Neutral Citation No: [2024] NICA 64 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **KEE12345** *ICOS No:* **22/37919/A01** *Delivered:* **22/01/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

LT

Mr John Orr KC with Mr Kevin Magill (instructed by Gillen & Co Solicitors) for the Applicant
Mr Gary McHugh KC with Ms Laura Ievers (instructed by the Public Prosecution Service) for the Respondent

---

Before: Keegan LCJ, Humphreys J and Fowler J

KEEGAN LCJ (*delivering the judgment of the court*)

Anonymity

[1] **We have anonymised the applicant's name to protect the identity of the complainant and so this will appear as the cypher LT. The complainant is also cyphered and referred to as Y in this judgment. She is entitled to automatic anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992.**

Introduction

[2] This is an application for leave to appeal conviction and sentence imposed by His Honour Judge Greene KC ("the judge"). Leave was refused by the single judge on 12 September 2023.

[3] The applicant was found guilty of a number of sexual offences perpetrated against a child, "Y." The unanimous jury verdicts were returned on 28 February 2023 on the following counts:

1. Rape (oral) of child under 13 (1/1/15–1/9/20)	Specific	Guilty	9-year DCS
2. Sexual assault of child under 13 (27/9/18–8/12/20)	Specific (related to counts 3 &4)	Guilty	1-year DCS (concurrent to count 3)
3.Digital penetration (27/9/18–8/12/20)	Specific (related to counts 2 & 4)	Guilty	3-year DCS (consecutive to count 1)
4. Sexual assault (27/9/18–8/12/20)	Specific (related to counts 2 & 3)	Guilty	1-year DCS (concurrent to count 3)
5. Sexual assault (1/1/19–27/9/20)	Specific	Guilty	3-year DCS (concurrent to count 3)
6. Sexual assault (27/9/17–8/12/20)	Specimen	Guilty	1-year DCS (concurrent to count 3)
7. Digital penetration (27/9/17–8/12/20)	Specimen	Guilty	3-year DCS (concurrent to count 3)
8.Digital penetration (27/9/18–8/12/20)	Specimen	Guilty	3-year DCS (concurrent to count 3)
9.Digital penetration (27/9/17–8/12/20)	Specimen	Guilty	3-year DCS (concurrent to count 3)
			Total Sentence **– 12-year DCS and 10-year Sexual Offences Prevention Order**

[4] There had been a previous trial in September 2022 when the jury was unable to reach a verdict on any count. This conviction, therefore, follows a retrial.

[5] Three grounds of appeal are raised in relation to conviction namely:

(i) That the judge erred in refusing the defence application, pursuant to Article 28 of the Criminal Evidence (Northern Ireland) Order 1999 for permission to cross examine the complainant's mother about pornographic images found on the complainant's phone.

(ii) The judge erred in refusing the defence application to stay the prosecution as an abuse of process.

(iii) In directing the jury, the judge failed to give the jury any or adequate care or *Makanjuola* warning.

[6] As regards sentence, two grounds of appeal are raised namely:

(i) The judge erred in stating that he would treat the sentence on count 1 as a headline offence and thereafter imposing consecutive sentences in relation to count 2-9 (which were concurrent with each other).

(ii) Having increased the sentence on count 1 because of the age of the victim, her vulnerability, the abuse of trust and the campaign of behaviour the judge erred by then imposing consecutive sentences for count 2-9 and thereby double counting those factors.

Background

[7] Y was born in September 2010. The applicant was her stepfather. The offending occurred during the period 2015 to 2020 when Y was aged approximately five to nine years, and the applicant was in his late twenties/early thirties. At the relevant times they were living as a family in Co Down. There were other children born to the applicant and to Y's mother. The couple ultimately separated in mid-2020.

[8] The charges arose when at the age of 10, Y made disclosures in school. In brief summary it appears that her teacher had asked the class how they were feeling to which Y responded, "bad." She went on to say that her mother had banned her from electronics and that she had been grounded. That was not the end of the matter as Y also indicated there was something else troubling her, so the teacher made arrangements to speak in private. Y subsequently told the teacher that she had been sexually abused by her step-father and that she had tried but failed to stop him.

[9] The matter was then referred to police. Y engaged in Achieving Best Evidence ("ABE") interviews on 8 and 9 December 2020. During interview she told police officers that she had been abused from the age of five/six years until she was about nine in various respects which were then subsumed within the various counts on the indictment as follows:

> **Count 1** reflects a specific incident of oral rape. She had asked the applicant for juice. He took her in to the kitchen, blindfolded her and tied her hands. He put his penis in to her mouth. She was aged approximately five to seven at the time.
>
> **Counts 2, 3 and 4** relate to a specific incident when Y had been watching YouTube in the living room. She was aged eight/nine years. The applicant

approached her and touched her vaginal area over clothing ***(Count 2***). She had told him not to. He then digitally penetrated her. She described it as being sore (***Count 3)***. She tried to kick out at him, but he trapped her legs. During the course of this he also kissed her on the mouth using his tongue; this was despite her protests, and she started crying ***(Count 4).*** She believed he was intoxicated and screamed for him to stop.

