Neutral Citation Number: [2022] EWCA Crim 1501

Case No: 202102332

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM AYLESBURY CROWN COURT**
**HIS HONOUR JUDGE ROCHFORD**
**SITTING AT AYLESBURY CROWN COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 November 2022

**Before :**

**LADY JUSTICE WHIPPLE**
**MR JUSTICE GARNHAM**
and
**HER HONOUR JUDGE KARU THE RECORDER OF SOUTHWARK**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **NIKKI ANTON PIKE** | **Appellant** |
| **- and -** | |
| **REX** | **Respondent** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mr Chandrapala** (instructed by **Noble Solicitors**) for the **Appellant**
**Mr Brady** (instructed by **CPS**) for the **Respondent**

Hearing date : 2 November 2022

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

This judgment was handed down remotely at 10.00am on 14 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

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

**LADY JUSTICE WHIPPLE :**

## INTRODUCTION

1. This is an appeal against conviction, brought with leave of the Full Court, by Nikki Pike (the appellant) against his conviction on 28 June 2021 following a trial before HHJ Rochford at Aylesbury Crown Court sitting at Amersham Law Courts.

2. The appellant was convicted of one count of causing or inciting a child under 13 to engage in sexual activity, one count of rape of a child under 13, and 7 further counts of rape of a child. He was acquitted of one count of causing or inciting a child under 13 to engage in sexual activity (this was count 2, the "cubicle incident" which we shall describe in more detail below). Counts of causing or inciting a child to engage in sexual activity, which had been charged in the alternative to the rape counts, were ordered to be left on the file.

3. Prior to his trial, the appellant had pleaded guilty to one count of causing or inciting child prostitution or pornography and one count of taking indecent photographs of children.

4. All counts related to a single complainant, to whom we shall refer as C1. The timespan of the convictions ran from 2013 to 2017, when C1 was between 12 and 16 years old.

5. On 5 October 2021, the appellant was sentenced by the same judge to a total of 18 years imprisonment for these offences. Permission to appeal against sentence was refused by the single judge and the application in relation to sentence is not renewed.

## FACTS

6. C1 was born on 28th November 2001. C1 started to go rock climbing at Xscape, a shopping centre in Milton Keynes, when she was about 10 years old. The climbing wall was in a shop called Ellis Brigham. C1's instructor was the appellant, a man who was 9 years older than C1. The appellant worked as a retail assistant at Ellis Brigham from November 2009 until August 2015. From September 2015 he worked at DC Shoes, a different shop in the same Xscape shopping centre.

7. On 2 October 2018 C1 approached her mother. She was tearful and said "I think I have been groomed". C1's mother contacted the police.

8. C1 was interviewed by the police on three occasions following this disclosure. The first ABE took place on 2 October 2018. She said she started climbing at the age of 10 years. She would go two or three times a week. She discovered that her parents were splitting up and would talk to, and confide in, the appellant. Their friendship progressed to having a sexual relationship which started as Skype video chats of an inappropriate nature. She said that the appellant started taking her out in his car and she would tell her mother that she was going for a jog or something else. She said that whilst in the car, he would get her to give him "blow jobs". He would also hide her under the blankets in the backseat as he did not want to be seen with her due to her age. On one occasion he hid her in the boot of his vehicle.

9. She said that in June 2016, the appellant organised an event at Ellis Brigham where participants climbed the wall in order to raise funds for a charity. She said that the appellant organised this event in order to get her alone. She said the appellant took her into the staff room and touched her chest over clothing and tried to kiss her. On 16 December 2017 the appellant was staying at the Jury's Inn, Milton Keynes for a work Christmas party. She said she went to meet him. She took condoms, which he had asked her to purchase, and they engaged in intercourse, vaginal once and oral on three occasions. Each time the appellant ejaculated. There was a further occasion in August 2018, in the car park of Bletchley Leisure Centre, when the appellant tried to initiate sexual contact, but she refused.

10. On 3 October 2018 the appellant was arrested. An iPhone, a laptop, an iPad and a Samsung computer were seized together with a set of car keys. Over the course of two interviews he admitted to engaging in inappropriate sexual conversations with C1 but denied any physical sexual activity until she had turned 16 in November 2017; he admitted to having vaginal sexual intercourse on one occasion with her after that (in December 2017 at the Jury's Inn hotel in Milton Keynes) but he denied all other allegations.

11. In a second ABE interview on 12 October 2018, C1 talked about the appellant recording her. She referred to him having a grey iPhone 5 and iPad in a black quilted cover. She said there was an occasion when she was giving him oral sex in the car and he was filming her with his phone. She said she never gave him permission to do this. She again referred to the charity climbing event and how he had got her into the staff room and started kissing her. She said Kenny, a work colleague, came in and interrupted them. She said the appellant would talk about the trouble the footballer Adam Johnson had got into and he said that that would happen to him if she talked about what was happening. (Adam Johnson, a professional footballer, was sentenced to imprisonment following conviction for sexual offences relating to a girl under 16.) C1 handed over some shoes that she said the appellant had bought her and she said he offered to get her a laptop. She said that he arranged for her to purchase a dildo via an Amazon collection box. She said she got rid of it in the summer before her disclosure to the police but that she had the receipt for it on her Amazon account. C1 explained that when the appellant made her give him oral sex he would demand that she swallow his ejaculate.

