Neutral Citation Number: [2023] EWCA Crim 558

Case No: 202202309 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM GRIMSBY COMBINED COURT
His Honour Judge Nadim
T20207096

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2023

Before:

LORD JUSTICE COULSON
MR JUSTICE GRIFFITHS
and
HIS HONOUR JUDGE BATE

- -

Between:

Rex
v
MT

- -
- -

Mr Matthew Scott appeared on behalf of the Applicant
Mr Nick Adlington appeared on behalf of the Respondent

Hearing date: 17 May 2023

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JUDGMENT

LORD JUSTICE COULSON:

Introduction

1. 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, by included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence.

2. On 17 March 2021, in the Crown Court at Great Grimsby (HHJ Nadim and a jury) the applicant was convicted of 13 counts in total: 3 counts of indecency with a child, 2 counts of indecent assault, 2 counts of sexual assault, 1 count of causing a person to engage in sexual activity without consent, 3 counts of attempted rape, 1 count of causing a child to watch a sexual act, and 1 count of rape. The victim in respect of each offence was the same. We shall call her C1. The applicant was acquitted of a further 10 counts, some of which were alternative counts, but 4 of which were free-standing. It was therefore a mixed verdict.

3. On 30 April 2021, the applicant was sentenced by the judge to a special custodial sentence[1] of 8 years 6 months (made up of a custodial term of 7 years 6 months and an extension period of 1 year) in relation to three counts of indecency with a child, and a consecutive determinate term of 7 years 6 months in respect of one count of attempted rape. Other terms for other offences were made concurrent with those two custodial sentences.

4. The applicant did not appeal against his conviction until July 2022 and therefore requires an extension of time of 462 days in which to appeal. The single judge referred the application for an extension of time to the full court. He also referred Grounds 1-3 of the proposed appeal to the full court. He refused permission to appeal on Ground 4, concerned with fresh evidence from a potential witness, Daniel Brocklesby. On behalf of the applicant Mr Scott, who has been of considerable assistance to the court, told us that he was not renewing Ground 4.

5. Accordingly, we propose to set out the background facts, the summing up and the judge's directions. We then address the delay in filing the appeal and the claim for an extension of time, before turning to the three live grounds of appeal.

Background Facts

6. C1's mother, Rachel, was first married to a man called Hugh. She had two children with him: Phillip, C1's older brother, and C1. When C1 was very young, Rachel separated from Hugh and married the applicant. Rachel had two children by the applicant, Chloe and Jake. C1 was principally brought up by her mother and the applicant in a variety of homes in Lincolnshire.

7. The allegations against the applicant were of historic sexual abuse. As we have said, C1 was the sole complainant. The 23 charges on the indictment covered a period of 10 years or so, and involved specific incidents of sexual activity in a variety of different locations. By reference to the 13 counts on which the appellant was convicted, the

[1] As an offender of particular concern.

first incident occurred between 12 March 1998 and 12 March 2000, when C1 was aged between 7 and 9. The last offence in time took place between 12 March 2005 and 12 March 2006, an offence of vaginal rape, when C1 was between 14 and 15 years of age.

8. In August 2007, when C1 was 16, she was staying with her father. She texted her mother to say "if you want to know what's going on there's a book, read it under the pillowcase". This was a reference to C1's handwritten diary. It contained a number of entries in which C1 alleged that the applicant had sexually abused and raped her. Rachel, her mother, immediately contacted the social services.

9. When C1 returned home, she spoke with her mother and told her that she had lied about the abuse. She told social services the same thing. Further contemporaneous notes in the social services records referred to C1's difficulties at school, and her resentment of her younger half-sister Chloe. The records noted that "she is a very mixed-up 16 year old who needs support".

10. In the late summer or early autumn of 2018, C1 told her husband that the applicant had sexually abused her. She had told him previously that she had been sexually abused when she was younger, but had said that she had been abused by an uncle. She complained to the police. She was ABE interviewed on 18 September 2018. She explained that, in 2007, she had not been telling the truth when she withdrew her allegations. She said that her mother had questioned her and that she could not cope. She said that that was why she had withdrawn her allegations against the applicant.

11. The ABE interview contained the details of the alleged abuse, beginning when the family lived in Peterborough and progressing, by the time they had moved to Boston when C1 was 7 or 8, to the applicant making C1 perform oral sex on him. She said this happened when her mother and siblings were in bed and she and the applicant were watching television together in the front room covered by a duvet. She said that the abuse worsened when her mother started working.

12. Thereafter the family moved to Goldthorpe and then Grange Farm, near Kirton Lindsey in Lincolnshire. She said the abuse continued in those places. She also referred to a specific incident at a nearby garage which the applicant rented. She said that on one occasion he took her there and persuaded her to put his penis in her mouth. She also refers to another occasion when the applicant took her on her own to stay in a caravan near Cleethorpes and when they were on a beach the applicant attempted to have sex with her. He stopped and later, when he tried to have anal intercourse with her in the caravan, she again asked him to stop and he did.

13. She said that when she was 14 the applicant told her it would be best if she lost her virginity to him rather than "some little boy". He asked her to pretend to be ill and take a day off school. Her mother was at work so she was at home alone with the applicant. She said that he asked her to dress in a French maid's costume. She said he showed her a video of him and her mother having sexual intercourse before then having sexual intercourse with her. Thereafter, there were other occasions she said when the applicant had intercourse with her when she did not consent.

14. The applicant was interviewed on 10 January 2019. He denied the offences. He said that C1 had accused him previously of such offences, and had then said she had lied

about it, "so this is not the first time I've been through this". He gave evidence about the difficulties with C1 when she was a teenager and the problems that had been created by her earlier allegations.

