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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 6th July 2018

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE GREEN

and

SIR ANDREW SMITH

R E G I N A

- v -

ALLAN RICHARDS

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Mr T Raggatt QC appeared on behalf of the Appellant

Miss M Moore QC appeared on behalf of the Crown

J U D G M E N T
(Approved)

Friday 6th July 2018

LORD JUSTICE HOLROYDE:

1. We record at the outset our thanks to Mr Raggatt QC on behalf of the appellant and Miss Moore QC on behalf of the respondent for their very helpful submissions, which have assisted the court by focusing on the real issues in this appeal.

2. In 2015 the appellant, Allan Richards, was charged with many serious sexual offences, including rape, buggery and indecent assault. It was alleged by a total of 27 complainants that over a period of more than 30 years he had used his positions as a police officer and a Scout master to commit acts of sexual abuse against young boys.

3. In order that the prosecution of the appellant should not become unmanageable, the Crown preferred two separate indictments against him and two trials were conducted. The first trial, on indictment T20157154, took place in the Crown Court at Birmingham before His Honour Judge Laird QC and a jury between 11th April and 23rd June 2016. It resulted in the conviction of the appellant of 31 offences: two of rape (counts 9 and 20), one of buggery (count 21), twelve of indecent assault (counts 1, 2, 3, 4, 7, 8, 15, 16, 17, 22, 23 and 24), five of misconduct in a public office (counts 5, 6, 10, 11 and 13), two of indecency with a child (counts 18 and 19), eight of sexual activity with a child (counts 25 to 29 and 34 to 36), and one of voyeurism (count 45).

4. The second trial, on indictment T20150763, took place before the same judge between 26th September and 29th October 2016. It resulted in the conviction of the appellant of nine offences of indecent assault (counts 1 to 5, 7 and 10 to 12).

5. On 4th November 2016, the appellant was sentenced for all matters. For one of the offences

of rape, he was sentenced to an extended sentence of sixteen years, comprising a custodial term of eleven years and an extension period of five years. A consecutive determinate sentence of three years' imprisonment was imposed for one of the offences of misconduct in a public office. On all of the other counts of which he had been convicted, concurrent determinate sentences were imposed, which did not affect the total sentence.

6. The appellant now appeals by leave of the single judge against his convictions in the first trial. His application for leave to appeal against his convictions in the second trial has been referred to the full court by the Registrar. Thus, all of his convictions are to be considered at this hearing.

7. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under those provisions, where a sexual offence has been committed against a person, no matter relating to him shall during his lifetime be included in any publication if it is likely to lead members of the public to identify him as the victim of that offence. This prohibition continues to apply unless varied in accordance with section 3 of the Act. We will refer to each of the complainants who gave evidence against the appellant by using initials.

8. We begin by summarising the overall facts. Sexual abuse was first alleged against the appellant in 2014 by GE. In the resulting investigation police searched the appellant's home address. Hidden on the hard drive of his home computer they found a document comprising a list of 35 male names. This became known as "the list". The police traced many of the men who were named on the list. A number of them alleged that the appellant had sexually abused them.

9. In the first trial some of the complainants could be divided into three groups, though there

was some overlap between the groups. In the first group were NV, SL, PQ and RB. Over a period of nearly 20 years, from February 1976 to January 1996, they were all Cubs or Scouts and, they alleged, were abused by the appellant whilst he was a Scout master or helper. We note in passing that in the second trial, all but one of the complainants had similarly been Cubs or Scouts during that period and alleged similar sexual abuse by the appellant.

10. The second group again included PQ and RB, together with AS and PM. Their evidence covered a period from September 1980 to December 2011. Three of them alleged that they were abused by the appellant using the subterfuge of bogus police enquiries. The fourth came into contact with the appellant as a result of a genuine police investigation in which the appellant was involved.

11. The third group, JC, MH, LN, RS and LP, gave evidence that over a period of nearly 20 years (September 1998 to March 2007) they had each come into contact with the appellant when in a local park wearing school uniform. With the exception of JC and MH, none of the complainants in the first trial knew any of the other complainants.