12. Following the appellant's charge and in preparation for the trial, C1, by then 18, made further disclosures to the police and on 15 October 2020 provided a third ABE interview. She said that the appellant had attended her home on three occasions when she was 14 or 15 years old. On the first occasion the appellant forced her to perform oral sex. Following this he attempted vaginal penetration but was only able to insert his penis "a bit". In frustration he forced her to perform oral sex again. He ejaculated far into her throat and ordered her to swallow. He then promptly left and blocked her on social media. The second occasion was about 6 weeks later. He pushed her head onto his penis and ejaculated in her mouth ordering her to swallow. The third time happened when she was 15 and the appellant had driven her to get birth control. She performed oral sex on him in her bedroom. Again he ejaculated into her mouth. She said not long after leaving he messaged her saying he needed to speak to her and had a breakdown saying he could not do it anymore and would go to prison if she told anybody and felt she was obsessed with him.

13. In interview and at trial, the appellant denied any physical sexual activity with C1 until she had turned 16, apart from one kiss. He described the communication between them as "sexting".

14. The appellant's phone, laptop and iPad were forensically analysed. There were 31 indecent images of C1 found on the laptop. These were from March 2016, when C1 was 14. These photographs formed the subject matter of the first offence the appellant admitted (taking indecent photographs of children). There was also a Skype chat between them from 2016 in which the appellant was typing instructions to C1 as to pornographic poses he wanted her to display. This included (on 19th March 2016 at around 21.22 to 21.29 hours) the following exchange: he messaged C1 to "bend over as if your touching your toes … feet hop width apart and slowly pull your knicers (sic) down… I wanna put my cock in there so bad"; C1 replied asking him what he saw and he replied "your vagina". This was the subject matter of the second offence the appellant admitted, causing or inciting child prostitution or pornography.

15. On the iPhone, there was messaging with C1 in 2018 in which she made accusations of his grooming behaviour and sexual abuse, which he denied in responding messages. The appellant had saved her number as "Sarah".

16. On his iPad, there was an email from C1 to the appellant regarding the collection of an item from an Amazon locker. The prosecution contended that this was the dildo that had been ordered.

17. In interview and thereafter he denied commission of the offences. His defence case statement stated:

> "The defendant denies engaging in any physical sexual activity with the complainant before she attained the age of consent, except a kiss when she was 15 years old (sometime after July 2017). … The Defendant accepts having consensual sexual intercourse with the complainant after she turned 16. The defendant also denies taking any indecent images of the complainant."

18. In his defence case statement, he advanced the following case:

> "The Defendant will state that the complainant became his friend whilst learning to climb at Xscape. The Defendant will say that he only tried to provide emotional support to the complainant who was going through a difficult time due to her parent's split. The Defendant accepts engaging in sexual conversation with the complainant, but it was only to answer the questions the complainant would ask him and over time their conversations became more sexual. The defendant was fully aware that he could not engage in any sexual activity with the complainant due to her age. The defendant denies arranging the charity event in June 2016, with a view to get the complainant alone. The defendant accepts that the complainant went to the staff room with him that day, but it was only to fill their water bottles and the defendant also checked Facebook

> page of the charity event on his manager's computer. The defendant denies that any sexual activity took place in the staff room. The room cannot be locked, and people constantly keep coming in and out of the staff room. The defendant denies ever recording the complainant on any of his devices or on the dash camera in his car, as alleged by the complainant. The defendant denies paying for the shoes for the complainant. … The defendant accepts that after the complainant turned 16 in November 2017, they had consensual sex at Jury's Inn, Milton Keynes. This was because they always used to have this discussion that they will have sex when the complainant turned 16."

19. At trial, the appellant maintained his denial and advanced the case outlined in his defence case statement.

20. The prosecution's case was that the appellant abused C1 when she was aged between 12 and 16 years. The abuse manifested itself in numerous ways with oral and vaginal intercourse being the most serious. Any notional consent that C1 may have given was brought about by the appellant's grooming behaviour and therefore was not true consent. Whilst the prosecution relied principally on C1's evidence, the appellant's electronic devices provided corroborative evidence.

## GROUNDS OF APPEAL

21. Before turning to the submissions of the parties, it is necessary to clarify the scope of this appeal.

### Existing Grounds of Appeal

22. By perfected grounds of appeal dated 2 September 2021 and drafted by Shaher Bukhari, trial counsel for the appellant, the following grounds of appeal are advanced. These are the "existing grounds of appeal":

    i. The learned trial judge wrongly did not give the defence permission to cross examine the complainant on the circumstances in which or as a result of which she made the allegations about the appellant. (We shall refer to this as the issue about "**JH material**".)

    ii. The learned judge wrongly failed to give the jury proper and/or adequate directions on each occasion the learned judge gave his opinion, as to how to treat HHJ's opinion of the prosecution or defence evidence. The learned judge also spent a lot of time in his summing up explaining away the inconsistencies and inaccuracies in the complainant's account, but did not offer the same generosity to the defendant. (We shall refer to this as the complaint about **"biased summing up**".)

    iii. The learned judge wrongly interfered, in the presence of the jury, with how the defence wanted to present their case, and put the defence under pressure to speed up the proceedings, having made no similar

interference during the Crown's case. Such interference was capable of influencing the jury's attitude to the defence case. (We shall refer to this as the issue about **"pressuring the defence**".)

23. Permission for the existing grounds of appeal was granted by the full Court at a renewal application on 15 June 2022 (Fulford LJ, Cutts J and Henshaw J). Mr Chandrapala appeared for the Appellant at that renewal hearing. He was not trial counsel.

**First Further Grounds of Appeal**

24. By a Note dated 29 June 2022 filed with the Court, Mr Chandrapala sought further orders in connection with this appeal. The focus of that Note was his request for funding to obtain an expert report on false memory syndrome with a view to broadening the grounds of appeal to challenge the complainant's account as a product of "false memory". At a case management hearing on 7 July 2022, the Court (Whipple LJ, Cutts J and His Honour Judge Michael Chambers, the Recorder of Wolverhampton) refused permission for an expert in false memory and refused permission for that further ground of appeal.