Count 5 was a specific incident in her bedroom. The applicant touched her shoulders, arms and legs and tried to pull off her shorts and pull her off the bed. She was aged about eight or nine. She said it hurt when he grabbed her, and he became angry. Eventually, she was able to get away from him.

Y said that the touching of her private parts occurred "probably" about five times a week, if not more and it was over a period of at least three years.

Count 6 is a specimen count to cover other non-penetrative touching.

Counts 7 to 9 are sample counts for other incidents of digital penetration.

[10] Y said that when she confronted the applicant about his conduct, he told her not to tell anyone or he would go to jail.

[11] The applicant was interviewed on 8 and 9 December 2020 immediately after his arrest. At interview he denied the allegations. He said that he had a good relationship with Y and that any sexual knowledge she had acquired was through the online game called "Roblox." During the first interview LT said that he would not have been alone in the house with Y. He said that his relationship with Y's mother ended in July, and he appeared to blame a tension between Y's mother and his mother for the breakdown.

[12] In answer to the question posed at interview "Have you ever observed any sexualised behaviour from Y?" LT replied that Y's mother had told him she had been conversing with others online in a way which was concerning but that he did not know what was said. He told police that Y had also managed to obtain her mother's password and had set up a new account.

[13] During his second interview police provided LT with more details of Y's allegations. He continued to deny committing any offences. Specifically, he said that he had never had an altercation with Y and that he would have only been in her room "very very rarely" as it was her space. He also said that he would not have drunk in the house. When he was again asked what had caused the child to report he replied: "Again, no idea I don't know who she is speaking to on the internet …" He suggested that she had been using "graphic language to strangers."

[14] Two other features of the case chronology are significant. First, whilst the complaint was made on 8 December 2020, it was not until 26 January 2021 that the

police seized the complainant's phone. On 28 February 2022 the police produced a report on Y's phone which identified multiple searches for pornographic material all of which post-dated the report on 8 December 2020 made to police.

[15] On 11 March 2022 the police emailed the defence to advise them that they had spoken to Y's mother and that she had denied that she had seen the pornographic material referred to by police. The mother also told the police that she had asked the child if she knew anything about the materials and the child denied that she did. Three days later on 14 March 2022, the mother made a statement to police advising that contrary to what she had previously told them, the searches for pornography referred to in the police report were in fact her searches and this only appeared on Y's phone because she and Y shared an iCloud account.

[16] Thereafter, on 12 August 2022 the PPS advised the defence that they could have access to the phone. In September 2022, the defence accessed the phone hard drive and identified a number of concerning images that police failed to identify at the inspection in January 2021. Trial one commenced on 5 September 2022 and ended with a hung jury on 13 September 2022.

[17] Between trial one and trial two the defence instructed an expert to further examine the phone. This exercise was hampered by the fact that the expert could not access apps that had been accessed without a PIN code and the PIN codes provided were incorrect. Nonetheless, the expert reported that 17 images were recovered associated with '17 plus' applications including from "Pornhub." The expert report could not date all images but did provide one date of 21 November 2020 and opined that some sites were visited between 1 November 2020 when a new phone was obtained and 26 January 2021.

[18] Third party disclosure was not extensive in this case. However, one record from a UNOCINI report generated by social services involvement was disclosed dated 8 December 2020. It is relevant and relied upon by the defence in this appeal. That is because contained within the record, reference is made to the following background information:

> "Y made a disclosure to her class teacher today. This morning as the teacher was welcoming the children into class she asked were they in a good mood/all going well. All the children said yes except Y. The teacher asked 'Who said no?' and Y came up to the teacher and said 'Me. I've been banned for all electronic devices for a month.' We had informed mum a couple of weeks ago that Y had told one of the teachers that she was chatting to a stranger on the internet and he wanted to meet her. Mum was obviously monitoring her chat on-line and had discovered a conversation with a 16 year-old that she felt was not suitable. She had spoken to Y about this and

> banned her from devices as a result. Y chatted to the teacher about this. Once this conversation was over she then told the teacher she had something else she wanted to tell her. The teacher realised from her tone that might be something that would need privacy.

[19] Following the above conversation the teacher then spoke to Y in a more private setting. There she then made the specific allegations which form the counts set out at para [9] above.

Relevant legal principles

[20] The core ground of appeal relates to the application made to the judge under Article 28 of the Criminal Evidence (Northern Ireland) Order 1999 ("the Order"). This legislation imposes wide restrictions on evidence or questions about a complainant's sexual history. The general prohibition is contained in 28(1):

> "(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—
>
> (a) no evidence may be adduced, and
>
> (b) no question may be asked in cross-examination,
>
> by or on behalf of any accused at the trial about any sexual behaviour of the complainant."

[21] Sub-paragraph (2) of Article 28 sets out the limited scope of any such exception to the above:

> "(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—
>
> (a) that paragraph (3) or (5) applies, and
>
> (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case."

[22] Sub-paragraphs (3) and (5) of Article 28 read:

> "(3) This paragraph applies if the evidence or question relates to a relevant issue in the case and either—

(a) that issue is not an issue of consent; or

(b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or

(c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,

that the similarity cannot reasonably be explained as a coincidence."