12. In his role as a police officer, the appellant had access to a police database which contained individuals' personal details. The system, which could be accessed by any police officer, was password protected. From around February 2000, the appellant carried out approximately 8,000 searches of this database.

13. The appellant had no previous convictions. He gave evidence at both trials. He had become a police cadet at the age of 17 and had joined his local police force two or three years later. He had been a Scout leader from the age of 18.

14. In the first trial, he denied some of the alleged offending. He said that the complainants concerned had been mistaken in identifying or purporting to identify him. In relation to other allegations, he admitted the relevant events but disputed details such as when and where the incidents occurred and, crucially, whether or not the complainants were above the age of consent at the particular time. His evidence was to the general effect that he is homosexual and sexually interested in adult men but not in boys; and that, as a police officer, he had been very aware of the significance of the age of consent.

15. We turn to the first trial. We summarise briefly in indictment order the facts relevant to the counts of which the appellant was convicted. NV joined the Cubs at the age of about 9 and later moved up to the Scouts. His allegations related to a man called Allan (said to be the appellant) who was involved with the Cubs' football team. NV said that whilst playing in a football match he injured his shin. Allan tended to him and placed a wet sponge onto his knee, before putting his other hand on top of NV's penis, over clothing (count 1). Two other witnesses gave evidence to the effect that the appellant helped with the football team.

16. A second incident (count 2) took place during a week-long Scout camp in Newcastle or in the Newcastle area. NV said that the appellant came into his tent and sat next to him. As they were talking, the appellant reached across, undid NV's clothes, exposed NV's penis and tried to masturbate it. NV said that he initially froze, then got up and ran out of the tent.

17. At an identification procedure, NV picked out the appellant. He said that he recognised the face but was not certain.

18. At trial the appellant denied these allegations. He said that he did not know NV and had never touched him and that he had never attended a Scout camp in the Newcastle area.

19. SL gave evidence about Allan, who was a helper at the Cubs and Scouts and was in some way connected to the police. SL described a game called Colditz which was played at the Scout hut. It involved the children moving around obstacles in the hut in the dark. The leaders stood at the edge with a torch. If they shone the torch directly at a child, he was out and had to stand by the person with the torch and watch the rest of the game. On one occasion when SL was out and was standing near Allan, Allan had his arms around him in a friendly manner. When the lights were off, Allan undid SL's zip, put his hand down the front of SL's pants and touched his penis for a couple of seconds before the lights came back on. Allan then quickly took his hand out and fastened the zip. This incident (count 3) happened only once.

20. On another occasion, SL said that he was walking home from Cubs when Allan picked him up, put him onto his shoulders and, with one hand, undid SL's trousers, put his hand inside and touched SL's penis for a few seconds. Allan then put SL down and they continued walking, holding hands.

21. At an identification procedure, SL picked out the appellant but said that he could not be one hundred per cent positive.

22. At trial, the appellant gave evidence that he remembered SL and remembered playing Colditz with the Scouts. However, he had never acted improperly towards SL and had never walked him home.

23. PQ (who featured in count 5) had been a Cub. He gave evidence about a helper called Allan who said he was a policeman. PQ said that one day he was contacted by Allan who told him that they needed to meet at the Scout hut. They did so. Allan told him that a girl had accused

PQ of rape and that PQ needed to provide a semen sample and some pubic hair. As PQ was masturbating in order to provide the sample, Allan stood in front of him and watched as he ejaculated into a tube. Allan then used a pair of scissors to cut a sample of pubic hair.

24. Enquiries revealed that the appellant had made a database search for PQ.

25. In his evidence, the appellant accepted that during the relevant period he had been a Scout leader and a policeman but said that he had never met PQ and there had been no improper contact between them.

26. RB (who featured in counts 6 and 7) gave evidence that just after his fourteenth birthday he had been playing outdoors when he was approached by the appellant who said that a girl had made an allegation of sexual assault in a nearby park. She had referred to the offender as "R" and said that he had a scar on his groin area. The appellant said that he needed to eliminate RB from the police enquiries. RB attended the appellant's home and sat on the sofa. The appellant asked him to drop his trousers so that he could examine him. RB did so. The appellant knelt in front of him and started to move his testicles with his left hand, before taking hold of his penis with his thumb and three fingers and pulling the foreskin back and forward. The incident ended. The appellant said that he would inform his station that there was no scar. RB was told to tell his parents that the meeting had been about the Scouts.

