast to the suit and tie which he had worn throughout the trial up to that point. It seems that no one had foreseen that this would occur, and it transpired that to bring the appellant's suit from prison would involve a delay of at least half a day. Mr Siddle submitted that the judge should direct the jury that following their guilty verdicts the appellant had been remanded in custody overnight, in accordance with usual practice, that he had not been provided by the prison service with his suit when brought back to court, and that the jury should not hold that against him in any way. Mr Collings objected to such a direction, on the grounds that it might tend to arouse feelings of sympathy amongst the jury which would cloud their proper consideration of their remaining verdicts. In the course of the ensuing discussion, the judge made clear that it would not be right to delay the proceedings by half a day or more. Various possible courses of action were canvassed. In the end, the judge concluded that it was best to say nothing at all. She offered Mr Siddle the opportunity to say something to the jury himself if he wished to, an offer which was declined. The jury then came into court for the brief period necessary whilst the jury bailiffs were re-sworn, after which the jury retired to continue their deliberations. They later returned their verdicts on the remaining counts.

28. On behalf of the appellant, Mr Siddle advanced five grounds of appeal, one of which developed significantly in the course of the appeal proceedings. The first ground challenges the directions given by the judge as to the appellant's good character. Relying upon the decision of this court in *Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367, Mr Siddle submits that the appellant was entitled to a full good character direction containing both the credibility limb and the propensity limb. He submits that the judge's first direction said nothing about credibility, was inadequate in relation to propensity and was rendered worthless by the qualifying remark relating to the allegations going back some years. He contends that this first direction was so fundamentally flawed that it could not be cured by any further direction. In any event, he submits, the second direction was also deficient because it still failed to direct the jury that they should take the appellant's good character into account in his favour when

considering his credibility and when considering whether he was likely to have committed the crimes alleged.

29. In response, Mr Collings submits that the second direction was sufficient in the circumstances of this case.

30. The second, and related, ground of appeal complains that the character evidence of the two witnesses called by the appellant was wrongly diluted by the judge's observations that they could not speak as to what happened in private. Mr Siddle submits that by those observations the judge effectively neutralised the evidence which the witnesses gave in support of the appellant, and she compounded that failing by making an inappropriate reference to marital infidelity. He criticises the judge for engaging in advocacy. He suggests that in almost every case in which a defendant of previous good character is charged with a sexual offence, it would be possible to say that character witnesses could not speak of the defendant's conduct in private. A defendant should nonetheless be able to rely on evidence attesting to his good character.

31. Mr Collings submits in response that the judge was doing no more than reminding the jury, as she was entitled to do, of concessions made by the two witnesses when they were cross-examined.

32. The third ground of appeal complains that the nature and scope of the direction as to cross-admissibility of evidence between the three complainants was not sufficiently discussed with counsel before the summing up, and was unclear. It is submitted that the judge did not make clear whether she was directing the jury as to cross-admissibility on the grounds of a relevant propensity, or on the basis of the unlikelihood of three complainants each making false allegations, or both. Mr Siddle refers in this regard to the decision of this court in *Freeman, Crawford* [2008] EWCA Crim 1863, [2009] 1 WLR 2733. He suggests that the judge appeared on balance to be giving a direction as to the unlikelihood of coincidence, but submits that such a direction was inappropriate in the circumstances of this case, involving as it did dissimilar allegations, on the one hand of sexual offences against adolescent girls and on the other hand of sexual offences committed in the course of a marriage. Even if it could be said that the sexual nature of all the alleged offences justified a direction of this kind, he submits that its terms were deficient because it did not help the jury to identify the extent of any similarities and did not sufficiently assist the jury with both the possibility of collusion to tell deliberate lies and the possibility of one complainant's evidence being influenced by her knowledge of what another had said. He further submits the judge in her summing up as a whole did not fairly reflect the evidence bearing on the issue of whether the complainants had colluded to make false allegations. Understandably, Mr Siddle relies on the observations of the single judge when granting leave to appeal, to which we have referred.

33. Mr Collings in response submits that it was for the judge to decide how best to assist the jury on this issue in the light of the evidence given, and that the nature of the direction given was appropriate. Mr Collings himself, in his closing speech, had addressed the jury about the unlikelihood, in the absence of collusion, of the three complainants each making sexual allegations against the appellant. He submits that the judge properly reminded the jury of the evidence bearing on the issue of collusion.

