IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2024] EWCA Crim 488
CASE NO 202203404/B2

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 25 April 2024

Before:

LORD JUSTICE COULSON

MR JUSTICE JAY

MRS JUSTICE HILL

REX

V

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

MS G BATTS appeared on behalf of the Applicant.
MR G HENDRON appeared on behalf of the Crown.

J U D G M E N T

LORD JUSTICE COULSON:

1. Introduction

1. This is a case in which the provisions of the Sexual Offences (Amendment) Act 1992 apply. Under those provisions, where an allegation has been made that a sexual offence has been committed against a listed 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 the offence.

2. The applicant is now 51. On 1 June 2015, in the Crown Court at Leeds, HHJ Marson ("the judge") and a jury, the applicant was convicted on counts 20, 21 and 22 of sexual activity with a child, contrary to section 9(1) of the Sexual Offences Act 2003 (counts 20 and 22) and attempted rape, contrary to section 1(1) of the Criminal Attempts Act 1981 (count 21). In each case the victim of this offending was his stepdaughter, "AF".

3. On 2 June 2015, the appellant was sentenced to a total of 15 years' imprisonment. He sought leave to appeal against that sentence and, when that was refused by the single judge, he renewed his application to the Full Court. The Full Court dismissed the renewed application at [2016] EWCA Crim 1324. We note that, so lengthy has been the subsequent delays, the applicant has now served the custodial part of his sentence and has been released on licence.

4. On 22 November 2022, the applicant sought permission to appeal against his conviction. The original grounds and the original claim for an extension of time were provided on 26 January 2023. A new Advice and Grounds of Appeal, incorporating a new Chronology prepared by Ms Batts of counsel, were provided in September 2023. Thus, the applicant requires an extension of time of in excess of 7 years in which to apply for (a) leave to rely on fresh evidence and (b) leave to appeal. He also requires permission to amend his grounds of appeal. All applications were referred to the Full Court by the single judge. These have subsequently been the subject of directions in respect of the fresh evidence, made on 5 October and 14 December 2023.

5. In essence, all these applications arise out of three text messages sent by AF to her mother SA, in which she said that she had lied about the applicant during the trial. These text messages were dated June 2016, over a year after his conviction and sentence. The applicant became aware of them immediately through his wife, SA. AF was subsequently interviewed, under caution, on 11 November 2016 in respect of those text messages. No further action was taken by anyone until the original application for permission in late 2022.

6. We set out below the relevant evidence that was adduced at the trial. We then turn to the new evidence, which we heard *de bene esse*, and the submissions that were made about that evidence. We then turn to the law. After that we consider the three key questions:

Is there a reasonable explanation for the delay in making these applications? Is the new evidence capable of belief? Does the evidence afford a ground for allowing the appeal? We are very grateful to Ms Batts, for the applicant, and Mr Hendron, for the Crown, for their helpful written and oral submissions.

2. The Trial

7. The evidence was that AF was adopted by SA in 2000, when she was two, and brought to live in Leeds. SA married the applicant in 2006, making him her stepfather. AF had significant behavioural issues and over the years numerous agencies became involved in order to try to protect and care for her.

8. By 2011, when AF was 13, she would sometimes stay out all night, drinking and smoking, and meeting older boys and men. There were occasions when the police were called due to her behaviour, resulting in her being arrested. During the course of the subsequent police investigation which followed the applicant's offending, it became apparent that AF had been sexually abused from the age of 12 or 13 by a number of local men, including "Z". They were the subject of counts 1 to 19 and 23 on the indictment at the trial. Although those counts did not concern the applicant, the fact that his co-accused were all convicted of abusing AF, and that their convictions have never been appealed, means that AF is the victim in this case, despite the attempts by some close to the applicant to blame her for what happened.

9. AF did not originally implicate the applicant in her allegations of sexual abuse: indeed, she originally denied that he had been involved. There was some important evidence at the trial about her reluctance to implicate the applicant, which is thrown into stark relief by these applications. We return to that evidence below. It was not until March 2013 that she disclosed the applicant's abuse to her social worker.