27. Evidence was adduced that in late 2004 and early 2005 the appellant had twice made searches of RB on the police database.

28. When interviewed about these allegations, the appellant denied any sexual contact with RB. He said that it was possible that RB had attended his flat for a first aid course or for map reading,

but that he had never attended on his own. He said that he did not like RB and did not trust him. He maintained this account in evidence.

29. MD (who featured in count 8) gave evidence that when he was aged 12 or 13 he had been inappropriately touched by a man in the local park. MD said that he was alone and in school uniform at the time when he a man walking a dog, which he described as being of "Staffie size". Other evidence showed that the appellant at the time owned a Boxer dog. MD said that the dog, which was off the lead, jumped up and put its paws on him. The man apologised and started to rub MD down, as if to clean him where the dog had jumped up. The man then put his hand on to MD's penis, over his clothes, before putting his hand inside his pants, touching his penis, skin to skin, and starting to move his hand as if trying to masturbate him. MD froze, then moved the man's hand away and walked off.

30. MD said that he later saw the man on a number of occasions driving a dark coloured estate-type car. Evidence showed that the appellant at the time did own a blue estate car. Further evidence showed that between 2003 and 2010 he made 43 searches of the police database for MD.

31. At an identification procedure, MD picked out the appellant, saying he thought it was him.

32. At trial, the appellant denied that he was the man involved.

33. AS (who featured in counts 9, 10 and 11) came into contact with the appellant when he was aged 15. At that time AS was using drugs and working as a prostitute. He had made a complaint of rape against a man called Colin. The appellant was the investigating officer. In the course of the investigation, the appellant took AS to the police station where he was based. He

said that AS needed to provide a semen sample in connection with another purported rape. The appellant said that he had two choices: either to provide a sample or be arrested.

34. AS gave evidence that at a later date the appellant told him that he could earn money by going to an address and having sex with a man from Liverpool who was the subject of a police investigation. AS reluctantly agreed. He was taken to a house, where he undressed. The appellant blindfolded him, tied his hands, told him to lie on the bed and left the room. A short time later, a man (said by the prosecution to be the appellant) came into the room. AS was asked to "suck him off", which he did. The man, who spoke with an unconvincing Scouse accent, then started to masturbate him and asked AS to lick around his penis and testicles. AS did so until the man ejaculated. The man then left the room, leaving £40. The appellant re-entered, untied AS and took off the blindfold.

35. About two weeks later, the appellant took AS back to the same address. Again, AS was blind-folded. He was told that the man (purportedly the same one as previously) wanted anal sex. The appellant left the room. A man, who AS said he was sure was the appellant, entered and asked AS to give him oral sex to make him erect. The man then penetrated AS's anus with his penis. No condom was used. The man ejaculated over AS's back and then left the room. The appellant returned a short while later, removed the blindfold and gave him £60.

36. On a third occasion, AS was again blindfolded and had his hands tied behind his back. He and the man engaged in oral sex before the man again penetrated his anus with his penis. AS said that he saw the man's watch; it was silver with a dark coloured screen – identical to the one worn by the appellant. Photographs from the time showed the appellant wearing a watch which matched that description.

37. AS told a friend at the time that he had been sexually assaulted by a police officer but said that he would not report it because no one would believe him.

38. When interviewed about these allegations, the appellant served a prepared statement denying any indecent assault or rape. At trial he said that a few years later he and AS had met and had engaged in a consensual sexual relationship at a time after AS had reached the age of consent.

40. PM (who featured in count 13) had been taken into care when he was aged about 13. He and his half-brother made a complaint of sexual abuse by a man called Graham. The appellant was involved in investigating that allegation. PM said that on one occasion he went to the police station, where the appellant took him into a room. The appellant said that he had received some intelligence that PM was recording their conversation. He asked PM whether he could check. PM agreed. The appellant proceeded to pat PM's upper body, before putting his hands up under his top. He then put his right hand down inside PM's pants and felt his penis and testicles for a few seconds. PM reported this to another officer.