25. The Court directed transcripts of the evidence of the appellant and the cross-examination of C1 to be obtained in readiness for the hearing of the appeal on the existing grounds of appeal, which the Court directed to be listed as soon as possible. The appeal was put in the list for 1 November 2022.

**Second Further Grounds of Appeal**

26. By a document lodged with the Court entitled "further grounds of appeal" drafted by Mr Chandrapala on 19 September 2022, permission was sought for yet further grounds of appeal. This was followed by a number of emails to the Court, attaching various items of literature and links to YouTube videos and other materials. In the main, these materials were about false memory syndrome. By this further application, Mr Chandrapala effectively renewed his application that this Court should permit that issue to be investigated. Other points were taken as well.

27. We invited Mr Chandrapala to address us on his further grounds of appeal at the outset of the hearing. We informed Mr Chandrapala that we refused permission for these yet further grounds and that our reasons would follow in writing. These are our reasons.

28. First, we direct ourselves that when an applicant seeks to rely on a ground of appeal not identified in the appeal notice, the applicant must apply by notice, in accordance with Criminal Procedure Rule 36.14(5) and Criminal Practice Direction IX 39C, which reflect the principles identified in *R v James* [2018] EWCA Crim 285 at [38]. In deciding whether to allow a variation of grounds of appeal already before the Court, the Court is to take into account the following (non-exhaustive) list of issues (see [38(v)] of *James*: (a) the extent of the delay in advancing the new grounds; (b) the reason for the delay in advancing the new grounds; (c) whether the issues/facts giving rise to the new grounds were known to the applicant's representative at the time he or she advised the applicant regarding any available grounds of appeal; (d) the

overriding objective of acquitting the innocent and convicting the guilty and dealing with the case efficiently and expeditiously; and (e) the interests of justice.

29. We have not received any formal explanation for the delay in raising these further grounds but it is our understanding that they result from Mr Chandrapala's own research since he took this case over from trial counsel, (the same firm of solicitors having been instructed throughout).

30. In our judgment it is plain that the issues and facts giving rise to the new grounds were known to the appellant's representative before the original appeal was lodged and all of these points could and should have been raised before. Nonetheless, we consider the merits of the points now raised and whether it would be in the interests of justice to grant leave for these further grounds at this stage.

31. First, Mr Chandrapala again seeks to assert that the complainant has confabulated her account as a result of the false memory which displays. He relies on extensive research about confabulation. We have no hesitation in rejecting that application, for the same reasons as the Court gave on 7 July 2022, when a similar application was rejected:

> "11. … At the heart of these [further grounds] lies his desire to seek to impugn the testimony of the complainant on the basis that she was suffering from false memory. This is to commence a wide ranging investigation at this appeal stage into that issue. We make the obvious point that this is in essence to seek to reopen a case which has already been tried in the Crown Court. This is an appeal and it would be an unusual course to permit such a wide ranging investigation at this stage. …
>
> 13. The reason is that there is no evidence or any material currently before this court to suggest that false memory syndrome might have been in play here. The suggestion of false memory syndrome is wholly speculative. There is no evidential basis for seeking that evidence at this stage and, indeed, there was no evidential basis for seeking it at the earlier stage at trial. The complainant is not a person in relation to whom there is any history of confabulation nor did she undergo any counselling which might have triggered false memory in her case.
>
> 14. We are mindful that the court has looked at matters relating to the circumstances in which expert evidence of this short should be admitted. We have in mind the case of *Stephen H v R* [2014] EWCA Crim 1555 where the Court of Appeal endorsed the trial judge's conclusions set out at paragraph 20 of the case report, notably that there had to be a "sound factual foundation" for such expert opinion to be admissible and in this case there is simply no foundation at all, sound or otherwise, for seeking to procure such evidence."

32. The issue in this case was credibility. It was for the jury, properly directed, to decide whether they were sure that the complainant was telling the truth. There is nothing in the background of the case or C1's history to suggest that her account might be the product of some external influence which had "seeded" a narrative account which accused the appellant of these serious offences. There is no factual foundation, let alone any sound factual foundation, for this Court now to permit the appellant to argue that C1's memories were confabulated. For the second time, we refuse permission to raise issues of confabulation in this appeal.

33. Secondly, Mr Chandrapala seeks permission to argue a point about res gestae and confabulation. We have struggled to identify the precise point of law which he pursues here. But we gather that Mr Chandrapala seeks to contrast confabulation with the concept of res gestae, the latter being a statement "by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded" (see eg *R v Ratten* [1973] 3 WLR 930 per Lord Wilberforce). As we understand it, he suggests that the complainant's evidence here was the very opposite of res gestae, and for that reason should be excluded or at least investigated. This is a novel argument, and not one that we consider to have any prospect of success on appeal.