10. At trial, it was the prosecution case that, from around May 2012, when AF was about 14, and knowing that she was being sexually exploited by others, the applicant began to groom the complainant. He provided her with cigarettes and alcohol but made it plain he wanted something in return for his generosity.

11. At the trial, AF described the big fall out that had occurred over her relationship with the co-accused, Z. She told the applicant that she had been in a sexual relationship with Z and the following day, Z was stabbed in the knee. Shortly thereafter, the applicant and AF were alone in the living room. Her mother was upstairs asleep. The applicant put his hand down her clothes and started to touch her right nipple. She tried to push him away but he was too strong. He touched her for about 2 minutes and then left (count 20).

12. On the second occasion, she was in her sister's bedroom cleaning the room. The applicant came up and asked her to sit down. She sat on the bed. He pushed down on her shoulders and pushed her down on the bed. He took his trousers off. He took off her knickers and leggings and touched his penis against her and tried to push it into her vagina. He told her to stay calm but she pushed him away with her legs. Then he got his trousers back up and said he would give her no more cigarettes (count 21).

13. AF told the jury that she did not tell anyone about these incidents because she did not want to go into foster care and did not want her two sisters (the applicant's natural daughters) to grow up without a father. She acknowledged that SA loved the applicant a lot. She told the applicant that if he came anywhere near her, she would tell her mother. He laughed at her and said that her mother was not going to believe her because he was her husband and he was more precious to her mother than she was. He said she was just "a piece of dirt", "a piece of shit".

14. The third offence occurred on 2 June 2012, when the applicant went to AF's bedroom in the early hours of the morning. He gave her a cigarette and then took his trousers down. He asked to rub his penis against her for 2 minutes in return for giving her a cigarette. He proceeded to rub his penis against her but her mother (SA) came in and screamed at him (count 22). SA called Social Services immediately at 4.45 am to ask for AF to be taken into care. The police became involved and arrived at 9 o' clock the following morning. AF was taken away and the applicant was taken into custody.

15. In addition to the evidence of AF, the Crown relied on the evidence of SA at the trial. In relation to count 22, she said in her written statement, taken on that same day (2 June 2012), that she went into AF's bedroom and saw the applicant standing in the middle of the room with his pyjamas down and his penis exposed. She said in that statement that his penis was erect (and it is to be noted that the applicant also accepted in his police interview that his penis was erect). She slapped him, shouted at him and asked for an explanation but the applicant told her that nothing had happened.

16. It appears that SA's oral evidence at trial was less incriminating than the account given in her witness statement. On a number of occasions, she sought to play down what she had seen. In particular, she said that, although she saw the applicant's penis, she could not be 100 per cent sure that it was erect. She also said that she tapped the applicant on the head rather than slapping him. Much of the cross-examination of SA went to AF's general bad behaviour.

17. The applicant denied the events surrounding count 20 (the touching of AF's nipple) and the attempted rape (count 21). He denied that SA had told him about the complainant's involvement with older men in the local area. He said he was not involved in the stabbing of Z. As to the incident on 2 June 2012, the applicant said he went to AF's bedroom in order to give her a cigarette and it was AF who had pulled his trousers down. Having earlier admitted that he had an erection, he subsequently appeared to deny it.

18. The judge summarised the evidence impeccably, and no issue is taken with his legal directions. As already noted, the applicant was convicted on the three counts against him. It is worth setting out what the judge said in his sentencing remarks about the applicant, and in particular the event that was witnessed by AF's mother, SA. The judge said:

> "I am entirely satisfied that when you began to abuse [AF] sexually, you were well aware that she had been sexually abused by others. She had told

you about [Z] and it is no coincidence that shortly afterwards he was stabbed in the knee. It is not suggested that you were personally responsible. I am also satisfied that you have been given the names of three people who were in the dock who had been sexually abusing [AF], and that you were taken in a motorcar and their addresses pointed out to you. You knew that [AF] had been tested for sexually transmitted infection.

As a stepfather, it was your duty to shelter and protect [AF]. She was entitled to turn to you to keep her safe. But you decided that she was being sexually active, you would add to her misery and degradation by abusing her yourself. You supplied her with cigarettes, but more importantly, alcohol and cannabis. You became more lenient to her, not only because you were advised to, but also, I am satisfied, in the hope that she would become sexually responsive to you. It is one of the sad facts of this case that [AF] was clearly delighted when you treated her in that way, because she craved attention and had done so for so long ...