41. There was evidence that the appellant had made thirteen searches of PM on the police database.

42. At trial the appellant denied any wrongdoing. He said that the incident never happened.

43. The complainant JC (who featured in counts 15 to 19) had a friend MH. JC said that when he first met the appellant, the appellant touched his penis over the top of his trousers. Thereafter, he and MH frequently bumped into the appellant who would pick them up in his car. The two boys were going through a phase of sexual experimentation. The appellant would watch as they

touched and kissed each other on the bed. He would also ask them to do things to one another whilst he masturbated.

44. JC said that when he was 13, the appellant tried to engage in oral sex with him and MH. On one occasion, the appellant performed oral sex on JC and he witnessed the appellant performing oral sex on MH whilst masturbating.

45. When JC was 13 or 14, the appellant masturbated him. That was witnessed by MH. On another occasion, JC was on the appellant's bed whilst the appellant masturbated next to him and ejaculated. None of what JC did was forced by the appellant.

46. MH (who featured in counts 20 to 24) gave evidence that he and JC had first met the appellant in the local park and had thereafter seen him frequently. On a number of occasions, they all went to a secluded area where the appellant masturbated, gave oral sex to the boys and asked them to masturbate him until he ejaculated. Other incidents of mutual masturbation took place at the appellant's home.

47. When MH was about 15, he and the appellant engaged in penetrative anal sex. MH said that, unlike most of the sexual activity, that was not consensual. He said that the appellant was aware of his age.

48. There was evidence that between 2003 and 2007 the appellant had made 12 searches of JC and 21 searches of MH on the police database.

49. When interviewed, the appellant made no comment.

50. At trial, he accepted that the events described by JC and MH happened, but at a later time than they alleged and at a time when they were either over the age of 16 or he reasonably believed that they were.

51. LN (who featured in counts 25 to 29) was a 14 year old schoolboy when he began to meet the appellant in the park. On a number of occasions over about twelve months, they engaged in mutual masturbation, oral sex and anal sex. There was evidence that the appellant made 14 searches of LN on the police database.

52. At trial, the appellant accepted sexual activity with LN, but only when LN was of legal age.

53. GE (who featured in counts 34 to 36) had a paper round when he was aged 14 to 15. He got talking with a man called Allan and began to visit Allan's house. He was able to describe Allan's cars. Allan let him use the computer. On one occasion when he was doing so, Allan touched his leg. Some weeks later at the house, Allan again touched his leg and this time put his hand inside GE's trousers and underpants and touched his penis.

54. On many occasions over the following months, on visits to the house, Allan masturbated GE.

55. There was evidence that between 2008 and 2010 the appellant made 15 searches of GE on the database. In addition, the appellant's diaries contained entries relating to GE, including the date of GE's fifteenth and sixteenth birthdays.

56. When interviewed, the appellant said that he had formed a friendship with GE and that there had been some mutual sexual touching but that he reasonably believed GE to be aged 16 or over.

He maintained that account in his evidence.

57. The diaries recovered from the appellant's home contained numerous entries from 2006 to 2013 which were alleged to relate to the appellant's observations of the genitals and underwear of young boys whom he observed as they were changing their clothes at the local swimming baths. There were names and initials and a basic code which related to sexual terms. The names and nicknames recorded in the diaries could be matched to the names of boys in a swimming class which met regularly at the baths. Electronic records of the appellant's use of his membership card showed that the times of his visits to the baths coincided with the times of the swimming class and that the appellant changed the time of his visits when the time of the class was altered. There was also evidence that he used the communal changing area where the boys changed, rather than using one of the separate cubicles.

58. The appellant's observations of the boys as they changed were the subject of count 45, the charge of voyeurism, which covered the period between 31st December 2004 and 31st December 2013 and therefore overlapped in time with the dates of some other counts.

59. When interviewed about the diary entries, the appellant made no comment.

60. At trial, he said that he had not deliberately observed the boys, who were naked or in their underwear, for the purposes of sexual gratification. He claimed that the entries in the diaries referred to men whom he had observed at the baths and not to young boys.