[23] By way of explanation, Article 28(5) reads as follows:

"(5) This paragraph applies if the evidence or question—

(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused."

[24] Article 28(4) also provides:

> "(4) For the purposes of paragraph (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness."

[25] Further, subparagraph (6) of Article 28 contains the requirement that:

> "(6) For the purposes of paragraphs (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those paragraphs is capable of applying in relation to the evidence or question to the extent that it does not so relate)."

[26] This is not a case concerned with consent. Rather the applicant's case is that the alleged assaults did not occur thereby placing his argument firmly within the ambit of Article 28(3)(a).

[27] Most of the case law in this area is based upon the England & Wales provisions namely section 41 of the Youth Justice and Criminal Evidence Act 1999 ("the 1999 Act"), of which Article 28 is a mirror. For simplicity, where section 41 is referred to, the point will apply *mutatis mutandis* to Article 28.

[28] The key authority on section 41 is the House of Lords decision in *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45. This was a compatibility challenge shortly after the introduction of the new legislation which restricted questioning of complainants in sexual offence cases as to previous sexual history. It was held that section 41 was not incompatible with the European Convention on Human Rights ("ECHR") and that it was possible to interpret the section in such a manner as to protect the accused's right to a fair trial.

[29] As the alleged offending in that case concerned an issue of consent, the House of Lords dealt primarily with the application of section 41(3)(c). Nonetheless, at paragraph [79], Lord Hope of Craighead referred to the following in relation to subsection (3)(a):

> "79. Paragraph (a) of subsection (3) sets out the first qualifying condition. This is that the issue to which the evidence or question relates is not an issue of consent. The justification for enabling leave to be given in such cases was powerfully argued by McLachlin J in *R v Seaboyer*, at pp 613-615. The distinction which she

> drew was between impermissible generalisations about consent and specific inferences pointing to guilt or innocence. Examples of issues which will fall within this paragraph because the evidence of sexual behaviour is proffered for specific reasons are (a) the defence of honest belief, which McLachlin J defined for the purposes of her examination of the Canadian legislation as resting on the concept—which I consider to be consistent with that described in *R v Morgan* [1976] AC 182—that the accused may honestly but mistakenly (but not necessarily reasonably) have believed that the complainant was consenting to the sexual act; (b) that the complainant was biased against the accused or had a motive to fabricate the evidence; (c) that there is an alternative explanation for the physical conditions on which the Crown relies to establish that intercourse took place; and (d) especially in the case of young complainants, as in the Scottish case of *Love v HM Advocate (*1999) SCCR 783, that the detail of their account must have come from some other sexual activity before or after the event which provides an explanation for their knowledge of that activity. The fact that leave may be given for evidence and questions directed to these and similar specific issues under this paragraph is an important protection of the accused's right to a fair trial."

[30] The applicant's case has consistently been that the nature of Y's allegations originated from her interacting with online games such as 'Roblox' and engaging with wider online activities due to her unsupervised access to a mobile phone. The applicant therefore argues that the present case falls within the examples set out by Lord Hope discussed in the passage from *R v A* set out immediately above. The argument is therefore that this case comes within Article 28(3)(c) on the basis that there has been some other sexual activity on the part of Y that explains how she obtained the sexual knowledge which forms the basis of her allegations. As such it is claimed that this is an alternative explanation scenario.

[31] In support of this claim, LT seeks to rely on mobile phone evidence obtained after the allegations were made. Authority exists to support admitting such evidence. Specifically, in the case of *Love v HM Advocate* (1999) SCCR 783, referred to by Lord Hope above, it was held that evidence might be admitted about a sexual experience of the complainant which had occurred two years after the abuse alleged, but which could provide an alternative explanation for his evidence.

[32] That said, it is well recognised that there is a high threshold required in order to satisfy the requirements of Article 28(3). This high legal standard has been explicitly recognised when issues of consent arise (see *R v Guthrie (Germaine)* [2016]

EWCA Crim 1633, [2016] 4 WLR 185). However, to our mind the same legal standard must also apply in instances such as arise in this case of alternative explanation. Requisite support is found for this view in subparagraph (1) of Article 28 which makes clear that there is a presumption against adducing evidence or cross-examination of relevant witnesses. That presumption represents the starting point, and a court must be satisfied that there is sufficient reason to depart from it for the reasons elucidated in subparagraphs (3) and (5).

[33] A relevant authority from this jurisdiction is *R v WC* [2004] NICC 3, which is a decision of Weir J. At para [11] of that case he ruled that to exclude limited questioning of the complainant under Article 28(6) would, "for the restricted purpose for which it is intended […] endanger the fairness of the trial under the Convention." Thus, Article 28(6) was interpreted to be subject to the "same implied provision as was [Article 28 (3)(c)] in *R v A*, namely that evidence or questioning which is required to ensure a fair trial under article 6 of the ECHR should not be treated as inadmissible." Although that case concerned the questioning of a complainant in relation to whether she had been taking a contraceptive pill, it speaks to the consideration that must be given to ensuring that a defendant receives a fair trial.