15. In his interview, the applicant denied the allegations of sexual abuse in the various locations mentioned by C1. He said that they had owned a caravan which he and C1 had visited together, but he had slept in the main bedroom at the back and she had slept in her own room. He denied that any sexual activity took place. He did rent a garage but again said that nothing of a sexual nature had ever occurred there. He denied telling C1 to take a day off school feigning illness. He said his wife did once have a French maid's outfit but denied ever making C1 wear it. He also admitted that he and Rachel had once recorded themselves having sex when they were first together, but they had never shown it to anyone and it had been thrown away long ago.

The Trial

16. C1's evidence in chief was in the form of her ABE interview. She was fully cross-examined by Mr Smith, experienced counsel who represented the applicant. Amongst other things, Mr Smith elicited from C1 that all her mother's things were in drawers in the bedroom and that nothing was out of bounds. She used to dress up in her mother's clothes and her sister's clothes and sometimes they would dress up her younger half-brother, although she said that she did not remember dressing him in a frilly maid's outfit. She was asked about the video but she said she could only really remember "my mum's face and noises she was making". She did not remember if her mother was wearing clothes or not. She also agreed that Chloe, her younger sister, had also stayed in the caravan alone with the applicant.

17. C1 agreed that she had the words "Mum" and "Dad" tattooed on her arm. She said the reason that she had "Dad" tattooed on her arm was because she had just spoken to the police and retracted her statement. She said:

> "I had to live with these people again and tried to make it up and say 'sorry' to him for speaking out about it and I was only 16 and young and stupid."

C1 agreed that, as she got older, she asked her stepfather for lifts when she went out at night and she remembered various instances when he had gone somewhere to pick her up late at night and bring her home.

18. Mr Smith put to C1 that she didn't feel able to tell the truth, and felt that she had to tell lies. She agreed with that. One example was her telling people that she had been sexually abused by an uncle. She accepted that that was a lie which she had told to a number of different people on various occasions. That exchange then led into significant cross-examination about the time she had made the original allegations against the applicant in 2007 and then withdrawn them. She agreed that, on her account now, when she said to the police "this is a lie", that was itself a lie. She also agreed that the reason that she gave to the police at the time for making the allegations, namely that she was jealous of her younger sister, was also a lie.

19. C1 was the primary prosecution witness. Three witness statements were read from C1's father, a former partner and C1's husband. We note that the former partner said that C1 had complained to him that the applicant had abused her. The timing of that complaint is unclear but appears to have been some time before C1 made the same complaint to her husband. There was also some evidence from the officer in the case. The officer dealt, amongst other things, with the fact that the delay meant that certain records were no longer available.

20. There was a Schedule of Agreed Facts which was also placed before the jury. Amongst other things, that dealt with what happened after C1 left home. She was in a relationship with Daniel Brocklesby and they had a daughter, Sophia. When they separated, in family court proceedings, Daniel Brocklesby raised concerns about Sophia having contact with the applicant, because of C1's earlier allegations against him. The formal report compiled by the Safeguarding Team at Humberside recorded that C1 had retracted the allegations shortly after making them, and had stated in the family proceedings that they were not true. She maintained that Daniel Brocklesby knew that she had been lying when she made the original allegations. She said that she and the applicant now had a good relationship. That was all recorded in a formal social services report, and the relevant quotations from that report formed part of the Schedule of Agreed Facts.

21. The applicant gave evidence. Particular features of his examination in chief were his evidence about his earlier life and the various places that he had lived as an adult. It was clear that his recollection of those houses was quite vague. He denied the allegations of abuse. In respect of the caravan he said he went one night with C1 and that it was a flying visit. He denied sex abuse on that occasion. He gave similar evidence in relation to a trip to Malta, which was not itself the subject of any of the counts on the indictment but featured in the history.

22. He also dealt with the effect of the allegations that C1 made in 2007. He had to vacate the family home but he had gone back the same day because social services said he could. He said C1 apologised to him, "straight to his face", at the Liberal Club in Scunthorpe. He went on to deny other specific allegations, including that he took C1's virginity. He was cross-examined by Mr Adlington about the domestic arrangements in the various properties and the sleeping arrangements in particular. He maintained his denial of the various allegations of abuse.

23. The applicant's wife Rachel (and therefore C1's mother) also gave evidence on his behalf. Assisted by a written Schedule of Addresses of where she had lived with the applicant, and the dates, she had a better recall of the various properties in which the family had lived and the living and sleeping arrangements in each. She confirmed the French maid's outfit, and the video, and the fact there was a video player and TV in the bedroom. She said that, when C1 came home after telling her to read the diary, they had "a quick chat and C1 told her that she was going to retract the allegations". In response to a question from the judge, she said, "I didn't need to ask her about the allegations because the first thing she said to me was she was retracting them because she had been lying". She did not question her daughter thereafter, saying there was no point in asking her about them when C1 said she was lying.

24. Finally, Chloe gave evidence on behalf of the applicant. Amongst other things, Chloe said that they used to dress her younger brother up in the maid's outfit which they got

from a drawer in their parents' bedroom. She also said that she had found the video tape and she had played the video on the television in their bedroom. She agreed that it was "an intimate film" and had stopped the tape almost immediately. She did not say that C1 had been present on that occasion.

25. There was a split summing up: in other words, the judge gave his directions on the law first, and counsel then made their speeches. Thereafter, he summed up the facts. The legal directions were the product of evolving discussions with counsel and there was a working draft that was updated at various times. The legal directions were handed to the jury at 12.11pm on 12 March. The judge read them into the record. We do not have a copy of the written directions themselves. However, for the purposes of this appeal, it is only necessary to refer to two of those directions, and we have assumed that the transcript accurately recorded what was in writing.