61. It will be apparent, even from that brief summary of the evidence in the first trial, that there was a powerful body of evidence against the appellant and that the task of summing up the case was by no means an easy one.

62. Submissions were made to the learned judge on the issue of whether the evidence in support of any one count was admissible in relation to any other count or counts. Following that discussion, the learned judge directed the jury to the following effect. At page 28G of his summing-up he gave a conventional direction as to the need to consider each count separately and to return separate verdicts which might or might not be the same on each count. He then went on to say the following (at page 29A):

> "Many of the counts involve allegations of a sexual nature against boys who are under the age of 16 years. The [appellant] denies any sexual conduct or activity with anyone who he knew to be under 16. In this regard, consider count 45 first. So start your deliberations with count 45. That is the allegation of voyeurism. If, having considered the evidence on this count, you are sure the [appellant] is guilty you should go on to consider whether that conclusion shows that he has a sexual interest in boys who are under the age of consent. If you are not sure the [appellant] has such an interest then your conclusion about his guilt of count 45 does not support the prosecution case on any other count. But if, having considered count 45 you are sure the [appellant] is guilty of it and you are sure that his guilt of count 45 does show a sexual interest in underage boys, then you may take it into account when deciding whether he is guilty of the other offences which involve allegations against boys under the age of 16."

63. As to the second possible route, the judge pointed out that the accuracy of each complainant's evidence had been challenged by the defence and that in some cases there had also been challenges to the truthfulness of some of the complainants. He noted the prosecution's submission in closing speeches that there were similarities in the allegations made by different complainants about the appellant's behaviour, which the prosecution submitted were no coincidence and made it more likely that the complaints were true. The judge said that in that sense the evidence from one complainant was capable of lending support to others. He directed the jury to look at the allegations in groups or clusters and to consider the similarities of behaviour as alleged by those complainants. He identified the three groups which we have

mentioned earlier. At page 31A he continued as follows:

> "Now, the prosecution point about the similarity of complaint only has force if the complaints made are truly independent of each other. If you are sure there is no realistic possibility of collusion or contamination between complainants you can treat the evidence of one complainant as supportive of the others in the way that I am now going to go on to explain.
>
> Taken group by group, if you are sure the complainants in group one, the Scouts, are all independent of each other, it follows that the closer the similarities between those complaints the less likely they can be explained by coincidence. It is for you to decide the degree to which the evidence of one complainant within group one assists you to assess the evidence of the others in group one. That is a matter for you to decide. It may lend powerful support or it may not. You must make that judgment."

The judge then dealt in similar terms with groups two and three.

64. In the written grounds of appeal, it was argued that in the circumstances of this case none of the evidence was cross-admissible by either of those routes and that the jury were accordingly misdirected, with the result that the convictions at the first trial are unsafe.

65. Following the ruling of the single judge, who limited her grant of leave to the full court, Mr Raggatt no longer pursues any challenge to the judge's directions in respect of route two. He does, however, maintain his submission that the judge was wrong to direct the jury at all as to route one and, in the alternative, that the direction given as to route one was deficient. He submits that the judge fell into error because he accepted submissions made by the prosecution which were themselves flawed because they failed to recognise the exceptional nature of the case. Mr Raggatt submits that "in the main" the appellant was not accusing the complainants of lying about the sexual activity, he was merely denying the accuracy of their evidence as to the identity of the man concerned or as to the dates when the sexual activity occurred and their ages

at those times. Moreover, he submits that the allegations dated back many years and there was therefore a clear risk that witnesses were in error in recollecting the details of their evidence. The jury's task in considering the allegation made by a particular complainant was necessarily fact-specific. Mr Raggatt argued that they could not be helped by a consideration of count 45. It was dangerous and unfair to direct them that they could do so.

66. In those circumstances, whilst recognising that there often is cross-admissibility as between the charges in a case involving historic sexual abuse, Mr Raggatt submits that in this case the real issues were such that there was no basis on which the evidence relating to count 45 could be admissible in relation to any other count.