[34] The same approach was followed by the Court of Appeal in *R v ZK* [2018] NICA 46. Stephens LJ, giving the judgment of the court, held:

> "[57] The restrictions imposed by Articles 28 - 30 of the 1999 Order required ZK to apply for leave both to adduce evidence and to cross-examine AB about any sexual behaviour. The House of Lords in *R v A* [2001] 3 All ER 1 has given detailed consideration to sections 41 - 43 of the Youth Justice and Criminal Evidence Act 1999 which is the equivalent provision in England and Wales. In *R v WC* [2004] NICC 3 Weir J summarised the relevant legal principles contained in Articles 28-30 of the 1999 Order in accordance with a judgment in *R v A*. We seek to follow *R v A* and we agree with the summary as set out by Weir J in *R v WC* and the application of those principles to the facts of that case.
>
> [58] In this case, whilst it was not necessary to do so, the prosecution introduced evidence that AB was a virgin at the time of the incident. They did so to support the prosecution case that there was no consent to sexual intercourse and that there was an explanation for delay. On that basis the application to question or to adduce evidence fell within Article 28(5)(a) as the evidence or question related to evidence adduced by the prosecution that AB was a virgin. We consider that the evidence or

> questions would not have gone further than was necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of ZK so that Article 28(5)(b) also applied. In those circumstances the judge had a discretion under Article 29(2) to give leave but was required not to give leave unless satisfied that a refusal of leave might have the result of rendering unsafe a conclusion of the jury on any relevant issue. The relevant issues not only included whether AB was a virgin but also that issue impacted on the issues as to consent and delay given the reliance by the prosecution on that aspect of AB's evidence in relation to consent and as an explanation for delay. We consider that the judge ought to have been satisfied that a refusal of leave *might* have the result of rendering unsafe a conclusion of the jury in relation to each of those issues. We consider that as in *R v WC* carefully circumscribed questions ought to have been permitted by the judge."

[35] In *R v ZK* the court concluded at paragraph [60]:

> "We consider that the credibility and reliability of AB was of central and critical importance and by this significant degree of unfairness the judge endorsed AB's evidence in relation to this issue elevating it to the status of not being challenged and not being contradicted. Applying the principles set out in *R v Pollock* at paragraph [32] we consider that the direction to the jury that the evidence of AB that she was a virgin that this evidence had not been challenged or contradicted gives rise to concerns about the safety of the conviction and, accordingly, we quash the conviction."

[36] Another authority which we have found of assistance from England & Wales is *R v MF* [2005] EWCA Crim 3376. In that case the appellant wished to pursue an argument at trial that showed that the complainant was sexually active before she complained to the police about the appellant. In dismissing the appeal, the court stressed that Lord Hope had referred to the issue arising when the detail of a child's account "must" have come from some other sexual activity which provides an explanation for their knowledge (*MF*, para [17]). As such, given that the complainant's account went beyond what a 14-year-old girl might otherwise be expected to know about sexual relationships and that the proposed question could not provide an explanation for her knowledge of the matters she described to them which did not involve any penile penetration, the Court of Appeal upheld the trial judge's decision as "obviously correct" (ibid, para [20]).

[37] Both *R v A* and *R v MF* were considered by the Court of Appeal in England and Wales in *Mark Le Brocq v Liverpool Crown Court* [2019] EWCA Crim 1398, [2019] 4 WLR 108. Although an appeal against wasted costs against the defendant's barrister for making improper comments, Lord Burnett CJ turned to the rationale behind the 1999 Act when evaluating the impugned comments in the following terms:

> "53. The philosophy which underlies section 41 of the 1999 Act has two principal components. First, the fact that a complainant has previous sexual experience does not make her more likely to consent to sex. The question of consent is at the heart of many allegations of rape and sexual offending but was not relevant in this case. Secondly, the fact that a complainant has been sexually active, even promiscuous, has no bearing on general credibility. These were described by McLachlin J in *R v Seaboyer* [1991] 2 SCR 577, 630G–H as the "twin myths." The statutory provision is thus astute to ensure that evidence of a complainant's previous sexual history is not introduced for the purpose of supporting arguments to either effect.
>
> 54. The exceptions found in the statutory scheme, discussed in *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45, include adducing evidence of previous sexual activity to avoid a conclusion that the detail of the complainant's account (especially a young complainant) must have come from sexual offending by the defendant: see Lord Hope of Craighead at [79]. That observation should be read in light of *R v MF [2005]* EWCA Crim 3376. This court discussed the reality that in the modern world, whether through the agency of chatter with school friends or sex education in schools (and we would add the ubiquity of pornography) children might often have much more knowledge of these things than those their age in previous generations."

[38] In terms of the test on appeal, in *R v Courtney* [2007] NICA 6, this court accepted the general principle that:

> "[26] … if it is necessary for this court to address the question whether the ruling was one that it was not reasonable for the judge to have made, it is not for the members of this court to consider whether they would have reached the same conclusion. The ruling could only be reversed on this basis if it was established that the judge did not act reasonably in making it. As a matter of

> inevitable logic, if we consider that the ruling was one that lay within the spectrum of reasonable conclusions on the available evidence, the application for leave to appeal, in so far as it depended on this ground, would fail."