26. The first direction related to the issue of consent. Consent was not a specific issue in the case because the applicant denied that any of the events had taken place. However, as is always appropriate in cases of this sort, the judge needed to direct the jury as to the various ingredients of the offences on the indictment. For some of the offences, lack of consent was one of those ingredients.

27. As we have said, the judge had discussed his directions with counsel. The consent direction was given in slightly different form on three separate occasions, when it was relevant to some of the 23 counts on the indictment. The judge's direction the first time was that:

> "It is a matter for you but you may think there can be no question of consent if the defendant in order to cause the complainant to engage in the sexual activity intimidated her by threats or abuse to such an extent that she was too afraid or beaten down to choose freely whether or not to consent."

That phraseology was repeated more or less verbatim on two further occasions. We deal with the evolution of that direction when addressing Ground 1 below.

28. The judge gave a specific direction about delay. It was in this form:

> ""Delay". You will wish to take into account that the complainant gave evidence of events that she said occurred approximately 15 to 25 years ago. She was cross-examined on behalf of the defendant in this trial in the March of 2021. Equally, when the defendant gave evidence in his defence he too had to deal with events occurring no less distant in the past. You must bear in mind that with the passage of time memories fade, witnesses – be it the prosecution or defence - cannot be expected to remember events with as much clarity as if they had occurred more recently. The passage of time may have made it more difficult for the defendant to answer the charges against him. You should make your own assessment and decide what weight you should attach to the effect of delay in this case."

29. When the judge resumed his summing up after the speeches, he referred extensively to the Schedule of Addresses (which again we do not have). To have this document in this form was clearly a benefit to the witnesses who referred to it, and to the jury. As

the judge said, the jury would want to consider the Schedule "because it informs you of the times when the family lived at various addresses. And you can utilise that information, coupled with the date of birth of C1 and you know that to be 12 March 1991, and from that you can then work out how old C1 might have been when she was staying at any particular address".

30. The summing up was completed on Monday 15 March at around 12.18pm. The jury returned the 13 guilty verdicts, and the 10 not guilty verdicts, on Wednesday 17 March 2021.

The Delay and The Extension of Time

31. On 27 April 2021, Mr Smith advised in writing that he could see no arguable grounds for an appeal against conviction. As noted above, the applicant was sentenced three days later, on 30 April 2021. The applicant and his family were not satisfied with Mr Smith's advice and, in the early autumn, instructed Mr Scott by way of direct professional access to advise on a possible appeal against conviction. Mr Scott received a bundle of documents from the family which included a complete set of trial transcripts.

32. On 29 October 2021, he emailed both the solicitor, Mr Pascoe of Hetts, and Mr Smith, asking that they invite him onto the digital case system and supply him with any relevant documentation. Mr Pascoe did not reply. Mr Smith pointed out various reasons why he did not consider that it was appropriate for him to invite Mr Scott onto the digital case system. However, that matter was addressed on 1 November 2021 when HHJ McKone granted Mr Scott access to the DCS. The following day, 2 November 2021, Mr Adlington, prosecuting counsel, sent Mr Scott a copy of the trial indictment, the route to verdict and the opening note.

33. Thereafter, Mr Scott sent numerous very detailed letters, asking various questions about the trial and in particular the decision not to call certain defence witnesses. During this process, Mr Smith became a judge. He explained that he needed to take advice on the extent to which he should be involved in the matter. Mr Pascoe continued not to reply and when he did, on 1 February 2022, he declined to provide any of the information requested because of the fees outstanding to his firm.

34. There was further correspondence with HHJ Smith (as he had now become) and Mr Pascoe. Judge Smith generally replied to the requests, albeit in understandably brief terms. Mr Pascoe generally did not. The notice of appeal was served on 14 July 2022. That was a total delay of 462 days.

35. An applicant has 28 days following the date of conviction in which to lodge an appeal. However, this period may be extended either before or after its expiry as a matter of discretion: Criminal Appeal Act 1968, s.18(3). The principles governing the approach to an application for an extension of time in these circumstances are set out in *O* [2019] EWCA Crim 1389 at [45] as follows:

    a. First, an extension of time will only be granted where there is a good reason and ordinarily where the defendant will otherwise suffer a significant injustice (*R v Hughes* [2009] EWCA Crim 841 at [20]).

b. Second, the court will only grant an extension if it is in the interests of justice to do so (*R v Thornsby* [2015] EWCA Crim 1 at [13]). This has several components, such as the public interest of finality of Crown Court judgments, the interests of other litigants and the efficient use of resources. The public interest also embraces the liberty of the individual.

c. Third, the court will examine the merits of the underlying grounds before the decision is made whether to grant an extension of time (*Thornsby* at [13]).

36. In our judgment, the delay in this case divides into two parts. There is the delay between the conviction and sentence in March/April 2021 and late November 2021, by which time Mr Scott had been in possession of the transcripts for some time, and had been invited on to the DCS. We consider that there are good reasons for that first period of delay. One can well understand the concern and feeling of helplessness that the applicant's family would have had following conviction and their general feeling that something may have gone wrong, without knowing quite what. It takes time to find another barrister by way of direct professional access. Once Mr Scott was instructed towards the end of October, he acted with commendable speed in writing to the previous lawyers and in obtaining access to the DCS. By late November 2021, Mr Scott had had full transcripts for a while, other information from the family, and had been invited onto the DCS. Accordingly, if the notice of appeal had been served in late November, we would have granted the necessary extension of time.