67. Mr Raggatt argues first that count 45 was an allegation of looking, not touching. Even if the jury were sure that in the period covered by count 45 the appellant had been looking at young boys because of a sexual interest in them, that could not assist the jury to decide whether many years earlier he had engaged in sexual activity with a specific complainant. In particular, where the issue was when the admitted sexual activity took place, a finding of guilt on count 45 could not shed any light on that issue. There was, however, a clear and substantial risk that if invited to take their finding on count 45 into account when considering other charges, the jury would lose their proper focus on the evidence relating to those other charges and the appellant would be prejudiced in his defence. Mr Raggatt submits that the only safe course in those circumstances was for the judge to direct the jury that they must consider count 45 in isolation and, whatever their verdict on it, must leave it to one side when considering other counts.

68. If this court, nonetheless, concludes that route one was a permissible approach, Mr Raggatt submits in the alternative that the judge should have directed the jury much more clearly than he did that if they were sure of a relevant propensity, that could only provide some support for the

prosecution case on another count; that the jury must guard against unfair prejudice; and that they must not convict of another count solely or mainly because of their finding on count 45.

69. Miss Moore submits that the judge's directions as to route one were correct in law and were appropriate and sufficient in the circumstances of this case. There was an important matter in issue between the prosecution and the defence as to whether the appellant had a sexual interest in young boys. The appellant's case was that his sexual partners were in fact aged over 16. If the jury were sure that he was guilty of count 45 and sure that he had a sexual interest in boys, they could legitimately be assisted by that conclusion in deciding whether he was also guilty of some or all of the sexual acts alleged in other counts. Miss Moore submits that it would be both wrong in law and contrary to common sense to require the jury to consider count 45 in complete isolation from all other counts.

70. In reflecting on these submissions, we begin by reminding ourselves of the statutory framework. So far as is material, section 101 of the Criminal Justice Act 2003 provides:

> "101 **Defendant's bad character**
>
> (1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if –
>
> …
>
> (c) it is important explanatory evidence,
>
> (d) it is relevant to an important matter in issue between the defendant and the prosecution,
>
> …
>
> (2) Sections 102 to 106 contain provision supplementing subsection (1).
>
> (3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears

> to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged."

71. Section 103, so far as material, provides:

> "103 '**Matter in issue between the defendant and the prosecution**'
>
> (1) For the purposes of section 101(1)(d) the matters in issue between the defendant and the prosecution include –
>
> > (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
>
> …"

72. Where the prosecution seek to rely on cross-admissibility of evidence as between the counts in an indictment, the evidence which does not relate directly to one particular count is evidence of bad character and the provisions of section 101 apply. In *R v Freeman and Crawford* [2008] EWCA Crim 1863, this court recognised two ways in which evidence may be cross-admissible. Those two ways correspond to the approaches adopted by the judge in his directions as to routes one and two. First, the jury may be sure of the guilt of the accused upon one count and if, but only if, they are also sure that guilt of that offence established the accused's propensity to commit that kind of offence, the jury may proceed to consider whether the propensity makes it more likely that the accused committed an offence of a similar type alleged in another count in the same indictment.

73. Secondly, evidence may be relevant to more than one count because it rebuts coincidence, as, for example, where the prosecution asserts the unlikelihood of a coincidence that separate and independent complainants have made similar but untrue allegations against the defendant. In this situation, the jury will need to exclude collusion or innocent contamination as an explanation for the similarity of the evidence of the complainants. The more independent are the sources of the evidence, the less probable it is that their similar complaints are the product of mere coincidence or malice. It is possible that evidence may be admissible under both approaches, though in such a case the directions to the jury will require particular care.

74. In the present case the learned judge was, in our judgment, correct to direct the jury as he did in relation to route one. Three initial features of the case are relevant. First, although the allegations dated back very many years, they were allegations of offending continuing from time to time throughout the total period covered by the indictment. It was not a case where all relevant events were alleged to have occurred 20 or 30 years ago.

75. Secondly, the essence of the appellant's case was that his admitted sexual interest in adult men did not extend to any sexual interest in young boys and that he had not committed any sexual act with any of the complainants when he was under the age of 16.