You did not stop the abuse, it continued. It only came to an end because you were caught by your wife in an act of sexual abuse of [AF]. That is the third charge of which you were convicted, one of sexual activity with a child. Having returned home from work, you took a cigarette to [AF] and went upstairs into her attic bedroom. By then you had changed into your night clothes. Your wife heard noises from [AF's] room and she went upstairs. You had gone into [AF's] room, exposed your penis and began to rub it, as the Jury found, against [AF's] vagina. At that moment your wife came in. She saw your exposed penis. It is a measure of the extent to which [AF] had been psychologically damaged by you and others, that she denied and continued to deny for a considerable period that you had sexually abused her."

3. The New Evidence

(a) The Text Messages.

19. The background to the text messages is that they were sent by AF to SA on 27 and 28 June 2016. By that point, AF was living in foster care. It appears that in June 2016, AF had her first face-to-face meeting with SA since the trial. The text messages followed that meeting.

20. The text messages were in the following form:

(i) 26 June at 2.41 pm:

"Mum, I just want to confess and tell you I lied about some things I said about [the applicant]. Please forgive me if you can and I am willing to take the

consequences for lying to the police about some things I said about him,"

(ii) 28 June at 5.48 pm:

"You're probably wondering why I lied about dad and put him in prison but it's because I was jealous that he was taking my mum away from me that why I did it. I had my ways to frame him, and it worked and now I know what I've done because it's gone to extreme lengths of him being in prison and I'm willing to take the consequences for my actions. I'm so sorry."

(iii) 28 June at 5.49 pm:

"But [the applicant] is the only one I lied about. The rest of the guys what they done was true but everything about dad was a little white lie that turned into something massive and I'm really sorry."

(b) AF's Interview.

21. The applicant or SA, or the solicitors acting on his behalf, immediately informed the police about the text messages. Accordingly, AF was interviewed by the police about the texts on 11 November 2016, in respect of the potential offence of perjury. The three text messages were put to her. She said that she felt stupid after sending the messages. She said the text messages were lies and what she had said in court was the truth. When asked further about why she had sent the messages, she said: "I was just really upset and part of me feels guilty so I just put them messages."

22. A little later in the interview, when asked what she wanted to achieve by the messages, AF said: "In a way I want to get him out of prison cos I feel sorry for him. I know that it sounds stupid."

(c) AF's Statement Dated 29 September 2023.

23. AF produced a short statement dealing with the text messages for the purposes of these applications. She said:

"The text messages I sent was not the truth. The reason he got sentenced was because he did rape me and that was not a lie. But the reason I sent those text messages to my mother was to try to get him out of prison. For anyone wondering why I wanted to get him out of prison, it was because I know what prison can do to people like him. He would get beaten up by other inmates and he would struggle with prison lifestyle. I know he would not feel safe in there. Deep down I still love him and care about him and despite him taking advantage of me being a vulnerable child and raping me."

24. The statement also went on to explain that another reason why she had sent those text messages was because "I could see my whole family breaking into pieces and I felt like I was the only thing that could put the family back together again. My little sisters, who are actually [the applicant's] biological children, mean everything to me and I did not want them to grow up without a dad because I know how that feels to grow up without a father…" She also said that she did not want to see SA without a husband.

(d) AF's oral evidence.

25. At the hearing of the renewed application, AF was cross-examined about these texts and the circumstances surrounding them. Two particular things struck us. One was that, when asked why she had sent them, AF said: "I just wanted to get him out of prison...If I said I'd lied, he'd get out of prison." She confirmed that, at the trial, "I wasn't lying about anything." She said that she did not really think about the consequences, although she had referred to them in the texts. She said again: "I was trying to get him out of prison."

26. Secondly, AF had great difficulty in recalling the surrounding circumstances. She often said: "I don't know" or "I don't remember". That was unsurprising given the delay in the making of these applications. Mr Hendron was, in our view, right to say that the potential prejudice caused by the delay was apparent in some of the answers that AF gave.