37. But it was not served then: it was not served until the following July. That time was taken up with the further correspondence with Mr Smith and Mr Pascoe, and the repeated asking of very detailed questions about the run up to the trial and the trial itself. None of that generated very much information that Mr Scott did not already have in one form or another. Moreover, it seems to us that the substantive points raised in the notice of appeal arose largely out of matters which were plainly known to and assimilated by Mr Scott by late November 2021: the two directions and many of the alleged failures in preparation. To put it another way, none of the subsequent correspondence and other events revealed anything of any real significance to this appeal.

38. As a matter of principle, we think it important to stress that the time limits provided by s.18(3) are substantively important. They are not simply an administrative convenience. Amongst other things, those time limits mean that, if an appeal is successful, any re-trial can take place relatively shortly after the first trial. It reduces the risk that witnesses' memories will have faded even more by the time of the second trial.

39. We acknowledge, as Mr Scott submitted, that an advocate in his position can be in something of a quandary, because he or she may be reluctant to launch an appeal that criticises the lawyers previously instructed without knowing the full facts. We are also mindful of the dangers of hindsight. But if there has already been a delay in the service of a notice of appeal, a prospective appellant needs to minimise any additional delay. If he or she has sufficient information to file a notice of appeal, albeit out of time, then that needs to be done without further delay. It is not appropriate, in a case that is already out of time, to delay yet further, and to seek more and more

information, in an attempt to produce the perfect appeal notice. It is a matter of judgment, but there comes a time when speed is more important than the last detail.

40. Accordingly, our preliminary view is that, whilst an extension of time to late November 2021 would have been justified, there are no good reasons for the second period of delay, from late November 2021 to July 2022. So, simply looking at the delay and the reasons for it, we would not be minded to grant the necessary extension of time. However, we recognise that, in accordance with the principles that we have identified, it is always necessary for this court to look at the merits of the proposed appeal in any event. If the detailed material with which we have been provided demonstrated to our satisfaction that the applicant would otherwise suffer a significant injustice, then we would reconsider our preliminary view not to grant the extension of time.

The Grounds of Appeal

41. There are three grounds of appeal which are pursued. The first is the criticism of the consent direction. The second is the criticism of the delay direction. The third, which breaks down into a number of different parts, is concerned with the allegedly inadequate preparation of the case. As we have said, the fourth ground, which related to the fresh evidence of Mr Brocklesby, is not pursued. However, we do address Mr Brocklesby's position because it arises amongst the criticisms of the inadequate preparation (Ground 3).

Ground 1: The Consent Direction

42. We have set out the consent direction above. Mr Scott submits that the direction as to consent was misleading and prejudicial because there was no evidence of intimidation, threats or abuse, nor evidence that C1 was too afraid or beaten down to choose freely whether or not to consent. We should say that Mr Scott realistically said that he did not consider this to be his best point, calling it "less persuasive" than Ground 2.

43. We consider that Ground 1 wrongly treats the consent direction out of context. We consider that, in the context of the summing up as a whole, it is tolerably clear that the judge was not suggesting that the applicant had necessarily been involved in intimidation or threats or abuse, or that C1 was too afraid or beaten down to choose freely whether or not to consent. He was, as judges often do, simply using those as examples to demonstrate to the jury how consent may not have been given, even if there was no screaming or shouting or repeated use of the word "no". We do not consider that Mr Scott is right to say that, by giving this direction, the judge was telling the jury that the applicant had necessarily engaged in such behaviour.

44. Further, we do not accept Mr Scott's submissions, made during the appeal hearing, that consent may have been relevant because, in describing one of the attempted rapes (Counts 18/19), C1 indicated at one point that she said "yes" rather than "no". As my Lord, Mr Justice Griffiths, pointed out, when you read the whole of that passage of evidence, it is quite clear that C1 was not saying that she had consented and, even in the passage particularly relied upon, the applicant only stopped when she said she would scream if he did not. Furthermore, nobody suggested during the trial that consent was an issue in respect of any of the counts; that would have undermined the

applicant's case – that these events simply did not happen - in its entirety. Everyone agreed that a legal direction about consent had to be given only because it was part of the ingredients of some of the offences. Beyond that, it was therefore not something which the jury had to grapple with.

45. Much was made by Mr Scott in his written material of Mr Smith's objection to the direction and the judge's alleged agreement that he would withdraw it. We do not consider that to be an accurate summary of the discussion. The original draft directions referred to the use of force. Mr Smith objected to that, saying there was no suggestion of force. The judge agreed, and took those words out and replaced them with references to threats and intimidation. The transcript shows that Mr Smith's principal objection was that the direction was clumsily done, and repeated three times. He wanted one consent direction only. He did not object to the amended version after this exchange, and the direction remained in broadly this amended form (namely with the reference to force replaced by threats and intimidation).

46. For completeness, we note that there were passages in the ABE interview which might suggest intimidation by the applicant. The manuscript diary also contained evidence that suggested threats, such as "(He) tell me not to say anything so I didn't, and it got where's I can't tell me mum". So the direction could be said to have been justified on the evidence in any event.

47. In summary, we consider that the debate about the consent direction was some way away from the *gravamen* of this case. For the reasons we have given, consent was not an issue. The applicant denied that these events had occurred at all. Although, as we have said, we do not have the written Legal Directions, we do have the written Routes to Verdict. No criticism is made of that document (which was apparently drafted by Mr Adlington and Mr Smith) and, in our view, it was an extremely useful and important tool. It made plain that, where consent was an element of the offence, the only question the jury had to answer was whether they were sure that C1 did not consent to the touching or penetration, as the case may be. That confirms our view that, in the present case, the precise nature of the consent or lack of it was not an issue and the jury cannot have been in any doubt about the elements of each offence and the particular points which they had to decide.