76. Thirdly, whilst it may be correct that the issues in the case were somewhat different from those which more frequently arise in cases of alleged historical sexual abuse, we are unable to accept the submission that there was for that reason no legitimate scope for cross-admissibility in accordance with established principles.

77. We accept Miss Moore's submission that there was an important matter in issue between the parties as to whether the appellant had a sexual interest in young boys. In our judgment, the

judge was correct to conclude that it was open to the jury, if satisfied that the appellant was guilty of the voyeurism charged in count 45, to infer that he had a propensity to take a sexual interest in young boys and to find in that propensity some support for allegations made by complainants. We recognise, of course, that count 45 related to comparatively recent behaviour, whereas other allegations dated back 30 years or more. We also recognise that when a jury are invited to find that a defendant had a relevant propensity which supports the prosecution case on a particular charge, they must concentrate on the existence or otherwise of that propensity as at the date of the offending which they are considering. The passage of time between earlier offending alleged against a defendant and later offending said to show a relevant propensity is therefore of course relevant. Indeed, when the court is asked to exclude admissible bad character evidence on grounds of fairness, section 101(4) specifically requires the court to have regard to that length of time.

78. A judge considering the admissibility of bad character evidence, or the exclusion of evidence on grounds of fairness, will therefore have to consider whether in all the circumstances of the case, including the passage of time, any attempt to derive from later misconduct a propensity held by a defendant at an earlier time would be an exercise in improper speculation, rather than legitimate inference. Nonetheless, as a number of decisions of this court make clear, it is, in principle, possible for later conduct to be capable of establishing a propensity which is relevant to a jury's consideration of allegations of earlier offending: see *R v Adenusi* [2006] EWCA Crim 1059 and *R v A* [2009] EWCA Crim 513.

79. In the circumstances of this case, the judge was in our view correct to conclude that the evidence relating to count 45 was capable of giving rise to a legitimate inference that the appellant, throughout the period covered by the indictment, had a sexual interest in young boys; that the jury were therefore entitled to consider whether he in fact had that sexual interest; and, if

sure that he did, were entitled to take that into account as evidence in support of other charges.

80. We have given careful thought to Mr Raggatt's criticism of the terms in which the judge directed the jury. We accept that the judge did not include in his direction any explicit instruction to the effect that bad character evidence can only provide some support for the prosecution case on a particular charge. We note, however, that in the opening words which we have quoted earlier in this judgment, the judge began his direction on this topic by speaking of evidence which "might support" the prosecution case on another count. He referred again to "support" later in his direction.

81. We accept that it would have been better if the judge had expressly warned the jury against prejudice and directed them that, even if they were sure that the appellant had a sexual interest in young boys, it did not follow that he had therefore committed all or any of the offences charged and they must not convict him solely or mainly because he had that interest. We are not, however, persuaded that in the circumstances of this case that omission renders the convictions unsafe. Although Mr Raggatt has argued that "on the whole" the case did not turn on issues of the credibility of the complainants, we take a rather different view. In relation to the counts on which they convicted, the jury must have been sure that the complainant had not, for example, made a mistake of identification or a mistake as to whether he was sexually abused as a young child, rather than involved in consensual sexual activity after he had attained the age of 16. They must, therefore, have focused on their assessment of the reliability of the evidence of individual complainants. We are told that the counts on which the jury acquitted were counts on which there was an issue as to whether the complainant was describing events before his sixteenth birthday or at a later date. Those acquittals indicate that the jury did not adopt an improper approach of convicting of a particular charge solely or mainly because they were sure of guilt on other charges.

82. We note, moreover, that no submission was made at the time to the effect that the judge should give the jury the sort of direction which it is now said was necessary. That supports our view that, in the particular circumstances of this case, the terms in which the learned judge directed the jury were sufficient and appropriate.

83. For those reasons, we are satisfied that the convictions recorded at the first trial are safe and we dismiss the appeal against those convictions.

84. We turn to the application for leave to appeal against the convictions recorded at the second trial. Seven complainants gave evidence of sexual abuse by the appellant in circumstances where he was taking advantage of his position as a helper or leader with the Cubs or Scouts. An eighth complainant, AP, was the son of the appellant's then partner. AP gave evidence of an occasion when he woke in the night to find the appellant touching his penis. The prosecution alleged that AP had, in fact, been the victim of two such assaults which they sought to prove by reference to diary entries made by the appellant.