34. Thirdly, Mr Chandrapala suggests that there have been procedural irregularities beyond those already identified in the existing grounds of appeal. The first challenge under this head relates to the judge's good character direction. The judge directed the jury that "bearing in mind what the Defendant has admitted, you are entitled to conclude that his previous good character cannot help very much, if at all; but it is a matter for you" (p 6D). It is now suggested that this was too strong a direction, and that it created unfairness for the appellant because it effectively erased the benefit in the jury's eyes of his previous good character. Further or alternatively, it is said that it should have been accompanied by a direction drawing the jury's attention to the fact that he had pleaded guilty to two offences, which was to his credit and might suggest that his denials of the index offences were truthful. The Crown's answer is twofold. First, they say that this direction was fair. The appellant had pleaded guilty to a number of charges, specifically, charges of causing or inciting child prostitution and taking indecent photographs of children, both of those offences involving C1 before she turned 16. It was for the jury to consider whether his good character *before* those charges occurred was to be taken into account in his favour. In the circumstances, it was obvious that the good character direction had to be moderated by reference to those admitted offences. Secondly, the Crown say that the good character direction in these terms was circulated to the defence team in draft, as part of the legal directions, and no objection to it was made. It is too late now. We agree with the Crown. There is no arguable criticism of the judge here. The appellant had pleaded guilty to two serious offences of sexual behaviour involving a child. In those circumstances it really was a matter for the jury whether his previous good character weighed in the balance when his credibility was considered, or not. There was nothing unfair or prejudicial in the judge's phrasing of this direction.

35. The second challenge under this head is that there should have been a corroboration direction following *R v Makanjuola* [1995] 1 WLR 1348. Mr Chandrapala points to aspects of C1's evidence which he asserts were plainly untrue and suggests that the judge should have exercised his discretion to warn the jury against accepting the

complainant's evidence without corroboration. The Crown argues that *Makanjoula* does not have any relevance to this case because that concerned events which occurred before the law changed (section 32 of the Criminal Justice and Public Order Act 1994 removed the requirement for corroboration warnings in sexual offence cases). But in any event, accepting that the Court has a residual discretion to give such a direction, the Crown say that there was no reason to give such a warning in this case; there was no evidential basis for suggesting that C1's evidence was so unreliable that such a direction was warranted. Further, and in any event, the Crown submits that no such warning was requested by defence counsel at trial. We agree with the Crown. There is no evidential basis, beyond the suggestions put to C1 in cross examination, that she is lying. In any event, the judge was not asked to give such a direction, and cannot therefore be criticised for not doing so.

36. The third challenge under this head is that the defence lacked expert reports. In his written submissions, Mr Chandrapala suggested that this created unfairness, because the Crown had expert reports on the mental condition of the complainant as well as the intermediary report which highlighted her autism. This was the basis of an agreed fact which explained that C1 had been diagnosed with autism, and that she was probably more vulnerable to early efforts at grooming than other children of her age as a result. This challenge was not pressed at the hearing. But the obvious answer to this is that it was a matter for the appellant's trial team to put before the Court such evidence as they considered necessary and relevant in order to represent their client's interests at trial. They did not challenge the Crown's expert reports about C1 at the time and it is too late to do so now. But in any event, there is no reason to doubt the Crown's expert evidence as to C1's diagnosis or its probable impact on C1's behaviour. Further, the appellant's defence was that these events did not occur, and that defence case was not undermined in any way by the expert evidence or the agreed fact based on it.

37. Fourth under this head, Mr Chandrapala suggests that there was inadequate disclosure in preparation for the trial. Mr Chandrapala suggests that disclosure should have included pre-ABE interview notes; he says that there was no disclosure of the JH allegations so that no check could be made on any similarities between the two complaints; he says that no detail of the prosecution case against JH, no details of who else at that business knew about the complainant's allegations against JH, and no school reports to support the evidence that the complainant said to her school that she had been groomed, were provided. This argument was not pressed at the hearing. But again, the answer can be given shortly. It is too late now to complain about a lack of disclosure. The time to raise that issue was at trial. But in any event, there is no reason to doubt the prosecution's compliance with their obligations of disclosure. The prosecution did disclose details of the case against JH (see below- we shall shortly come to the JH allegations, which are an important element of this appeal). There is no reason to believe that other relevant material existed.

38. For those reasons, we refused permission for all grounds of appeal contained in the second further grounds document.

## Summary

39. The only grounds for which the appellant has leave are contained in the existing grounds of appeal, to which we now turn.

## GROUND 1: JH MATERIAL

### Background

40. By this ground, the appellant challenges the judge's refusal to allow the defence to cross examine C1 on the circumstances in which she made her allegations against the appellant. The particular issue arises from the fact that C1 made allegations against the appellant shortly after C1 was told that her allegations against a different person, JH, would not be pursued by the police.

41. Such details as are available in relation to the allegations against JH are contained in the unused material disclosed by the Crown on 10 November 2020. That material included a Crime Reporting Information System ("CRIS") report which records that C1 and JH both worked at the Bletchley Leisure Centre and that JH had sexually touched C1 on a number of occasions. This had been the subject of discussion by C1 with friends and colleagues, and had been reported to management. Because JH had been the subject of previous complaints by other female employees and had also been involved in an incident where he had gone into a changing cubicle with a 15 year old female, the employer decided to inform police on 30 August 2018.

42. In the days following, the employer attended a strategy meeting with the police and explained C1's complaint, as it had been reported to the employer. On 7 September 2018, C1 spoke to the police in a "pre-interview assessment". C1 said that she had started working at the swimming pool in April 2018 when she was 16. This was when she first met JH. He had started asking her for pictures and sending her pictures (including one of his naked penis). This had developed into an unwanted sexual relationship. When she heard that he had previously been investigated for sexual misconduct at work, she reported what he had done to her to management.

43. In the event, the police decided not to charge JH because they concluded that no offences had been committed. Their reasoning was that C1 was over 16 and the contact was consensual. The police spoke to C1's mother to inform her of their decision on 20 September 2018. An entry on 1 October 2018 indicates that the police had again spoken to C1 to tell her that they would not bring charges.

44. On 24 October 2018, the police met JH and his father. JH was given strong words of advice. The file was formally closed on 9 May 2019.