48. For these reasons, we reject Ground 1 of the appeal.

Ground 2: The Delay Direction

49. We have set out the delay direction above. Mr Scott said that the delay direction failed to identify the possible prejudice to the defence which the delay could have caused, or to identify the particular areas where the delay had made it harder for the applicant to answer the allegations. He also said that the jury should have been told that they should consider the effect of the delay when deciding whether the prosecution had proved its case to the criminal standard.

50. In response, Mr Adlington said that the direction was concise but sufficient in the circumstances. He noted that Mr Smith never at any time objected to that direction. We also note that the delay, although identified in his speech to the jury, was not a major element of Mr Smith's submissions. Beyond the general reference to school records, no specific difficulties caused by the delay were identified.

51. We consider that the delay direction was just about adequate but not all it might have been. It was fine as far as it went, but, as the single judge indicated, it could be criticised because it did not expressly address the specific difficulties that delay can cause those who face historic abuse charges. In *PS* [2013] EWCA Crim 992, Fulford LJ said that, on the facts of that case, the jury should have been warned that delays can place the defendant at a material disadvantage and, the longer the delay, the more difficult it was for the defendant to meet the allegation. He made similar comments in *PR* [2019] EWCA Crim 1225. Both cases were concerned with the specific consequences of delay on the facts, rather than general concerns about memory loss and the like. Fulford LJ also made clear that the need for such a direction would depend on the circumstances of, and the issues arising in, the trial.

52. Many judges in cases like this include a direction along these lines:

> "The defence say the defendant has been particularly prejudiced by the delay in the complainant going to the police and the case coming to court. They say because of the passage of time he may now not be able to remember details which could have helped his case. Had any complaint be made at the time a sexual assault is said to have happened he might have been able to show he was elsewhere or call a witness who would have assisted his case. He may not have even appreciated what evidence has been lost after such a period of time. As there are no specific dates for when things are said to have happened, as there might have been if a prompt complaint had been made, a defendant cannot say he was elsewhere or say that there was someone else in his company or call a witness to confirm that. You should take the delay into account in the defendant's favour when you are deciding whether or not the prosecution have made you sure of guilt."

If warranted on the facts, we commend that sort of full direction.

53. In consequence, we are prepared to accept that the judge's direction on delay in this case, when considered in isolation, may not necessarily have gone far enough. But the real issue is whether that caused significant injustice and/or could have affected the safety of the applicant's convictions. In our view, it did not. There are a number of reasons for that.

54. First, these allegations were made more or less contemporaneously in 2007. Of course, they were subsequently withdrawn. But the fact that they had been made at all would have alerted the applicant to the issues much closer to the time of the alleged offences; indeed the period covered by the indictment ended in 2006, only the year before the complaint. It therefore gave him the opportunity in 2007 to go beyond a bare denial, particularly if there were matters which he could rely on independently to establish the falsity of the allegations. Mr Scott pointed out that in 2007 the applicant was not arrested and not spoken to either by the police or by social services. But he had been put on notice that very serious allegations had been made against him by C1. It was a matter for him whether or not he chose to do anything more about them.

55. Indeed, one of the features of the evidence in this case was the way in which both the applicant and his wife chose not to discuss or investigate the making of these serious allegations any further, apparently relying on their withdrawal as obviating the need for any further consideration. The transcript of Rachel's cross-examination shows the

judge's surprise at that attitude (hence his question), a surprise we share. Moreover, despite the applicant's lack of reaction, the making of the allegations in 2007 did have other consequences which subsequently assisted him, including the preservation of the social services investigation, which was identified and quoted from in the Agreed Facts.

56. Secondly, it appears that this jury was very careful to work through the individual allegations to see whether or not they were satisfied that they had been proved. The jury acquitted on 4 freestanding counts against the applicant, two relating to early allegations and two more to a much later event. In our view, this demonstrates the care and attention that this jury gave to the detailed allegations. They did not regard the allegations as one overall offence, but 23 separate allegations, and acted accordingly. In considering each count carefully, the jury would inevitably have considered, as the judge told them to, the effect of the delay on the applicant ("the passage of time may have made it more difficult for the [applicant] to answer the charges against him).

57. The jury's careful approach to the lengthy sequence of events took its cue from the judge's summing up of the facts. Not only did the judge emphasise the importance of the Schedule of Addresses when considering matters of chronology, but towards the end of his summing up (Y268-Y276), he went through each of the allegations in chronological order, identifying the evidence in respect of each allegation from C1, the applicant and the applicant's wife. He fairly ended each episode of the story with a reference to the applicant's positive defence to each count.

58. Thirdly, the judge's delay direction did not exist in isolation. As part of the summing up, the jury were expressly reminded about particular consequences of the delay, to the extent that they were in evidence. The most significant example was the evidence of the officer in the case, who had agreed in cross-examination by Mr Smith that the information she would ordinarily obtain in this sort of case, including school records and the like, were no longer available to her because of the passage of time. The judge's reminder to the jury of this evidence about the effect of delay came almost at the end of the whole summing-up. It was not a direction of law, but the jury would plainly have been well aware of the point when they retired to consider their verdicts.