[39] Further, it is observed in *Rook and Ward on Sexual Offences (6th ed., 2021)* when discussing the relevant provisions as follows:

> "6.100 This issue could arise in cases where the prosecution is seeking to argue, or the jury might otherwise form the view, that the complainant would only be able to describe the particular sexual activity alleged if they had experienced it with the defendant. Much will depend upon the age of the complainant, his or her level of sophistication, and whether the sexual activity alleged is unusual or something a jury might reasonably expect the complainant to know of. […]
>
> 6.101 However, this issue is only likely to arise in exceptional cases. […]"

[40] Reflecting on all of the above we can see that *R v A* remains the guiding authority in this case. It effectively decided that the introduction of previous sexual history is now circumscribed by law. However, the presumption against such questions may be rebutted if the conditions within Article 28 are satisfied. In limited circumstances, with leave of the court, evidence may be admitted under tight control of the judge in order to allow a defendant to present a valid defence. Whether this happens depends on the facts of a particular case. The overarching consideration is preservation of fair trial rights pursuant to common law and article 6 of the ECHR.

[41] We cannot help but observe that *R v A* is now nearly 20 years old. Since then, society has moved on. The internet is readily accessible and contains pornographic material. However, there is no reason in principle why in limited circumstances the accessing of such material may not be relevant to a complaint of sexual offending. Whether it is relevant will depend on the circumstances of a particular case. The courts have consistently striven to strike the right balance between admissibility of sexual history and fair trial rights. That has been possible by rigorous scrutiny of such applications by trial judges to tease out the real issues and then effective case management. If the threshold for admission is passed, there is then a second stage whereby the trial judge must manage how such evidence is dealt with at trial. In our jurisdiction this exercise will involve a ground rules hearing, the formulation of relevant questions in advance, agreement as to how they should be asked and whether any relevant questions should be asked of an adult rather than a child complainant all of which preserve the fairness of the process for the complainant.

[42] We referred a more recent case to the parties of *R v Philo-Steele* [2020] EWCA Crim 1016 which illustrates how courts have been dealing with an issue falling within the scope of Article 28(3)(c). In that case the trial judge had refused to admit evidence of previous sexual history which was W's access to pornography at the age of six. W went on to accuse *Philo-Steele* of molesting him in the bath and in the bedroom. The trial judge ruled the issue in dispute in the bathroom was the defendant's intention not the nature of the touching. She was, therefore, not satisfied this was evidence of a complaint by W that demonstrates an unexpected knowledge of sexual behaviour (analogous to the example given by Lord Hope in *R v A*).

[43] This decision does not alter the principles set out by the House of Lords in *A (No 2)* [2021]. *Blackstone's Criminal Law and Practice* at paragraph F7.37, cites the *Philo-Steele* case as examples of the following:

> "(a) there was no similarity between the other sexual activity and the sexual activity in the case.
>
> (b) where the sexual behaviour was so unexceptional that someone of the complainant's age could be expected to know about it, for example an attempt to remove underwear in order to touch the complainant."

[44] We agree with the supplementary defence submissions that the case is fact specific. The evidence sought to be adduced in *Philo-Steele* is distinguishable from the evidence sought to be adduced in the subject appeal. In the subject appeal, the 10-year-old complainant was presented to the jury as an innocent child with no previous sexual experience whatsoever. The behaviour she complains about cannot be described as unexceptional and her account of same could only have come from learned experience, either as a victim or from her access to pornography. In addition, there was evidence on her phone which may have been evidence upon which the jury could rely as capable of providing an alternative narrative to the allegations presented to the jury.

The judge's ruling on the Article 28 application

[45] The relevant sections of this ruling are as follows:

> "7. As the defence propose to put the images to Y's mother during her evidence and she will be asked to confirm that she has viewed the images retrieved from Y's phone, and that the images are pornographic in nature, the question arises as to whether Article 28 is engaged at all. The Order, in my view, must be interpreted and implemented in

a way that is consistent with its legislative purpose. The purpose is to curtail questions relating to a complainant's previous sexual history, whether they are asked directly of her, or, as here and for understandable reasons, through another. Article 28 is clearly engaged.

8. In my view a girl of 10 years three months is not too young to have a had a "sexual experience." Even if she had no appreciation that what had occurred was sexual because of her lack of maturity, it still comes within Article 28, see *R v E* [2004] EWCA 1313.

9. Article 29(1)(c) of the Order defines "Sexual behaviour" as **any** sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding (except in Article 28(3)(c)(i) and (5)(a)) anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused.

10. The behaviour of accessing pornographic **material is** "sexual behaviour" as contemplated and defined in the Order. In *R v Ben-Rejab* [2011] EWCA Crim 1136, Pitchford LJ stated at para 35:

> 'It will be noted that 'sexual behaviour or experience' need not involve any other person. The expression is plainly wide enough, in our view, to embrace an activity of viewing pornography or engaging in sexually-charged messaging over a live internet connection.'