### Ruling

45. At trial, the defence applied to cross-examine C1 on her previous complaints against JH. They gave this reason in their written application (with emphasis added):

> "The defence will only cross examine the complainant to the extent that she made the earlier allegations in August 2018 and that she had contact with the police throughout until October 2018 when she was informed that the investigation will stop, and that she never mentioned anything in relation to the defendant in this case. The suggestion being that **once she had been through the process, she was familiar with the way the police investigations take matters further**. Whilst part of

> what she says is true (the skype conversation and indecent images[1]), **she has embellished the allegations against this defendant to get over the embarrassment of the case against [JH] not going any further**."

46. The Crown resisted this application, submitting that section 41 Children and Young Persons Act 1999 applied and that none of the gateways for admission applied in this case. The Crown noted the appellant's claims that the allegations against JH were false, but that was not supported by the report itself which indicated that the C1's allegations against JH were thought to be true in fact (although not to amount to a crime, for different reasons). Thus, said the Crown, there was no clear evidential basis to establish relevance, and in any event there was no non-defendant bad character application which would be necessary before this material could be used to cross examine C1 on the basis of propensity to make false allegations of sexual misconduct.

47. The Judge refused the defence application. He rejected the Crown's submission that this was a case which fell under section 41 at all. The issue, in his judgment, was one of relevance. In his ruling, he summarised the appellant's argument in this way:

> "The defence say that it is surprising, if these complaints were genuine, that she did not make the complaint previously; she - they say that her previous dealings with the police, over the [JH] matter, between August and October, would have given her a familiarity with police procedure, and contact with the police, which might have been expected to trigger her making the complaint against Mr Pike, the defendant in this matter. It is also suggested … that she has embellished the allegations against this defendant, to get over the embarrassment of the case against [JH] not going any further. That has been somewhat expanded upon, orally, to suggest, also, that there was an element of revenge, or spite: the complaints against [JH] having not been proceeded with, she has, then, effectively, invented, or embroidered allegations against this defendant, and it is also said, in support of the application, that she may have learnt that it is helpful to add, or embroider to the allegations."

48. The judge concluded:

> "There is no evidence on which a case can, really, be advanced against the complainant to the effect that she has embroidered these allegations out of spite, or out of disappointment, nor can it be said that she would be - that her coming into contact with the police would have provided her with an opportunity, earlier, to make complaints. The police are there, and available for complaints to be made to them, at any stage, and, in any event, the complaint was made to the police in October, which is only some two months - indeed, less than two months after the complainant first went to the police with information about

[1] A reference to the two counts to which the appellant had pleaded guilty

> [JH]. In my judgment, the prosecution are right to say that these questions are speculative, and no more than that. There is no positive case that can be put to the complainant, and, in those circumstances, I consider that the questions would not be admissible, or proper. I reach that conclusion without considering the exclusionary principles of section 41."

## Parties' arguments

49. The perfected grounds of appeal challenge this ruling. They argue that the JH allegations were inherently relevant to the reliability of C1's account. The timing of her disclosure to her mother on 2 October 2018 needed to be seen in the context of her being informed on 1 October 2018 that the police were not proceeding with her complaints against JH. C1 was in regular contact with the police for almost two months while they were investigating the allegations against JH and at no point did C1 mention her allegations against the appellant, so that the timing of the two allegations were part of the context which should have been put before the jury. Further, there were similarities between the allegations against JH and those now made against the appellant, specifically the allegation of sexual assault in a car, which she had made against JH and the appellant.

50. In their Respondent's Notice, the Crown maintain that the judge was right to refuse the defence application. The earlier complaint against JH had no bearing on C1's credibility assessed in the context of her complaints against the appellant. The police did not drop the action against JH because they did not believe C1; far from it, they dropped it because the evidence pointed to consensual sex when C1 was over the age of 16. It would have been wrong to have allowed this trial to become involved in satellite litigation relating to JH who had never been prosecuted, in fact. Further, the appellant's argument that C1's engagement with the police would have shown her how to fabricate her allegations was illogical in circumstances where there was no indication that her complaints against JH had been fabricated. The suggestion that she had invented her allegations against the appellant out of spite at her allegations against JH not proceeding was incoherent.

51. At the hearing before us, Mr Chandrapala's submissions rested substantially on asserted factual similarities between C1's allegations against JH and those made subsequently against the appellant. He noted two in particular: (i) forcing her into a cubicle for sexual purposes, and (ii) making her perform oral sex in a car. He said that even if C1's allegations against JH were true, C1 must have known that no crime had been committed yet she had still persisted in these allegations and in that sense she had made false allegations against JH.

52. Mr Brady submitted that the judge was right to exclude this material as irrelevant and stood by the points made in his Respondent's Notice and his more recent skeleton argument. This material was incapable of supporting the appellant's case. The allegations against JH were true, so they could not assist the defence in undermining her credibility in the context of these allegations. The suggestion that this material was relevant to show that C1 had worked out how to embellish her story through her contacts with police was fanciful; there was no evidential foundation for that.

Further, this material did not assist the jury on C1's delay in making complaints against the appellant; if anything, this material offered a valid explanation for C1's delay in making these allegations, because it was only in the course of her discussions about and contact with the police in relation to JH that she came to realise that the appellant had abused her and that explained the timing of her disclosure to her mother.

## Conclusion

53. The sand beneath this ground of appeal has shifted over time. At various stages and in slightly different ways, three arguments have been advanced by the appellant to justify admission of the JH material:

    i) That the JH material was relevant to show that C1 had embellished her account, and/or that she might have fabricated these allegations out of spite or embarrassment once her allegations against JH were dropped.

    ii) That the JH material was relevant to delay in making her complaint.

    iii) That there were factual similarities between the JH allegations and the allegations against C1.