34. In the fourth ground of appeal, Mr Siddle complains that he was wrongly prevented from cross-examining Ms Ferrary, and that the judge's comments early in her summing up amounted to unfair advocacy in favour of the prosecution's side. He submits that the jury needed to know precisely what was in the bullet point notes in order to assess the significance of the omission of any reference to sexual allegations against the appellant, and to decide whether that omission cast doubt on the reliability of CB's allegations at trial.

35. As part of this fourth ground of appeal, Mr Siddle also relied on the fact that it has since trial become known to those representing the appellant that Melissa Chevin, the person referred to throughout Ms Ferrary's evidence as her supervisor, is in fact Ms Ferrary's daughter. His initial argument was that if that fact had been known at trial it would have been the subject of further cross-examination which, he suggests, would have called into question Ms Ferrary's production of the notes CF/6 at such a late stage before trial, and would have been likely to undermine Ms Ferrary's credibility. He had in any event put to Ms Ferrary, at the conclusion of his cross-examination at trial, the proposition that she had fabricated the notes CF/6 in order to lend weight to CB's allegations. Ms Ferrary had denied that suggestion, but Mr Siddle submitted that it would have been strengthened if everything which is now known had been known at trial. He submitted moreover that if he had been able to cross-examine about the matters which have only emerged since trial, the judge would not have been critical of him in the way she was in the summing up.

36. Mr Collings' initial response, in the Respondent's Notice, was that Mr Siddle had in fact been able to hammer home the point that the bullet point notes CF/1 did not contain any report of sexual offending by the appellant, making any further cross-examination unnecessary. He submitted that the late discovery of the notes CF/6, which supported Ms Ferrary's evidence that sexual offences had been reported to her even though there was no reference to them in CF/1, weakened the point which Mr Siddle wished to make.

37. When the appeal was first listed before the court, the respondent was able to confirm the mother-daughter relationship between Ms Ferrary and Ms Chevin, and to confirm that the respondent had been unaware of that relationship until it was brought to their attention by the appellant's advisers. There were however a number of unanswered questions to which it seemed to the court that insufficient attention had been given by the parties, and the hearing was adjourned to enable further enquiries to be carried out and any appropriate application made for leave to call fresh evidence. Consequential issues then arose between the parties, which they were unable to resolve by agreement, and a further directions hearing became necessary. Thus the substantive hearing of this appeal was regrettably delayed for a considerable time.

38. The result of steps taken during the period of adjournment is that the court has now heard, *de bene esse*, evidence from both Ms Ferrary and Ms Chevin, and has heard submissions as to whether that evidence should be received as fresh evidence. Ms Ferrary has explained why she did not feel it relevant to explain that the person who did indeed act as her supervisor was her daughter. Both witnesses have given an explanation of how an envelope containing the notes CF/6 was left by Ms Ferrary at her daughter's house, and was mentioned by Ms Chevin when Ms Ferrary had said that she had been unable to find some important documents.

39. The fifth ground of appeal challenges the failure of the judge to give a direction to the jury, in the terms sought by Mr Siddle, as to the appellant's clothing on the last day of the trial. Mr Siddle points out that throughout the trial the appellant had taken care to be smartly dressed before the jury. The concern which he expressed to the judge was that the jury, having returned some guilty verdicts on the previous afternoon, might regard the appellant's markedly less smart appearance as an indication that he had previously been putting on something of a show. Mr Siddle accepts that on its own, this would not be a matter which rendered the convictions unsafe; but he relies on it in combination with other grounds of appeal and submits that it is an indication of the approach taken by the judge which was generally unfavourable to the appellant. He submits that in the light of the judge's refusal to give the sort of direction which he sought, there was no point in himself making any comment to the jury.

40. Mr Collings maintains the stance he took at trial, namely that a direction such as was sought would be inappropriate, and submits that the judge was entitled to conclude that the best course was to say nothing. He underlines the fact that the defence were given the opportunity to say something to the jury but chose not to do so.

41. The submissions of both counsel were advanced on the tacit basis – with which we agree – that all the convictions must stand or fall together. Our conclusions are as follows. We begin by considering grounds 1 and 2 together, as both relate to the previous good character of the appellant.