11. That being the case, the defence must make an application under the Order for leave to adduce this evidence. I accede to their application for an extension of time in which to lodge the application as it falls foul of the time limits set out for such an application.

12. As a preliminary matter, the issue as to admissibility of this evidence, primarily these images, has to confront an examination as to when they were created. The defence are unable to say

when the vast majority of these images were downloaded. With the exception of two rather innocuous images, none of the others can be said with any degree of certainty, to have been created before the allegations were made (8 December 2020). Given the nature of the application they make, it must be a pre-requisite that it can be shown they were downloaded at a time before the allegation was made, otherwise the "sexually graphic nature of the allegation" argument set out in para 5 has no foundation.

13. The defence point to certain frustrations they have encountered in perfecting their proofs in this regard. The precise reasons for this have yet to be established. However, given my conclusions on the substantive matter set out below which contemplates that the images all existed before 8 December 2020, even if it could be proved these images were in existence before the allegations were made, it follows the conclusion on the Article 28 issue would be the same.

14. The purpose of the proposed line of questioning is to invite the conclusion that the complainant has or may have become sexualised from her experiences of accessing sexual images on the internet. The argument, in essence, is that this provides a counterweight to the assertion, inferred in the defendant's interviews and asked of the complainant in the first trial, that the only way the child could have made the complaints of such a sexual nature was if she had been abused as alleged.

15. The essential test is one of relevance. A girl of 10, downloading pornographic material of a very general character is not in this modern day world anything unusual or exceptional. Children of all ages have access to information and material previously unthinkable. Children are curious human creatures and are likely to access such material out of curiosity as well as part of a sexual experience.

16. There is nothing in this material that is remotely related to the detail of the allegations Y makes against the defendant. The general nature of these images does not provide an alternative explanation as to how a child of 10 could make such sexually graphic allegations. Consequently, the jury will not be misled if they are not made aware of them.

17. The sole or main purpose in seeking to put this material before the jury is to suggest in their eyes that, because she was accessing such material, she is more likely to be untruthful in her allegations against the defendant. In my view, the application is speculative and precisely the kind of thing Article 28 was designed to guard against.

18. For the sake of completeness, the proposed questions concerning the contact with a 16 year-old, forming part of the main application under Article 28 is refused. However, it was given in evidence in the first trial, and I will hear the parties on this discrete issue of relevance if there is an objection to this evidence."

[46] One other issue was not specifically addressed in the judgment, but it was live between the parties as it was submitted that if the court were to refuse the application the defence would be prohibited from adducing clear evidence of Y's lies. The judge dealt with this submission by permitting questioning of the mother on a limited basis which was stipulated in advance and comprised the following limited basis:

> "Is it correct that during the course of this investigation the police asked you to ask Y about an important matter?
>
> And didn't she tell you a lie?"

Discussion of the grounds of appeal

Ground 1 - Refusal to admit evidence of previous sexual history

[47] It is accepted by both parties to this appeal that the judge was correct to find Article 28 was engaged and that relevance was the key consideration. The Article 28 application focused on adducing evidence that Y had accessed online pornographic material in or around the time the allegations were made to her teacher and then to police. It was mounted on the basis there would be limited cross-examination of the

child and more extensive cross-examination of her mother who was also a Crown witness.

[48] The prosecution argued that the judge was correct to find that, in the circumstances of this case, an Article 28 application was necessary as this was a relevant issue. However, the judge decided against the admission of the evidence for the reasons found in his written ruling, primarily at paras [16] and [17] discussed above.

[49] Reliance was also placed upon the fact that the defence expert could not specifically date the images found on the complainant's phone and therefore it could not be proved that they were accessed before the complaints were made.

[50] In addition, a point well made by Mr McHugh was that images of a pornographic nature had been accessed but, that which was depicted, bore no relevance to the detailed and graphic nature of the sexual abuse alleged by the complainant. Therefore, it was contended that there was no basis to admit evidence of Y's access to pornography on the basis that: (a) it bore no relevance to her detailed allegations of sexual abuse; (b) it could not be timed as being before or after her disclosures. To adduce such evidence would amount to an attack on the character of a young witness and invite speculation on the part of the jury. The overarching submission of the prosecution was that in light of all of the aforementioned the judge was entitled to make the ruling he did and that it was not *Wednesbury* unreasonable.

[51] Against this, the argument ably presented by Mr Magill was that the defence had been deprived of a fair trial by the judge's refusal to allow any questions on the alternative explanation for the allegation and a very limited number of questions regarding the complainant's lies.

[52] We have considered the competing arguments which were made with skill and precision by both counsel. In undertaking our analysis, we are cognisant of the high threshold required before an appellate court would interfere with a decision of this nature by a trial judge who has a feel of the case. It is not for the members of this court to consider whether they would have reached the same conclusion as the judge. Rather, the ruling can only be reversed if it was established that the judge did not act reasonably in making it. Applying this standard to the particular factual matrix of this case we consider that this is a rare case where the threshold is met, and the judge did not act reasonably in making the decision he did for the reasons we will now give.