(e) Other New Evidence

27. There were two statements from SA. The first, dated 11 July 2016, dealt with her conversation with AF in the run up to the sending of the text messages. We note that, in her own account of the June 2016 visit, SA was pressing AF in relation to the trial. But AF did not say to her that she had lied about the applicant (although she did say that she had lied about Z). The second statement of 31 October 2016 gives more details about the texts but adds little else.
28. SA gave oral evidence which roamed over the period from June 2012 to the present day. Most of it was irrelevant to the appeal. She did say that AF had not said to her, at their meeting in June, that she had lied about the applicant. She confirmed the texts were the only place where that was said. SA said she did not further discuss the texts with AF.
29. There were also statements from one retired police officer, DC Angie Bowers, and a social worker, Kirsty Clarke. Their statements went, in one way or another, to the pressure that SA put on AF to retract her allegations against her husband, the applicant. They too could remember very little about the specific events, many of which are now more than 10 years old. But Ms Clarke's statement contained a reference to SA saying to AF's care home employees that AF was 'ruining the lives of 13 men'. At Ms Clarke's first meeting with SA, SA told her that "the whole incident [on 2 June 2012] was AF's fault and that AF had stolen her husband." Ms Clarke agreed that SA was "stressed about what had happened" at the time of that comment, but it was not suggested to her that SA had not made that comment at all.

4. The Submissions

30. On behalf of the applicant, it was submitted by Ms Batts that the delay**,** although long, was explicable, and that in any event the Court should have regard to the merits of the applications. The inference was that no matter how long the delay, if it was arguable that the applicant's convictions were unsafe, the extension should be granted. As to the substance of the application, Ms Batts submitted that the timing of the messages, the fact that they were unsolicited, their wording and the fact that, by the time of her interview with the police, AF knew she was facing perjury charges, all demonstrated that the texts were true and that AF had lied at the trial.

31. On behalf of the Crown, it was submitted by Mr Hendron that the delay was unjustified and had caused prejudice, as was apparent from the oral evidence received by the Court at the hearing. As to the merits, Mr Hendron reminded us that AF's repeated changes of mind were addressed front and centre by the judge at the trial, even to the extent of denying things witnessed by others. Mr Hendron said that she was patently telling the truth when she denied lying at the trial.

5. The Law

32. A person seeking an extension of time to give notice of appeal, under section 18(3) of the Criminal Appeal Act 1968, must give reasons for his application (see Criminal Procedure Rules 36.4). A party seeking to amend the grounds of appeal out of time requires permission pursuant to Criminal Procedure Rules 36.14(5) and Criminal Practice Direction IX.39C. ***R v James*** [2018] EWCA Crim 285 [38] identifies various matters to be taken into consideration when considering such applications, including the extent and reasons for the delay, the overriding objective and the interests of justice.

33. Section 23(2) of the Criminal Appeal Act 1968 governs applications to rely on fresh evidence. The Court of Appeal must have regard to the following when considering such an application:
(a) whether the evidence appears to the Crown to be capable of belief;
(b) whether it appears at court the evidence may afford any ground for allowing the appeal;
(c) whether the evidence would have been admissible in the proceedings from which the appeal lies or an issue which is the subject of the appeal; and
(d) whether there is a reasonable explanation for the failure to adduce the evidence in these proceedings.

34. Despite the fact that there are a number of applications in the present appeal (an extension of time of over 7 years; reliance on fresh evidence; amending the grounds of appeal and the substantive application itself), it seems to us that we can sensibly focus on the delay in making these applications, and then the issues at paragraph 33(a) and (b) above. That will address the delay and the potential consequences, if any, of the new evidence.

6. Is There A Reasonable Explanation For The Delay In Making These Applications?

(a) The Law

35. It is sometimes said that this Court will always consider a late application on the merits, even if there is no proper explanation for the delay. That was Ms Batts' submission today. In our view, that is a misstatement of the law. The authorities dealing with delay make plain that, as this Court put in ***Gary Bennett v The King*** [2023] EWCA Crim 795, at paragraph 8:

> "… asserted strong merits cannot of themselves be assumed by prospective appellants and their lawyers to be some sort of trump card in securing an extension of time."