54. As to i), the judge was right to reject any suggestions that the JH material provided evidence in support of embellishment of or motive for making false allegations against the appellant. These suggestions formed part of the appellant's case that C1 was lying. But the JH allegations were *true.* There is no logical or evidential connection between the (true) JH allegations and the appellant's defence of false accusation. The judge was right so to conclude.

55. As to ii), we first clarify the facts, having had close regard to the CRIS report which revealed the sequence of C1's disclosure of the JH allegations. C1 told others she worked with about JH, and then went to her line manager. It was her *employer* who raised the JH allegations with police, not C1. C1 only had contact with the police on one occasion on 7 September 2018 for her pre-assessment interview, where the sole subject of discussion was JH. She did not have "repeated contact over a period of two months" as the appellant submits. The police informed her mother that they were not proceeding against JH on 24 September 2018, a message which was confirmed on 1 October 2018. The defence suggestion that she made her allegations against the appellant on the day after she was told that her allegations against JH were not proceeding is factually incorrect.

56. Once the true sequence of events is understood, the potential significance of the JH allegations in relation to the issue of delay reduces. Still, we consider that there is some force in the argument that the jury might have benefited from knowing about the JH allegations in the context of assessing why C1 delayed making her allegations against the appellant. Her last contact with the appellant had been in August 2018 (in the Bletchley car park) and she first disclosed on 2 October 2018. Mr Brady suggests

that the JH material would probably have assisted the Crown by explaining why C1 made the admission about the appellant when she did (after she had the opportunity to reflect on the way JH and the appellant had behaved towards her) and in the manner that she did (a disclosure to her mother that she thought she had been groomed). The appellant suggests that it would have assisted his case by showing that the allegations against him were late invention on C1's part. To admit the JH material would have permitted the appellant to make that argument.

57. In the end, this was a case management decision for the trial judge. He had to balance a number of factors, not least the short time estimate for this trial and a desire to limit the evidence to what was centrally important. We conclude that it was open to the judge to exclude this material as irrelevant. But we think some other judges might have taken a different view and admitted it as relevant to the delay issue, on both sides' cases. We will look again at the potential impact of this material when we come to consider the safety of this conviction, below.

58. As to iii), Mr Chandrapala's suggested factual similarities are slight: the fact that abuse takes place in a cubicle is not significant in the context of allegations of sexual abuse in the workplace when that workplace is a climbing centre (appellant) and a swimming pool (JH); the fact that the allegations include oral sex in a car is not particularly striking either. But even if we were to accept the presence of some factual similarities between the two sets of allegations, still that was insufficient to make the JH material relevant and admissible. We come back to the central point that the allegations against JH were true. In the context of a defence of false accusation, similar but *true* allegations are not relevant.

59. Ground 1 fails.

## GROUND 2: BIASED SUMMING UP

### Submissions of Parties and Approach

60. By this ground, the appellant says that the judge failed to give a balanced, fair and neutral summing up of the case to the jury. He gave his own view of the evidence in various places, he invented explanations for defects in C1's evidence which lacked any basis in the evidence, he excused errors C1 made in her evidence and he failed to remind the jury that aspects of C1's evidence were absurd.

61. The prosecution say that there was no imbalance in the summing up and the examples given by the appellant are insubstantial or wrong. Taken overall, the summing up was fair and just.

62. The central complaint here is one of bias. The lead case is *Porter v Magill* [2001] UKHL 76; [2002] 2AC 357: the court must ascertain all the circumstances which have a bearing on the suggestion that the judge was biased and must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or real danger that the judge was biased.

### Particulars

63. The appellant's perfected grounds give a number of examples of alleged bias. Mr Chandrapala indicated his intention to adopt those examples, and so we address them in turn. First, there is the judge's direction to the jury in connection with the cubicle incident. C1 had given evidence that the appellant had sexually assaulted her in a cubicle, gaining entry by lifting the cubicle latch with his finger. There was evidence at trial that you would need something smaller than a finger to get into the cubicle. The judge reminded the jury of that evidence and said:

> "Well, you'll need to make of that what you will. Maybe the defendant used something other than a finger to open the lock, and [C1] is wrong about a particular but of the detail, or maybe she is just completely wrong about it. It's a matter for you what you make of that description. You may think it's odd to deliberately lie about those matters when she might be caught out."

64. Mr Chandrapala complains that this was unfair. Mr Brady disputes this and says that it was a reasonable comment from the judge. In any event, says Mr Brady, the jury acquitted on this count which shows that they exercised independence and fairness.

65. We are not persuaded that this comment goes beyond what was reasonable. The judge reminded the jury of the key evidence. Such comment as he made was acceptable. Certainly, it comes nowhere near meeting the real possibility of bias test, judged objectively, particularly in circumstances where the jury acquitted the appellant on this count.

66. Secondly, there was the judge's summing up of C1's evidence that the first time she gave the appellant oral sex was in the appellant's car, when he was driving; she says that he approached a roundabout which she knew to have five exits at which point a police car stopped alongside. Mr Chandrapala's submission is that this was "obviously fantastical" and the judge should have reminded the jury of the absurdity and the unlikelihood of these events. The judge summed up this evidence as follows:

> "She described, also, an incident when she was in the front - indeed, actually, performing oral sex as he drove, when she described him, also, as being chased by the police with sirens, but the police went another way at the roundabout. Well, you may think that if her account is accurate, it's unlikely that the police would simply abandon the chase. You may think that the more likely explanation, if there is truth in [C1's] account, would be that the police happened to be responding to an emergency, and it felt to [C1]as if it was them that they were after, and we've probably had the experience of driving along and hearing sirens and wondering if they're wanting you to stop or somebody else, and then they disappear off into the distance, and it's clearly not you."