[53] First, there was a relevant issue, namely the complainant's clandestine accessing of adult pornography when a child and her lying about that. Article 28 was therefore engaged. We consider the fact that a girl of 10 was accessing pornographic material even of a very general character is concerning. Thus we do not know how the judge reached his assessment expressed at para [15] of his judgment that this activity was not unusual or exceptional. In any event this case

was not simply about accessing content of a general nature. It was about a child surreptitiously accessing adult sites on her mother's account. That activity is obviously up a level from curiosity.

[54] In addition, we are not satisfied with how the judge dealt with the lie issue. There were in fact two elements to the lie which the judge himself articulates at page 595 of the transcript when addressing Mr McHugh as follows:

> "... and it would seem two layers to the lies, one is, did she deny I think access using her PIN number or whatever to gain access to that. You did deal with that but was there not another lie that was potentially told which was that when challenged about whether the content was hers Y had lied about that …"

[55] Notwithstanding these two layers of lying, the judge only permitted questioning in the most general sense that there was a lie told during the course of the police investigation about an "important matter." To our mind this direction left the jury unsighted on the nature of the lies told and was, to our mind, wholly inadequate to deal with a relevant issue.

[56] A second factor which weighs strongly in the balance is that the applicant referenced this issue from the outset at interview as we have discussed at paras [11]-[13] above. He put in play the fact that there were tensions in the household between the mother and Y in relation to accessing inappropriate material on her phone. He also put in play that Y was accessing the internet and as he put it, talking "graphically to strangers." There can be no doubt that the applicant was making the case that Y must have gained sexual knowledge from an extraneous source such as pornography rather than by virtue of abuse perpetrated by him.

[57] A third factor which supports our conclusion derives from the UNOCINI record discussed at para [18] above. Y made a disclosure to her class teacher which began by reference to her being banned from all electronic devices for a month. This corroborates what the applicant said at interview in relation to the phone issue. In addition, other information provided in the UNOCINI report raises a broader issue about Y's sexual knowledge and contacts. That is corroborated by the school's concerns a number of weeks before in that Y had told one of the teachers that she was chatting to a stranger on the internet, and he wanted to meet her. The third aspect of this record of significance is the report that Y's mother was obviously monitoring her chat on-line and had discovered a conversation with a 16-year-old that she felt was not suitable. She had spoken to Y about this and banned her from devices as a result.

[58] Fourth, we do not think the judge paid enough regard to what was actually found on the phone. The defence expert reports set out a series of images that were found and sites that were accessed. True it is that none of the images mirror the

allegations made, particularly, the account of oral rape given by Y. However, the gateway to the images stored was recognised adult pornography sites including Pornhub which is known to contain graphic images. It was impossible to discover exactly what was downloaded without the PIN. However, we think the defence is correct in submitting that a reasonable inference to draw was that Y may have been using the pornographic images in conjunction with the over 18 apps which were downloaded in November 2020 before the complaints were made.

[59] Fifth, we find that the police failing in relation to seizure and examination of the phone is highly significant in the case for the reasons so ably outlined by Mr Magill during argument. It is patently obvious to us that the police should have seized the phone earlier and properly examined it as this was a reasonable line of enquiry. The failure to do so left a forensic gap in this case which has proven to be detrimental to the prosecution.

[60] Sixth, we do not consider that the trial process corrected the problems we have identified through questioning of witnesses or by virtue of the judge's charge. In fact, we find the transcript of evidence of concern in numerous respects. First, and foremost it is clear that the applicant could not answer questions put to him about Y's sexual knowledge as he would have liked as a result of the judge's ruling. This is illustrated by the basic fact that when asked the following questions by Mr McHugh in cross examination the applicant could not answer:

> "Q: There is no evidence of sexualised language being sent by Y."
>
> Q: Could unauthorised use of the phone come anywhere close to supporting the case that her account is all lies."

There are other passages in the evidence that concern us including uncontradicted evidence by Y's mother that she was a "good girl" at school. That is notwithstanding the UNOCINI report that raised concerns. In addition, as we have already said the evidence of the lies told was not dealt with in any context.

[61] The judge understandably issued his directions to the jury having made his Article 28 ruling. Therefore, as far as Y he simply stated:

> "So, I want to now deal with inconsistencies, and you heard a lot about that in the two speeches and mostly in the defence speech yesterday. The defence in this case ask you to consider that Y has been inconsistent in some of the things she has said at various times. They also say that she lied to her mother about an important matter."

The judge then recounted the evidence given at trial but the problem with what he

said is that it was all based upon the Article 28 ruling which we think distorted the evidence.

[62] Overall we consider that the jury were left with a partial picture of the facts upon which they had to determine the case. We disagree with the judge's finding at para [16] of his ruling because we consider there was relevant evidence which was excluded. The jury should have been informed of the phone evidence in a controlled way by the construction of agreed questions to be asked through the mother as to the child's activity on the phone. That way the jury could have made an informed choice as to whether this activity may have led to inappropriate sexual knowledge which could explain the allegations, or some of them, made against the applicant or whether it had no bearing on the applicant's guilt. Without the evidence being admitted in the controlled way it could have been the applicant was unable to put his defence in full and was denied a fair trial

[63] None of what we have said detracts from the underlying policy objective of Article 28 which is to prevent unnecessary questioning as to sexual history. It would be wrong to adduce such evidence without a valid basis as that would simply amount to an attack on the character of a young witness and invite speculation on the part of the jury. Complainants in sexual offence cases must have the protection of this presumption to ensure that they also are provided with a fair trial and can achieve justice. However, where evidence is relevant, the presumption can be displaced by way of exception and, if so, it will be closely controlled by the court.