42. In *Hunter*, this court reiterated two general rules which were applicable in the circumstances of this case: that a direction as to the relevance of good character to a defendant's credibility is to be given where a defendant has a good character and has given evidence, and that a direction as to the relevance of good character to the likelihood of the defendant's having committed the offence charged is to be given where the defendant does have a good character. We accept Mr Siddle's submission that in this case, a direction containing both limbs was necessary. An appropriate course would have been for the judge to give a direction based on example 2 set out in the Crown Court Compendium at page 11-6, and not to add to it any gloss or qualification. The judge was not of course obliged to adopt precisely the words of that suggested direction, but if she chose not to do so it was incumbent upon her to ensure that she clearly conveyed to the jury the five essential elements of it: namely, (1) that good character is not a defence to a charge, but (2) that the jury should take the appellant's good character into account in his favour in two ways, those being (3) that good character supports his credibility and should therefore be taken into account when deciding whether to believe his evidence, and (4) that his good character may mean he is less likely to have committed the alleged offence, (5) it being for the jury to decide what weight they give to the good character, taking into account all they have heard about the appellant.

43. We accept Mr Siddle's submission that the judge's first direction as to good character, which we have quoted earlier in this judgment, fell well short of meeting that requirement. It failed to convey the essential points, and it was moreover expressed in confusing terms which are very difficult to follow even when reading and re-reading them on the printed page. We shall have more to say later about the fact that the jury were not assisted by written directions on important points of law such as this. The direction was in addition undermined in two ways. First, it was unnecessary and inappropriate for the judge to make the comment she did to the effect that the character

witnesses could not speak as to the appellant's private life. Secondly, it was inappropriate for the judge to add to her direction a reference to the appellant's infidelity. It was particularly inappropriate when there had been no previous suggestion that issues of infidelity were in any way relevant, and no opportunity for counsel to make submissions if the judge was minded to include such a comment.

44. The judge rightly recognised that there was force in Mr Siddle's criticism, and accordingly gave the further direction which we have quoted. We understand the judge's wish not to delay the jury's retirement by acceding to Mr Siddle's suggestion of postponing her further direction until after the short adjournment. We nonetheless think it unfortunate that the judge did not at that stage either adopt the example in the Compendium, or spend a little more time drafting, and providing to counsel, a note of what she would say. If (which is far from clear) she had a concern that a direction in conventional terms would be inappropriate, we respectfully suggest there was all the more reason for her to hear submissions from counsel before finalising what would be said to the jury.

45. In the result, the second direction which we have quoted was far from satisfactory. First, the judge did not tell the jury whether this further direction about good character was intended to replace or to supplement that which she had given more than an hour earlier. The jury therefore could not know whether they were to ignore the earlier direction or to try to recall it and consider it in conjunction with the later one. Secondly, the terms in which the further direction was given are again difficult to follow. Thirdly, insofar as it can be said to include the five essential elements to which we have referred, the direction was immediately undermined by the concluding indication that the two things which the jury should take into account were that the appellant had no criminal convictions and that he was therefore to be treated as a man of good character.

46. In a trial in which there was a stark conflict as to whether certain acts had ever been committed, and in which the credibility of the witnesses was therefore a key issue, the appellant's good character was an important matter in his favour. The judge was required to give a clear direction identifying the two respects in which his good character should be taken into account in his favour. We have concluded that she failed to do so. It may just be possible, by cross-referencing and editing the passages which we have quoted from the transcript, to identify references to each of the five essential elements. We very much doubt, however, whether it was possible for the jury, unassisted by anything in writing, to understand the essential points which they needed to understand.

47. Ground 3 raises a similar question as to whether the jury could have understood, and been assisted by, the direction as to cross-admissibility. In *Freeman*, *Crawford* the court stated that evidence in relation to one count of an indictment may be admissible as bad character evidence in relation to another count or counts if it meets any of the criteria in section 101(1) of CJA 2003. If evidence relating to one count tends to rebut an unlikely coincidence that separate and independent complainants have made similar but untrue allegations against the defendant, then the evidence of one complainant in relation to one count may be relevant to the credibility of another complainant's evidence on another count, which is an important matter in issue pursuant to section 101(1)(d) of the Criminal Justice Act 2003. In this situation, the jury will need to exclude collusion or innocent contamination as an explanation for the similarity of the evidence of the complainants: the more independent the sources of evidence are, the

less probable it is that their similar complaints are the product of mere coincidence or malice.

48. Alternatively, the jury may be sure of the guilt of the accused upon one count, and that finding may satisfy them that the accused has a propensity to commit a particular kind of offence, which is again is an important matter in issue pursuant to section 101(1)(d) of the Criminal Justice Act 2003. In this situation if, but only if, the jury are sure that guilt of that offence establishes the accused's propensity to commit that kind of offence, they may proceed to consider whether the accused's propensity makes it more likely that he committed an offence of a similar type alleged in another count in the same indictment.