67. In our judgment, it was not necessary for the judge to tell the jury that this was an absurd account, if that was the judge's view, which it may or may not have been. That point had doubtless been made to the jury by the defence in their closing speech, and it was for the jury to consider the likelihood of C1's account being true. In fact, it

seems that the jury may not have shared Mr Chandrapala's view that this event was so fantastic that it could not have occurred, because they convicted of all the rape counts.

68. Thirdly, the judge reminded the jury of a Skype exchange when C1 was 14, in the course of which C1 and the appellant discussed having sex and C1 messaged the appellant saying "irl, not for until Nov' 17". That meant, as the judge explained to the jury, "in real life, not until November 2017". The significance of November 2017 was that C1 would turn 16 in that month. The judge summed up this part of the evidence in the following way:

> "So what are to you to make of that in the context of the fact that that exchange seems to be taking place after September 2015, the date when, on [C1's] account, they had had sex in the car, because she's 14 at the time of this, and she says she was 13 when they had sex in the car. Well, possibly, she is - possibly, that is part of role playing. She wasn't asked about that; we don't know what explanation she might have given, and you shouldn't speculate about that, but, clearly, there is an element of role-playing. The defendant's own account was that the sexting involved role playing; perhaps her pretending to be a virgin in that video was part of role playing or pretence, and role playing is a feature of many relationships, and as I say, the defendant says that there was role playing here. So you'll need to consider that when you analyse the evidence."

69. The appellant complains that the judge suggested that this was role play when that had not been part of the evidence. It is said that this is an example of the judge trying to plug gaps in the Crown's case and that it is biased against the appellant.

70. This Skype exchange was an important piece of evidence. It is perhaps surprising that C1 was not asked about it when she gave her evidence. The judge's comment picked up on the appellant's own evidence, where he had sought to explain some of the other messages shown to the jury which involved explicit content, by saying that he had engaged in role play only with C1, and the matters discussed in some of these other messages (including penetrative sex, vaginal and oral) had never in fact occurred. However, the appellant's case was that this Skype exchange was true, and that he had waited until the appellant was 16 before having sexual intercourse with her.

71. The judge was unwise to have suggested an explanation for "irl" when no such explanation had been offered by C1 herself. We have considered very carefully whether his comment about this piece of evidence might have jeopardised the fairness of the trial.

72. Set in the context of a long summing up on multiple counts over a period of 4 years, and bearing in mind that the judge was only reminding the jury of the appellant's own evidence of role play as part of his explanation for other exchanges – a point which the jury might themselves have thought of - we do not consider this comment, taken alone, to demonstrate bias, applying the real possibility test and judged objectively.

73. Mr Chandrapala had further complaints about the fairness of the summing up when he addressed the Court orally. We deal with each of them. First, he complains that the

judge had reminded the jury of C1's evidence that "I did not even know what a blow job was until I did one", without also reminding the jury of C1's evidence that the boys in her maths class at school had been talking about sexual phrases including "blow job" and that could have been an explanation for her using that term, which had nothing to do with the appellant. But this is a tiny point on the evidence. And further, it does not appear that defence counsel at trial asked the judge to remind the jury about C1's evidence about what the boys in the maths class at school had said. We can see no possible bias or prejudice as a result.

74. Secondly, Mr Chandrapala complained about the way the judge summed up the episode in December 2017 at the Jury's Inn in Milton Keynes, where C1 had initially said that she gave the appellant oral sex three times and then had vaginal sex. The judge said this:

> "She was asked by [defence counsel] "The vaginal sex didn't last long, and then you left". That was the question, and the reply to it was, "With everything included, I would say about 10 minutes". Now, [defence counsel] says that that answer means that the three acts of oral sex and the vaginal sex took 10 minutes, which [defence counsel] says is implausible and undermines [C1's] credibility. You may think - and you heard her give the answer - you may think her answer was not directed to the entire sexual activity, but was directed to how long the vaginal sex and, perhaps, any immediate preliminaries to that, took, rather than to the entire sexual event. The question, again, was "The vaginal sex didn't last long, and then you left". So it was a question specifically about vaginal sex, and the response was, "With everything included, I would say about 10 minutes".

75. We reject any criticism of the judge in this passage. The question posed by defence counsel to C1 had, as the judge records, related to *vaginal* sex only, and the answer given was at the very least ambiguous, as to whether it was a response to the time taken for vaginal sex only or for all the sexual activity which had occurred on C1's account that day. This was an important issue, because the appellant's case was that he had only had vaginal sex with C1 that day and there had been no oral sex. It was therefore important to remind the jury of the precise question put to C1.

76. Thirdly, Mr Chandrapala suggests that the judge should have suggested to the jury that the appellant's lies to her mother about where she was when she was out with the appellant (she told her mother she was going for a jog or for after school activities) undermined her credibility. We disagree. This was not a point the judge was compelled to make. The jury knew that C1 had lied to her mother about where she was going. They were at liberty to consider the significance of those lies, in the assessment of the credibility of C1's account of abuse by the appellant. The judge did not need to tell them they could do that.

77. Fourth, Mr Chandrapala complains that the judge belittled the appellant's reply to C1's messages sent on 1 and 2 October 2018, around the time she disclosed to her mother. The judge said this:

> "Now, in that, she is making clear and serious allegations to him, and he is responding by denying them. You may think it must have been pretty obvious to him that she was trying to get him to admit in WhatsApp messages that he had behaved in an inappropriate, indeed, criminal, way, and in those circumstances, you may think the fact that he denied everything, doesn't give much support to his case."