[64] We also stress that it is not just the fact that Y accessed pornography that leads us to our conclusion. It is the combination of the six factors in this case explained above that results in the outcome we have reached, namely the fact that the applicant raised these issues at interview, the failings in seizing the phone and consequent inability to fully verify what was on the phone, the defence expert report which found 17 images, the lies told by Y and the UNOCINI reference. Such a potent combination of factors is unlikely to occur in many cases. That is why we find that this is a rare case where an appeal must succeed on Ground 1 as the correct balance has not been struck between the competing interests of regulating the admissibility of sexual background and fair trial rights. Our conclusion on Ground 1 effectively deals with the appeal, however, we make some brief comment on the other grounds for completeness sake and for the assistance of practitioners.

Ground 2 - The judge erred in refusing the defence application to stay proceedings as an abuse of process

[65] The application was mounted on the following basis: (a) investigative failings, (b) the difficulties faced by the applicant as a result of the failed Article 28 application. On behalf of the applicant, it was submitted that Y's phone was not seized until approximately eight weeks after the disclosure and was not examined for a further twelve months despite the applicant's assertion at interview that she

had accessed inappropriate material online. The PINs given to the defence experts did not provide access to some apps. The defence expert found pornographic material on the phone, whereas police did not. This ground is overtaken by our conclusion on Ground 1 and so it is unnecessary to reach a conclusion upon it.

Ground 3 - In directing the jury, the judge failed to give the jury an adequate care/Makanjuola warning

[66] It is concerning that this court must return to a so called *Makanjuola* warning issue again. We say this because the court has reiterated many times before that there is no set formula for such a warning - it will depend on the facts of a particular case. It is a matter for the judge's discretion what, if any, warning is appropriate and if a warning is given in respect of a witness, it should be done as part of the review of the evidence rather than as a set-piece legal direction. Where some warning is required, it is for the judge to decide its strength and terms.

[67] *Blackstone's Criminal Practice* at Section F 5.16, is also instructive as to the evidence of children and reads as follows:

> "There was a time when an accused was not liable to be convicted on the unsworn evidence of a child appearing on behalf of the prosecution unless that evidence was corroborated (CYPA 1933, proviso to s38(1)); and when the sworn evidence of a child required a corroboration warning as a matter of law (see eg *Cleal* [1942] 2 All ER 203). The former statutory requirement has been repealed (CJA 1991, s101(2)); as to the latter common-law rule, the CJA 1988, s34(2), now provides that 'Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a child is abrogated.' Despite these statutory reforms, in some cases the evidence of some children may remain unreliable, whether by reason of childish imagination, suggestibility or fallibility of memory. In *Pryce* [1991] Crim LR 379, it was held that it was not necessary to give a direction to treat the evidence of a six-year-old with caution, because in effect that would be to reintroduce an abrogated rule, but, after *Makanjuola* [1995] 3 All ER 730, it is submitted that whether a direction is given, and if so, the terms of the direction, are matters of judicial discretion turning on the circumstances of the case (*L* [1999] Crim LR 489; *Barker* [2010] EWCA Crim 4). Circumstances of importance, it is submitted, will include the intelligence of the child and, in the case of unsworn evidence, the extent to which the child understands the

duty of speaking the truth."

[68] It was recognized in the case of *Makanjuola* that a court of appeal would be disinclined to interfere with a judge's exercise of discretion save in a case where that exercise was *Wednesbury* unreasonable *(Associated Provincial Picture Houses v Wednesbury Corporation* (1948) 1 KB 223).

[69] In this case the trial judge addressed the inconsistencies in Y's account as part of his summing up for the jury. He had an in-depth understanding of the case and the evidence, and the warning was adequate in all the circumstances. There is nothing wrong with the warning he gave. We reject this ground of appeal.

Sentence

[70] The overall sentence was 12 years. The judge had to consider totality. To arrive at a just sentence, the court may impose consecutive sentences in cases where the offending occurred over a period of time. What was alleged in this case was a campaign of sexual offending including penetration perpetrated over years against a prepubescent child. Therefore, we consider that consecutive sentences were warranted and that the sentence passed could not be described as manifestly excessive nor wrong in principle.

Conclusion

[71] We do not lightly interfere with the decision of the trial judge in a case such as this. However, Ground 1 of the appeal succeeds for the reason we have given. This outcome is essentially because we consider that the applicant was not permitted to pursue a reasonable defence which the jury should have considered. Therefore, the applicant was denied a fair trial. As a result, we cannot be sure that the conviction is safe. This means that the conviction will be quashed. We will allow some short time for the prosecution to decide on whether there should be a retrial.