49. The Crown Court Compendium gives guidance as to the directions which must be given in each of those two situations. It observes that a direction based on both coincidence and propensity may in some cases be appropriate, but adds that such a direction "is likely to be complex and, unless great care is taken, confusing." We agree with that cautionary note.

50. As we have said, the full text of the learned judge's direction as to cross-admissibility is unfortunately not available to us. It seems, however, that her direction was essentially based on the unlikelihood of coincidence approach, and not on the propensity approach. That was consistent with the approach which the prosecution had taken in the course of the trial. It was therefore necessary to direct the jury that the evidence of one complainant may be relevant to their assessment of allegations made by other complainants, because they might think it unlikely that similar allegations had incorrectly been made by two or three independent persons. It was also necessary to warn the jury that before following such a line of reasoning, they would have to be sure they could exclude any risk that the witnesses had colluded to give false evidence and any risk that the evidence of one complainant may have been contaminated or influenced, even unwittingly, by her knowledge of what another complainant had said. That again was a direction which could have been given in conventional terms, and the judge could have been assisted by the example set out at page 13-5 of the Crown Court Compendium, suitably modified to reflect the evidence in the trial.

51. We do not accept Mr Siddle's submission that such a direction was inappropriate in the circumstances of this case. There were of course differences between the allegations made by the three complainants. It would, for example, have been obvious to the jury that there were significant differences between a sister alleging that she was sexually abused by her brother as a child, and an adult wife alleging that consensual sexual acts were interspersed with non-consensual acts. There were however broad similarities between the complainants, each of whom alleged that the appellant had imposed himself upon her in the privacy of a family home in which he had a degree of control over her. In our view, those similarities were sufficient to justify the judge in giving a direction based on the unlikelihood of coincidence.

52. Like the single judge, we have found it necessary to read the judge's direction on this topic more than once, and we keep very much in mind that the jury were not able to take that course because the direction was not given in writing. We regret to have to say that the direction lacks clarity and focus, and we cannot think the jury would have found it easy to follow. There are two aspects of the direction which particularly concern us.

53. First, we accept Mr Siddle's submission that the incomplete transcript available to us does not include any passage in which the judge assisted the jury as to what similarities they might find to exist as between the evidence of the three complainants. We do not know whether she said anything on that topic in the initial part of her summing up which was not recorded, and we acknowledge the possibility that she did so. It would have been possible for an appropriate direction to be given quite briefly. We are bound to say, however, that the discursive direction as a whole lacks any obvious structure, and we therefore cannot be at all confident that the missing section would have contained a clear and succinct indication of the relevant features of the evidence. Certainly the passage which we have quoted does no more than leave it to the jury to consider "any degree of similarity between their allegations that you perceive". In those circumstances we are not satisfied that the judge identified for the jury either the similarities on which the prosecution relied, or any other similarities on which they could in her view properly rely, or the features of dissimilarity on which the defence relied.

54. Secondly, the defence case was as we have indicated that the complainants had colluded and were deliberately giving false evidence. The judge was entitled to tailor her direction to reflect the defence case, and she did clearly direct the jury that they must be sure that a complainant's evidence was not the product of collusion before they could rely on it as having any relevance to the credibility of another complainant. It was however also incumbent upon her to direct the jury as to the need for them to be able to exclude a risk that, even in the absence of collusion, one complainant may have been influenced, consciously or unconsciously, by what another had said. In this respect, the judge's direction was much less clear. The judge did in an early part of her direction tell the jury that they must be sure that the evidence of one complainant had not been "influenced in any way, either consciously or sub-consciously" as a result of her hearing about the allegations of others. Thereafter, however, she used the word "contamination" to mean deliberate telling of lies, which was also referred to as "collusion". At no point did the judge give the jury a simple explanation of the difference between, on the one hand, collusion between witnesses to put forward false accounts, and, on the other hand, innocent contamination and unconscious influence of one witness through her knowledge of what another has said. At no point did she give an explicit direction that the jury must be satisfied that they could exclude both, even though the defence case focused on the former.

55. We bear in mind that the issues in the trial were stark. A jury properly directed would have been entitled to exclude any risk of collusion or of unconscious influence, to be satisfied that the witnesses were independent of one another in this regard, and to use the coincidence of broadly similar allegations in the way which the judge indicated in the passage we have quoted. We have concluded however that the lack of clarity in the oral direction makes it impossible to say that the jury were properly directed in this regard.