59. Mr Scott made a number of points about the obvious deficiencies of the applicant's memory. At one point, he seemed to be suggesting that this warranted some particular direction to the jury. We do not agree. A trial judge must be very careful about commenting on the *quality* of the evidence from any witness, particularly a defendant. It is not uncommon for older witnesses to be forgetful about events which, so one might have thought, they should plainly remember. But there was no medical evidence suggesting that the applicant's memory was particularly deficient, nor was it a point emphasised by Mr Smith in his speech. We do not therefore think that it was appropriate for the judge to give any particular direction by reference to the applicant's allegedly poor memory.

60. Fourthly, we make the point that the judge's direction on delay cannot have been so out of kilter with the way in which the trial proceeded and the evidence emerged, because Mr Smith did not take issue with it, despite having sight of it in draft well in advance of the judge's summing up. The delay direction was never the subject of any

debate at all. We can only assume that that was because, in the context of the other directions and the summing up as a whole, it was considered to be adequate.

61. For all those reasons, we do not consider that, in the circumstances of this case, the judge's delay direction amounted to a significant injustice or calls into doubt the safety of the applicant's convictions.

Ground 3: The Allegations of Inadequate Preparation

General Principles

62. We understand that the applicant and his family feel short-changed by the criminal justice system. It is inevitable that, in such a case, they question the advice that they received and the steps which were and were not taken. We are also aware of the dangers of hindsight and the possibility that, on any given issue, different solicitors and counsel might have given different advice. Much of the preparation for a Criminal trial is a matter of judgment. It is for us to bear these points in mind as we pilot our way through the individual particulars of the general allegation of inadequate preparation.

63. It is also important to remember that what we are looking for is not a series of examination questions for the previous lawyers to pass or fail, but things which, had they been done, may have made a difference to the fairness of the trial. As this court emphasised in *R v Sutherland & Khan* [2022] EWCA Crim 72:

> "[33] Incompetence on the part of lawyers can only render a conviction unsafe when the incompetence has led to identifiable, serious errors or irregularities which in turn resulted in an unfair trial. An appellant must go beyond establishing incompetence and show that it lead to identifiable errors or irregularities rendering the process unfair or unsafe: see for example *R v Day* [2003] EWCA Crim 1060 at [15], as approved in *R v Ekaireb* [2015] EWCA Crim 1936 at [22].
>
> [34] The key problem in Mr Godfrey's submissions is that, whilst there has been a heavy focus on what is alleged to be gross incompetence on the part of Khan's lawyers, there has been a failure to engage with the requirement to show that there have been identified errors or irregularities such as to result in an unfair trial. There is an absence of identifiable specific prejudice. That is so despite what has been a comprehensive view by Khan's new lawyers, who have been instructed since March 2020 and whose involvement is said to provide an explanation for the lateness of the renewed application."

64. Mr Scott submitted that there must come a point when, if a solicitor continually falls below a basic level of competence, the trial should be regarded as unfair and the conviction set aside, without more. He relied on [33] of *Sutherland & Khan*. But in our view, that is not what that paragraph says. That paragraph says that, regardless of the level of competence, "identifiable errors" which "render the process unfair or unsafe" must still be demonstrated.

65. To that extent, Mr Scott's submissions to this court were very similar to those of Mr Godfrey in *Sutherland & Khan,* and suffered from the same inherent defect. An

applicant or appellant who wishes to rely on the incompetence of his or her lawyers needs not only to show incompetence, but the potential consequences of that incompetence on the fairness of the trial. The authorities demonstrate that, sadly, it can be relatively easy to do the former; it is much more difficult to show that the alleged incompetence could or might have made any significant difference to the fairness of the trial. But that second part of the exercise cannot be avoided simply by adding to the quantity of the complaints advanced in the first part. The possible causative effects of the alleged incompetence matter just as much, if not more.

66. We therefore turn to consider the individual failures. The sequence and sub-headings are our own. They represent an attempt to impose some sort of logical structure to the catalogue of complaints made.

Particular (i): Lack of Engagement Generally

67. There is a general complaint that Mr Pascoe did not engage with the applicant and his family during the period before the trial. Mr Pascoe's response was that, in the months before the trial, the applicant and his family were difficult to contact and not proactive, with the result that there was considerably less engagement than might otherwise have been the case.

68. It appears that the applicant met Mr Pascoe on five occasions between July 2020 and March 2021. There appears to be a gap between 15 September 2020 and 16 February 2021, during which Mr Pascoe had Covid and there were the second and third lockdowns.

69. Mr Pascoe describes the applicant as generally uncommunicative, which does not appear to be disputed. Of course, as Mr Scott submits, if the solicitor should have done something and failed to do it, it can never be a defence to say that the solicitor's client was difficult or uncommunicative. But it means that this court has to identify particular acts and omissions that flowed from the alleged lack of engagement and which potentially came to bear on the fairness of the trial. We move on to consider what those are alleged to be.

Particular (ii): Failure by Mr Pascoe to watch or show the applicant the ABE interview or go through the transcript with him

70. It is unclear whether Mr Pascoe watched the ABE interview himself. More importantly, the allegation is that he did not either show the applicant the interview, or show him transcripts of it. We would have expected Mr Pascoe to do one or the other. In a case of this sort it is always important to obtain the defendant's comments on the evidence against him.

71. However, there is no suggestion that there was anything in the ABE interview which came as a surprise, whether to the applicant or his family, before or at the trial. There is no suggestion that the applicant did not know the detail of what C1 said, and no suggestion that Mr Smith was unable to cross-examine her on the contents of that interview because he did not have detailed instructions. On the contrary, the questions to the applicant in his police interview, and the indictment itself, loyally followed the ABE interview. There was nothing secret about it.