36. It is unnecessary to set out extracts from all the authorities. They include ***R v Thorsby*** [2015] EWCA Crim 1; ***R v Wilson*** [2016] EWCA Crim 65; R v Roberts [2016] EWCA Crim 71, particularly at paragraphs 36 to 39; ***R v James*** (supra) and ***R v Paterson*** [2022] EWCA Crim 456. Those cases make plain that this Court must examine all the circumstances of the case in coming to a conclusion as to whether or not the delay is justified. Those circumstances include, but are not limited to, the length of the delay, the reasons put forward to justify it, the overall interests of justice, including the virtues of finality, the interests of the victim, the practicality of a retrial and any potential injustice to the applicant.

37. None of that removes or lessens the importance of the time limit of 28 days. As the Lord Chief Justice put it at paragraph 39 in ***Roberts***: "Time limits are set for good reason and in the interests of justice. They must be strictly observed unless there are good and exceptional reasons for their not being so observed." Plainly, the longer the delay, the more difficult it will be for a dilatory defendant to explain the delay and obtain an extension. In ***Gary Bennett***, where the delay was in the order of 6 years, this Court said at [9] that the lengthy delay and the absence of any proper explanation for it meant that the applicant had to demonstrate "at least a compelling case on the merits" in order to obtain the necessary extension of time.

(b) The Delay in The Present Case

38. In our view, there is no reasonable explanation for the delay in the present case. We consider that much of the material proffered to excuse the delay is, on analysis, either irrelevant or misleading.

39. There is no dispute that the applicant became aware of the text messages no later than the end of June 2016. SA said that they were handed to a solicitor (presumably the same solicitor who is acting for the applicant in his ongoing sentence appeal) on 11 July 2016. Although two different documents have been produced on behalf of the applicant, purporting to deal with the subsequent chronology, neither of them seek to explain the delay between June 2016 and October 2018, when it appears that contact was first made with the applicant's present solicitors. That is a delay of over 2 years. Although Ms Batts said that an advice was sought and received from counsel in January 2017, even

that fails to explain the delay of 21 months from January 2017 to October 2018. That is on its own an unexplained delay which is potentially fatal to these applications.

40. The second chronology, prepared by the applicant's new solicitors and incorporated into the amended grounds of appeal of September 2023, deals with the period between 2018 and 2021. It does so by reference to various communications that the solicitors had with counsel, prisons and the court, in relation to, amongst other things, the trial documents, prison visits and the like. Two things are striking about this rather meandering history. The first is that it proceeds as if the 28-day period for making an application for permission to appeal simply did not exist. There is no reference to any time limit at all; there is no sense of urgency in this chronology, no express awareness that the solicitors had to comply with the Court's timetable, rather than the other way round.

41. The second is that the matters which are identified here between October 2018 and September 2021 appear to be of no relevance whatsoever to the applications that are now being made. The existing trial papers were not required in order to advance this appeal. Detailed advices were not required. The current applications are all based on the three text messages which were known about by the end of June 2016. They could have, and in our view should have been, the subject of a crisp application for permission to appeal, if that was what was sought, within days or weeks of the applicant becoming aware of their existence. The relevant delay is therefore in excess of 6 years.

42. Ms Batts submitted that the chronology demonstrated that a process was being followed. That may well be true. But what matters is whether that process justifies the inordinate delay of over 6 years. In our view, there is nothing to explain how or why that process meant that the applicant could not reasonably bring these applications at any point in the period covered by the chronology.

43. Furthermore, there is no chronology between September 2021 and late 2022/ early 2023, when these applications were eventually made. That is another period of 15 months or more for which there is no explanation at all, much less an excuse for the delay.

44. It is said that the applicant's family were not able to afford necessary representation for an appeal. It seems to us that that submission must fail at every level. First, there is no evidence of any kind to support the allegation. The applicant had legal representation in 2015/2016. Why therefore could the application not be publicly funded? If it could not, what attempts were made to ask trial counsel to undertake the application *pro bono*? Secondly, the suggestion of financial difficulty is wholly at odds with the fact that the applicant sought permission to appeal his sentence and, when that was refused, renewed his application to the Full Court in July 2016, (by which time he knew about the text messages). If he was paying for one application, why could he not pay for the other? If he was not paying, because it was publicly funded, then the difficulty in respect of funding the application for permission should not have arisen at all.