56. Before moving on to the remaining grounds of appeal we must yet again stress the desirability of a judge providing the jury with written directions, about which counsel have had an opportunity to make submissions before they are given to the jury. As this court has frequently pointed out, written directions can be valuable even in an apparently straightforward case, or in respect of a conventional direction; and when the jury have to be given a number of legal directions, including in respect of legal issues

such as cross-admissibility, they are even more important. In the present case, we think it is very regrettable that the jury were not given written directions on important matters of law. The provision of written directions would have assisted the jury to follow them as they were delivered, to remind themselves of the legal directions if it became necessary to do so during their deliberations, and to approach the issues in the case in a structured manner. However clearly the oral directions were expressed, the jury would surely have found it easier to follow them if they also had them in writing; and regrettably, as the passages which we have quoted show, the terms in which the learned judge delivered her summing up were not entirely clear. Moreover, we agree with the single judge that the structure of the summing up was not clear, making it harder for the jury to identify those points at which the judge was directing them about the law as opposed to reminding them of the evidence.

57. In addition, we emphasise once again that the assistance which written directions give to the jury is not their only benefit. The mental discipline involved in drafting them has the further advantage of enabling the judge to focus on precisely what legal issues need to be the subject of directions, to refine the manner in which those directions should be expressed, and to identify areas of difficulty or complexity which may not have been apparent in the earlier stages of the trial.

58. We can deal briefly with the complaint that Mr Siddle was prevented from cross-examining Ms Ferrary as fully as he would have wished. It seems to us that in their discussion of this point in the absence of the jury, the judge and counsel may, to some extent, have been at cross purposes. Be that as it may, it seems to us the point to which Mr Siddle wanted to establish at trial was a very simple one: the bullet point notes, CF1, contained no reference to any complaint of sexual abuse by the appellant. Mr Siddle was entitled to make that point, and to bring to the jury's attention that the bullet point notes did include complaints about other aspects of CB's relationship with the appellant, and did include a reference to a sexual allegation against another man. We do not believe that Mr Siddle was prevented from making those legitimate points. Beyond that, however, we do not see how - as matters stood at the time of the trial - detailed cross-examination of Ms Ferrary about the matters recorded in the bullet point notes could have assisted the jury. In the nature of a counselling session, those notes were likely to relate to highly personal matters; and it would have been quite inappropriate to trawl through their contents for the sole purpose of reiterating that they did not include any reference to sexual abuse by the appellant. We therefore do not find anything in this ground of appeal which casts doubt on the safety of the convictions.

59. We can also deal briefly with the criticism that the judge in her summing up commented upon the defence case in a way which may have seemed to the jury a rebuke of Mr Siddle. We do not see that there was any ground for a rebuke, as Mr Siddle was doing no more than putting the defence case; and although the judge was entitled to point out that the allegation was of perverting the course of justice, and not simply of unprofessional conduct, we think it regrettable that she did so in the terms she did at the start of her summing up. This is not, however, a matter which either on its own, or in combination with other grounds of appeal, undermines the safety of the convictions.

60. We turn to the challenge now made to the genuineness of the notes said to have been restored to Ms Ferrary by her daughter, and the evidence which we have heard in this appeal.

61. CB's evidence at trial was that she reported her husband's sexual offences to Ms Ferrary in the course of counselling sessions in 2013-2014, a year and more before she made her complaint to the police which was said by the appellant to be a fabrication. Ms Ferrary in her evidence to the jury confirmed that such reports had been made to her, notwithstanding that she had not mentioned them in her bullet point notes CF/1, and she was able shortly before the trial to produce the more detailed notes, CF/6, which confirmed that part of her evidence. On behalf of the appellant it was argued before the jury that the absence of any reference to sexual abuse in CF/1 was a suspicious feature, as was the late emergence of CF/6, and that the jury could not be sure that Ms Ferrary's evidence had not been fabricated in order to assist CB. It is now submitted that evidence which has emerged since trial shows a further suspicious feature, suggesting that Ms Chevin too has been involved in fabricating evidence in order to assist her mother and, indirectly, CB.