72. Accordingly, whilst Mr Pascoe should have shown the applicant either the interview itself or transcripts thereof, we cannot see how this had a bearing on the fairness of the trial. Nothing has been identified from the ABE interview that was missed, or which (had it been spotted) could have triggered some line of enquiry that was not pursued, or which should have been the subject of cross-examination and was not.

Particular (iii): Failure to take an accurate statement from the applicant

73. There is first a complaint that the statement from the applicant was taken late. We do not understand that since there was no fixed deadline, and a witness statement was prepared by Mr Pascoe.

74. The main complaint about its accuracy appears to go to the alleged events in Malta. The original statement said that C1 made no allegations about what happened in Malta; the complaint now is that there were. That is wrong in fact; none of the counts related to the trip to Malta, so the original statement was technically correct. It would have been quite easy to add a sentence about the events in Malta as part of the statement, if this was felt necessary. The complaint about what the statement said about the potential paternity of Sophia arose from a simple confusion about the dates. The statement referred to that matter being raised in 2007, when in fact it was a point made in the applicant's interview with the police in 2018. But that error can have confused nobody; Sophia was not born when the allegations were made in 2007.

75. Accordingly, we consider that these criticisms in themselves are untenable. Like so many of the points advanced by Mr Scott under Ground 3, they may demonstrate a lack of attention to detail on the part of Mr Pascoe, but they do not demonstrate that there has been any injustice, let alone a significant injustice.

Particular (iv): Failure to serve a defence case statement.

76. A defence case statement ("DCS") was served on the day of trial. Plainly, it should have been served earlier. It is simple and straightforward in its terms because that was the nature of the defence. The DCS said that the allegations were untrue (as C1 had admitted they were untrue when she first made them) and the events referred to in her ABE interview did not happen. Beyond that, there was little else the DCS could have said.

77. There is no suggestion that the late service of the DCS made any difference to anything. It was not the subject of adverse comment in the judge's summing up.

Particular (v): Failure to request material from Social Services.

78. Mr Smith advised that it was unnecessary to obtain further material from social services. There is nothing to suggest that that view was not a reasonable view in all the circumstances; it was a judgment call. Indeed, the most important record that the social services would have had was the report about the custody debate over Sophia, referred to above, and included in the Agreed Facts. That was the detailed description of how C1 accepted that she had lied when she made the allegations in 2007 against the applicant.

79. There is no evidence that any other social services record, if it had been produced, would or could have made any difference to the fairness of the trial. Accordingly, we do not consider that this alleged failure takes us any further.

Particular (vi): Failure to obtain documents or other information from the Family Court

80. In our view, the position is the same as with the social services records. The most important information from the family court was that which had been included in the Agreed Facts: that C1 had relied on the fact that the original allegations were a lie to bat away Daniel Brocklesby's concerns over the applicant's contact with Sophia. Again, there is nothing to say that there was anything else from the family court proceedings which would or might have been relevant.

81. There is a suggestion that C1 said on oath during those proceedings that the allegations were a lie. We address that under the next sub-heading.

Particular (vii): Failures in relation to the Unused Material

82. The unused materials were provided in two batches to Mr Pascoe: the first batch contained over 200 pages, the second batch about 30.

83. The first complaint is that Mr Pascoe did not provide the first batch of unused materials to Mr Smith. He certainly had the second batch. Mr Adlington suggested that Mr Smith had both. Mr Smith could not recall. That is the sort of point which this court cannot resolve, given the passage of time since the original trial (another example of why the time limits for an appeal are so important).

84. The second complaint is that Mr Pascoe did not consider these documents. Again that is not entirely clear. However, even if he did not, save for a point we deal with below about the statement from Daniel Brocklesby, there is nothing in the unused material which, it is suggested, would have made any potential difference to the fairness of the trial.

85. As we have noted, the ground of appeal that relied on a fresh statement from Daniel Brocklesby is no longer pursued. The failure that is still relied on is the failure on the part of Mr Pascoe to seek a copy of the statement of Daniel Brocklesby which the prosecution had obtained, and which was in the unused material. It is said that this might have assisted the defence case because it suggested that C1 had lied on oath in the family court.

86. There are a myriad difficulties with this point. The first is that there is some doubt about the precise nature of the statement of Daniel Brocklesby which was in the unused material. It was, according to Mr Adlington, a very short statement which did not express Mr Brocklesby's "belief" that C1 had lied on oath. Again that is not a matter that we can determine. Secondly, as we have indicated, the version of Mr Brocklesby's statement which we have seen simply said that he 'believed' that she had lied on oath, without identifying any supporting evidence for that belief. Thirdly, this very point was put to C1 in cross-examination, who was equivocal in her reply. She did not deny it outright. Accordingly, even if Mr Brocklesby's evidence of his belief had been adduced in evidence, it would have made no difference. Fourthly, it is clear that, when they separated, C1 and Daniel Brocklesby were locked in a bitter

custody dispute over Sophia. It appears that Daniel Brocklesby was using the earlier allegations that C1 had made about the applicant for his own ends in those proceedings. So the undisputed evidence that C1 had admitted that the earlier allegations were untrue could not be improved by Daniel Brocklesby, and ran the risk of being undermined if Mr Smith had called evidence from her estranged former partner.

87. We also need to stand back and consider all this in the round. Even taking Mr Scott's point at its highest, it is not clear to us that a jury would have regarded C1's lie any differently whether it was given on oath or not. The important thing is that the jury knew that it was an admitted lie about a matter of the utmost gravity made in the context of court proceedings. In our view, the evidence that C1 had been untruthful could not have been any stronger or any better presented to the jury than her own unqualified admission to that effect during her cross-examination by Mr Smith. That was the most damming element of her evidence. It needed no support.