45. Thirdly, there is no explanation of how in 2023 the application suddenly became affordable when it had not been affordable before. What changed? There is no evidence about that either. Fourthly, an application for permission to appeal at the end of 2016,

based on the three text messages, would have required minimum financial outlay. As we have already said, it was an extremely short point. It could have been made in person by the applicant without legal representation at all. Indeed, we note that the original grounds of appeal in the present case were drafted by the applicant's family, not lawyers. That only confirms our view that this was a straightforward issue to raise. Finally, and overarching all else, there is neither any fact specific to this case, nor any wider legal principle or authority, which supports the suggestion that an absence of funds could justify a delay in appealing of more than 6 years.

46. The delay is dealt with very briefly in Ms Batts's Advice and Grounds of Appeal of September 2023. She says there that the reasons that the appeal was made out of time is set out in the chronology. For the reasons we have already explained, they are not. She goes on to say that the Crown "has not taken this point in its Respondent's Notice". With great respect to Ms Batts, that completely misunderstands the importance of time limits. It is not a question of whether the Crown takes the delay point or not: these are the Court's time limits and, as the authorities show, the interests of justice mean that they are jealously guarded. It is in the interests of justice that these time limits are complied with.

47. We are struck with the similarities between this case and the case of ***Gary Bennett*** referred to above. In that case, a similar lengthy delay of around 6 years accumulated, and much of it could not be excused or justified. The failure to pursue the appeal could not be attributed solely to the applicant's lawyers, and the court emphasised that the applicant had the obligation and responsibility to ensure that any appeal was expeditiously pursued. In addition, in ***Gary Bennett*** (as here), there was no realistic prospect of a retrial and the applicant had served the custodial element of his sentence.

48. In ***Gary Bennett***, in those circumstances, this Court considered that "it is incumbent on the applicant to demonstrate at least a compelling case on the merits in order to persuade us to grant the necessary extension of time." In our view, precisely the same applies here. There is no reasonable - or indeed any - explanation for the 6-year delay. Accordingly, a compelling case is required in order to persuade us to grant the necessary extension of time, to consider the fresh evidence and consider the application for permission to appeal on its merits. As we shall make plain, no such compelling case emerges. Indeed, we consider that the fresh evidence, even taken at its highest, would have made no difference to the outcome of the trial. We have not the least doubt about the safety of the applicant's convictions.

7. Is The New Evidence Capable Of Belief?

(a) Did AF Send the Text Messages?

49. It is plain that AF sent the three text messages. That has never been disputed.

(b) Why Did She Send the Text Messages?

50. There are two potential reasons why AF might have sent the text messages. The first is because she felt guilty about lying about the applicant's conduct at the trial and wanted to

retract what she had said. The second is that she felt under pressure (particularly from her mother, SA), and was in any event deeply conflicted about the result of the trial, despite the fact that the applicant had done what she had said he had done on oath at trial. She therefore sent the text in the hope that in some way they might lead to his release.

51. We are in no doubt that the latter explanation is the only one which fits with the evidence, including the new evidence. AF had always been reluctant to make the allegations about her stepfather. She made this plain at trial. She said during her oral evidence to the jury: "I didn't want to get him into trouble", "I didn't want anything to happen because I didn't want my sisters growing up without a dad", "I didn't tell anyone. If I did, I knew foster care would become involved. I didn't want my two little sisters to grow up without a dad and I didn't want my cousin's brother to grow up without his uncle and my mum did love him, I mean she loved him a lot and that's why I didn't tell my mum as well." It was perhaps inevitable that this conflict between AF's need to tell the truth about what had happened, and the consequences for others of that truth, would continue after the applicant had been sentenced.