78. We do not accept the criticisms of this passage. The judge was entitled to point out the context of these messages.

## Conclusion

79. We have looked at each individual instance where complaint is made. We do not consider any one of those instances, or particulars, to demonstrate bias towards the appellant.

80. We are reinforced in our conclusions on the individual instances when we stand back and look at the judge's summing up as a whole. This was a case of multiple allegations over many years. The judge had a great deal of evidence to summarise to the jury. No complaint is made about the majority of the summing up. There is a danger in taking individual elements of the summing up out of context and over-analysing them. What is required is a fair reading of the whole.

81. The judge was alive to the jury's different role and on two occasions reminded them that they should ignore any views which he appeared to express which they did not agree with. As is standard, he also told them that if he did not mention some piece of evidence which they thought was important they should have regard to that evidence and vice versa, and that the facts were for them. We can be sure that the jury understood this, by their acquittal on count 2 at the same time as returning guilty verdicts on other counts.

82. We note, further, that the appellant's counsel at trial had a solid grasp of the facts and the law. The appellant was well-represented at trial and his defence was robustly asserted. On at least one occasion the appellant's trial counsel invited the judge to correct his summing up, which the judge did when the jury next came into court. That counsel did not raise any of the points set out above. If she had thought them to be significantly detrimental to the appellant at the time, we have no doubt that she would have raised them, consistent with the professional duty she owed her client.

83. Standing back, we are not persuaded that there is any merit in the suggestion that the summing up was biased against the appellant. Ground 2 fails.

## GROUND 3: PRESSURING THE DEFENCE

84. By this ground, the appellant says that the judge wrongly interfered in the presence of the jury with the way the defence was conducting its defence. Mr Chandrapala

appeared to accept that this was the weakest of the existing grounds but he did not abandon it and so we deal with it.

85. The perfected grounds suggest that the judge was wrong to question defence counsel in the presence of the jury about the relevance of questions being put relating to the charity event in June 2016 when C1 was 14, including an interruption when defence counsel read out an email about that event. We have considered the transcript of C1's cross examination including the several interruptions by the judge where the charity event is being discussed. We note that there had been a ground rules hearing to determine the questions to be asked of C1, who was assisted at trial by an intermediary, and that the questions were scripted. It seems to us, on a fair reading, that the judge's interventions were aimed at ensuring that the questions remained as scripted, and that time was not wasted on matters which were not in dispute (for example, the matters in the email). We are not persuaded that there was anything improper about these interruptions. We do not accept that they 'conveyed a message to the jury that the appellant's account was not worthy of being heard' as the appellant suggests.

86. The perfected grounds suggest that the judge put pressure on the defence to edit the appellant's interviews into a summary. But editing interviews is standard practice in the Crown Court, and by asking for this to be done at an early stage, the judge was managing the case in an exemplary fashion. No point arose in the trial about what was said in interview or about the length of the interviews. Producing a summary saved court time in front of the jury. There was no prejudice to the defence.

87. The perfected grounds complain that the judge intervened during the defence closing speech to ask how long the speech would be. But on the appellant's own account, the judge gave the defence advocate more time to complete her speech (it was coming up to 4.20pm and the judge wanted to let the jury go for the day) and offered more time the following day. It is suggested that this put defence counsel under pressure to finish her speech. That is hard to follow: she was offered time the next day. There is no valid basis to criticise the judge here.

88. In summary, we are not persuaded that the judge's interventions during the defence cross examination of C1 or closing speech, or at any other time particularised, were improper or unfair or led to a perception of bias against the appellant.

89. Ground 3 fails.

## SAFETY OF CONVICTION

90. We have not found any defect in the judge's handling of the case. But as a belt and braces, in case we are wrong about that, we consider whether the conviction is safe.

91. We concluded that the judge's exclusion of the JH material was permissible but that other judges might have admitted it. We have considered specifically whether the admission of the JH material might have made a difference to the outcome in this case. We are satisfied that it would not. The JH material would, in the context of this case, have been a small part of the evidence overall. It is difficult to see that it would have assisted the defence significantly. At its height, it *might* have enabled the defence to make a marginally stronger case on C1's delay in making these allegations,

given that her last sexual encounter with the appellant was in December 2017 at the Jury's Inn in Milton Keynes and the last time she saw the appellant was in August 2018 in the Bletchley car park, yet she did not make any allegations until October 2018. But with or without the JH material, delay was already one of the issues for the jury and was one of the legal matters on which the judge directed the jury. In any event, the delay was not excessively long; this is not a case where opportunities to disclose had come and gone over many years.

92. Overall, this was a very strong prosecution case. The evidence of C1 was at the heart of the case. Credibility of her evidence was key. But her evidence did not stand alone. There were texts and messages to support what she was saying. Further, interrogation of the appellant's electronic devices revealed indecent photographs and sexually explicit messages, exchanged with C1 when she was only 14, which led him to plead guilty to two counts related to those photographs and those messages. There was, as a result, a notable weakness in his case, because he was asking the jury to accept that although he had an unhealthy and criminal sexual interest in C1 from a young age, demonstrated by the photographs and the messages, yet he did not have any form of penetrative sex with her until she was 16. There were many difficult questions for the appellant to answer when he gave evidence; his answers to some of them were unconvincing.

93. We are satisfied that this conviction is safe.

**DISPOSAL**

94. We thank counsel for the care with which they prepared and advanced their submissions in this case. We dismiss this appeal.