88. For completeness, we should say that it appears to be wrong to suggest that Mr Smith was not aware of this statement. Indeed there was a conversation between counsel as to whether Mr Smith was going to call Daniel Brocklesby as a defence witness. For the reasons we have given, it appears that Mr Smith concluded that that would be unnecessary and potentially counter-productive. There is therefore nothing in this complaint.

Particular (viii): Failure to take witness statements from any of the family witnesses.

89. Short statements from nine witnesses, some related to the applicant, some not but aware of his family circumstances, were provided to Mr Pascoe. None of these statements were turned into formal witness statements and none of these witnesses were called.

90. Mr Pascoe's general reason for not doing that, that all the witnesses were of the applicant's bloodline, is unsustainable because, although most were, some of them were not.

91. But the real difficulty is that, when taken in the round, these nine draft statements add nothing significant to the case. Much of their content is inadmissible, because the statements seek to give opinion evidence as to what the applicant was or was not capable of. Although there is some evidence as to the domestic circumstances and living arrangements, with one possible exception, this evidence added nothing of significance to the evidence given by the applicant and, in particular, his wife. One of the difficulties for the applicant is that the existence of the garage and the caravan, and the fact that he slept there alone with C1, and the existence of the maid's outfit and the video, were all accepted and admitted. Those, and any of the other details in this case, were not the subject of any evidence from any of these nine individuals.

92. The possible exception is the evidence of the applicant's son that he and a friend were sleeping in the living room of the house in Boston, where some of the abuse was alleged to have taken place. We accept that this was something that should have been explored further. But to a significant extent, this evidence overlapped with the evidence that was given by his mother. It is not clear what it adds to the evidence. Moreover, in cases of this sort, particularly where specific dates for the alleged

offences cannot be identified, it is rare that the allegations can be successfully countered by general evidence of living or sleeping arrangements. So by way of example, no-one suggested that the applicant's son and his friend were in that room for the entirety of every evening that the family lived in Boston.

93. We accept that some of the material in the 9 drafts went to the applicant's good character. But it is very general in nature. And the applicant's character does not appear to have been in issue: the judge gave a full good character direction in the applicant's favour. It is therefore impossible to see what real difference this very general evidence as to his character, largely but not exclusively from family members, would have made.

94. Accordingly, whilst we accept that Mr Pascoe ought perhaps to have done more with the material that was provided to him by the family, we cannot see that any of it could ultimately have made any difference to the fairness of the trial. It could not, for example, undo the accepted facts which underpinned C1's evidence.

Particular (ix): Failure to take witness statements from Rachel or Chloe

95. Witness statements were not taken from Rachel (the applicant's wife) or Chloe (his daughter). They should have been. However, both women gave evidence, and that evidence was supportive of the applicant. Amongst other things, Rachel gave detailed evidence as to the living arrangements and her working hours. Amongst other things, Chloe gave evidence about the French maid's uniform and the video. Neither Rachel nor Chloe suggest that, if witness statements had been prepared, there would have said something else and/or something different.

96. Mr Scott suggested that, if a statement had been prepared, Chloe would have known that her earlier statement to the Police would have been put to her in cross-examination. She had referred there to her mother sometimes working at night, and the argument was that, in her own statement, she would have had an opportunity to clarify what that meant.

97. We do not agree. The reference to her mother working at night was something that Chloe had herself volunteered to the police. If, as Mr Scott said, it required to be clarified – because it was not clear whether that meant all night or simply the first part of it – then that was something which Chloe could have done when giving evidence. It was, after all, her statement.

98. Accordingly we do not consider that there is anything in this allegation.

Particular (x) Failure to make enquiries of Rachel's employer

99. It is said that Mr Pascoe should have made enquiries of Rachel's employer to discover her working hours during 2004-2005. We do not accept this criticism. First, that was a matter that Rachel could and did give evidence about herself. Secondly, there is nothing to suggest that, had that been done, anything of any materiality would have been provided. Again the problem was that the allegations were not linked to specific dates, so records may not have helped at all.

Summary in Respect of the Allegations of Inadequate Preparation

100. We began this section of our judgement by saying we understood the unhappiness felt by the applicant's family. We reiterate that in our conclusions. But, as we have demonstrated, there is nothing in any of the alleged failures of preparation to suggest that, even if more work had been done or different steps taken, it would or could have affected the fairness of the trial. Accordingly, although we note and have fully considered all the criticisms of Mr Pascoe's performance, we do not consider that, in the circumstances of this case, these points amount to significant injustice and/or render the applicant's convictions unsafe.

101. Finally we should address what might be thought of as 'the elephant in the room', namely the truthfulness of C1. The underlying dissatisfaction of the applicant and his family can probably be summarised as follows: how can anyone believe a word C1 says? The applicant was convicted because the jury believed to the necessary high standard that the allegations made by C1 were proved. That was despite the fact that C1 had made those allegations when she was much younger, and then withdrawn them. That was always the applicant's best point.

102. But that point was never certain of success. Juries understand that, in some circumstances, young women who have been abused find telling others about it incredibly difficult, and may often retract the allegations because of the pressure they feel and the opprobrium they face in consequence. C1 was firmly but fairly cross-examined by Mr Smith on this critical aspect of the case. Despite her admissions about lying in the past, the jury accepted her evidence before them, at least in respect of those specific allegations on which they convicted the applicant. That was exclusively a matter for them. It is not a matter for this court.

Conclusions

103. For these reasons, and in the circumstances of this case, we do not doubt the safety of the applicant's convictions. Accordingly, whilst we would have granted an extension of time to the end of November 2021, we do not grant the longer extension that is sought. The application is therefore refused.