52. We cannot but note, when this Court refused the applicant's renewed application for permission to appeal against sentence, it said this:

> "4. Originally she denied any inappropriate behaviour by [the applicant] because her mother loved him a lot, but eventually she described being groomed by him with alcohol and cannabis and being abused by him when she was 14, including an attempt at vaginal rape in the family home…"

The conflict of which we have spoken was apparent to this Court in July 2016, just as it is apparent to us now.

53. As to the pressure on AF from her mother, it is plain that SA loved the applicant and did not want him to be convicted. One consequence of that was that SA shifted her position between the taking of her statement and her oral evidence at trial, when she downplayed what she had seen, and appeared to blame AF for the event that she had witnessed in her bedroom. It is no coincidence that the text messages were sent at a time when AF had her first contact visit with SA since the trial, and when SA was talking about the trial. Those messages did not therefore arrive out of the blue.

54. We acknowledge that AF was clearly a difficult child, who tested the patience of SA to the limits. But we are struck, not only by the evidence of those like Ms Clarke who witnessed her attitude to AF, but also by the comments and tone of SA's own statements, how little empathy she had with AF. AF was the victim of widespread abuse for which a number of men have served lengthy prison sentences. She deserves rather more sympathy than she appears to receive in SA's written statements.

55. Accordingly, it seems to us that the sending of the text messages was simply further evidence of the emotional conflict which AF unsurprisingly felt, which was then exacerbated by her first personal contact with her mother after she had lost her husband to a lengthy jail term. We are in no doubt that was the reason that the three text messages were sent.

(c) Were The Text Messages True?

56. For the reasons we have already given, we are in no doubt that the text messages were not true. AF did not lie at trial in relation to the allegations against her stepfather (the applicant). She rapidly resiled from the contents of the texts.

57. As to Ms Batts's points about the texts, we would say this. We agree that the timing of the texts is of relevance, but we consider that, for the reasons we have given, the fact that they came after AF's first meeting with her mother since the trial, supports the view that AF's split emotions would be particularly apparent. In other words, it is a point that supports the conclusion that the texts were untrue, not a point the other way. The wording of the texts is, we think, neither here nor there. Indeed, the fact there is no detail, and simply claims that she lied at the trial, is also consistent with AF's simple desire to get her stepfather out of prison. We do not accept that AF's responses in her subsequent interview were informed either by the threat of perjury charges or her compensation claim to the CICB. We consider that she told the truth in that interview.

58. Finally, we consider that the suggestion that AF lied at the trial to be wholly at odds with the other evidence. Take, for example, count 22 and the incident in the early hours of the morning of 2 June 2012 in her bedroom. SA witnessed the applicant, with his trousers down and his penis exposed, in their 14-year-old daughter's bedroom. It is perhaps worth quoting what SA said in her own oral evidence about that event:

> "He shouldn't have his trousers down because that's where my daughter's room is. I saw his penis hanging down. It was just his penis."

Even allowing for her downplaying of this event, that was the most powerful evidence against the applicant, and it was unrelated to anything that AF had said. It is evidence which is wholly contrary to any suggestion that AF lied and entirely consistent with her case that she did not.

8. Does The Evidence Afford A Ground For Allowing The Appeal?

59. The answer to that is "No". There are a number of reasons for that. The first is because the text messages were not true, for the reasons that we have given.

60. Secondly, we repeat the point that we have already made that, in our view, if the evidence about the text messages that we have heard had been available to the jury, it would have made no difference to the outcome of the trial. The jury already had plenty of material

which was capable of undermining AF. They also had plenty of material that showed that she had been reluctant to implicate her stepfather. This was simply more of the same. None of that material, either that which undermined her or which demonstrated her reluctance to implicate her stepfather, persuaded the jury to acquit the applicant. Neither, in our view, would this further material. If anything, it would have made the jury even more sympathetic to AF, and certainly not to the applicant or SA.

61. Furthermore, when standing back and when considering the safety of the applicant's convictions in the light of the new evidence, we are not persuaded that the convictions are even arguably unsafe. For all the reasons set out above, we are in no doubt that the applicant was rightly convicted.

9. Conclusions

62. Accordingly, for all these reasons, we refuse all applications. There is no basis for an extension of time. There is no basis for granting permission to appeal, even if all the fresh evidence were admitted. In our view, the applicant's convictions are entirely safe.