62. Mr Siddle invited us to receive, as fresh evidence pursuant to section 23 of the Criminal Appeals Act 1968, the agreed evidence of a police officer, DC McNamee, who had telephoned Ms Ferrary in July 2018 and asked for her daughter's address. The evidence showed that Ms Ferrary initially refused to provide the address, saying she did not want to get her daughter involved in the case. About an hour later she rang the officer, in a state of distress, saying –

> "I did not lie, but I may have misled the bit about my daughter being my supervisor, she has not been trained as a supervisor, as like me she is not trained as a supervisor, I did not have aa supervisor, so we would just check each other's stuff … "

Mr Siddle relies on that as a confession by Ms Ferrary that she had given misleading information in her evidence, and submits that if this evidence had been available at trial the jury would have viewed Ms Ferrary's evidence in a different light.

63. Mr Siddle also relies on what he submits were unsatisfactory accounts given by Ms Ferrary and Ms Chevin, when called as witnesses before this court so that their evidence could be heard *de bene esse*, as to the circumstances in which the notes CF/6 passed from the possession of Ms Ferrary to Ms Chevin and then back again. He points to the contrast between Ms Ferrary's account in a witness statement of 12th April 2017, to the effect that she had given those notes to her supervisor Ms Chevin, who had recently retrieved them from a file in her office, and the account given to this court by both witnesses to the effect that the notes had been with other documents in an envelope which Ms Ferrary had either dropped or inadvertently left behind when she was visiting her daughter, had been found by Ms Chevin at a later date when she was moving house, and had then remained with Ms Chevin until shortly before the trial. Mr Siddle also points to the fact that in their evidence to this court both Ms Ferrary and Ms Chevin described the latter's role as one of emotional support and of being a supervisor in the sense of helping Ms Ferrary to manage her emotions after difficult sessions with clients. Mr Siddle suggests that the curious concept of "supervising emotions" is a device to try to explain away the initial misleading references to Ms Ferrary's supervisor.

64. In view of our decision that the appeal must be allowed and a retrial ordered, it would not be appropriate for us to comment in detail upon evidence which may or may not be before the jury at the retrial. It suffices for present purposes to say that we are satisfied that the evidence of DC McNamee met the criteria in section 23 of the 1968 Act, and

we admitted it as fresh evidence. It is evidence that Ms Ferrary gave misleading evidence to the jury, and it is evidence which, if it had been available at trial, would have strengthened Mr Siddle's challenge to the credibility of Ms Ferrary and thus, indirectly, his challenge to the credibility of CB. The prosecution relied on Ms Ferrary's evidence at trial as supporting the consistency, and therefore the reliability, of CB's allegations. But Ms Ferrary could only provide that support if the jury could be sure that she was giving a truthful and reliable account of what CB had told her during the counselling sessions. In assessing her reliability, the assertion that she had given contemporaneous notes CF/6 to her supervisor was an important factor for the jury to consider: the absence from the notes CF/1 of any reference to sexual abuse was a significant feature, and Ms Ferrary pointed to the notes CF/6 as confirming that sexual abuse was mentioned even though not recorded in CF/1. It is now known that Ms Chevin is her daughter, and she was not a supervisor in the sense which the jury are likely to have understood that term. It is also known that Ms Ferrary has since the trial told DC McNamee that she may in one respect have misled the jury, albeit she maintains the truthfulness of her evidence as to what was said in the counselling sessions. We accept that on the face of it, these are matters which call into question the safety of the convictions.

65. The oral evidence of Ms Ferrary and Ms Chevin did not meet the criteria in section 23, and we did not receive it as fresh evidence. In seeking to deal with the issues which have arisen, their evidence raised a number of questions to which we did not find any satisfactory answer. We do not think it appropriate to go into detail. For present purposes, it suffices to say that their accounts did not undermine the points which Mr Siddle makes, and we are unable to be satisfied that the convictions are safe.

66. We turn finally to the complaint made in the fifth ground of appeal about the decision of the learned judge to say nothing to the jury about the appellant's clothing on the last day of the trial. This was an awkward situation, which might have been, but was not, foreseen. There were various approaches which could have been taken. In the absence of any agreement between prosecution and defence, it was a matter entirely within the discretion of the trial judge how best to deal with the situation which had arisen. We can well understand why she concluded that the best course was to say nothing at all. It cannot be said that she was wrong to exercise her discretion in that way.

67. It was for those reasons that we concluded that these convictions were unsafe. In doing so, we have had regard to the combined effect of the deficiencies in the summing up, and the further evidence now available in relation to the evidence of Ms Ferrary, which bears on the extent to which she was capable of supporting the consistency of CB.