85. The appellant gave evidence at the second trial denying the allegations against him.

86. The grounds of appeal relate to the judge's rulings on applications made by the prosecution under both section 101(1)(c) and section 101(1)(d) of the 2003 Act to adduce evidence, which applications were opposed by the defence. We have cited above the material words of sections 101 and 103. We should at this point cite the terms of section 102, which are as follows:

> "102 '**Important explanatory evidence**'
>
> For the purposes of section 101(1)(c) evidence is important explanatory evidence if –

(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and

(b) its value for understanding the case as a whole is substantial."

87. The judge decided that it was necessary and appropriate for him to determine at the outset of the trial the prosecution's application to admit evidence through gateway (c), but that the application relating to gateway (d) could and should be postponed until a later stage of the trial. The judge held that the list of names and the fact of convictions at the first trial of offences against persons named in the list were admissible through gateway (c). At a later stage, the judge admitted through gateway (d), and refused to exclude pursuant to section 101(3), evidence of all of the convictions at the first trial, except for the convictions for offences of rape, buggery, voyeurism and gross indecency, in respect of which he accepted that there was a risk that evidence of such convictions would so adversely affect the fairness of the trial that they should be excluded.

88. The judge also ruled that he would not permit the prosecution to adduce any of the details of the offences underlying the convictions, save to explain that the offences of misconduct in a public office related to sexual activity with boys.

89. The judge also admitted, through both gateway (c) and gateway (d), evidence as to diary entries relating to GE and AP, which the prosecution contended should be read together so as to understand the full meaning of the entries relating to AP.

90. It is submitted on behalf of the appellant that none of the evidence should have been admitted, and that the judge should not have made any ruling under either gateway until most of

the prosecution evidence had been called, by which stage of the trial he would have had a clearer appreciation of the true issues. It is submitted that the admission of evidence through gateway (c) was wrong because the statutory criteria were not met. By giving his early ruling, which wrongly did admit some evidence through gateway (c), the judge inevitably influenced his later decision in relation to gateway (d). Moreover, Mr Raggatt submits, the result of admitting this evidence was that the second trial became swamped by issues from the first trial and bad character evidence was improperly used to bolster a weak case. He submits that the contentious diary entries were also used to bolster a weak case on the specific counts to which they were said to be relevant.

91. We can express our conclusions briefly. We see merit in some of the criticisms made of the ruling in respect of gateway (c). Gateway (c) is narrow. We accept that in relation to the list, it is arguable that the statutory criteria were not met and that the judge should have postponed any ruling until the prosecution evidence was well-advanced.

92. Those arguable points can, however, be of no assistance to the appellant if the judge was correct in his later ruling that all of the contentious evidence was admissible through gateway (d). As to that, Mr Raggatt submits with force that the evidence was, in reality, used to bolster a weak case. He points out that in relation to some of the counts on the second indictment, he was able to make a submission of no case to answer on the basis that the actions alleged, even if they happened, could not be regarded as indecent. Mr Raggatt submits that in such circumstances it would be particularly difficult for a jury to give fair consideration to an issue of that nature once they had been told that the appellant had been convicted of numerous offences of sexual assault against other boys.

93. Miss Moore, for her part, denies that any of the charges in the second trial was inherently

weak. She points out that seven complainants gave independent evidence of similar offending and that each of them was supported in some respect by other evidence. The eighth complainant gave evidence of one indecent assault as he slept, which the appellant's own diary entries showed to have been in fact one of two such assaults.

94. Mr Raggatt's advocacy persuades us that his points in relation to gateway (d) are arguable. But we conclude that they do not cast doubt on the safety of the convictions. The judge was, in our view, correct to admit all of the evidence which he did through gateway (d). The evidence was plainly relevant, as it had been at the first trial, to the important matter in issue of whether the appellant had a sexual interest in young boys. There was no unfair prejudice in adducing the evidence in the second trial. It will be remembered that the prosecution held two trials only because a single trial could have become unmanageable.

95. In those circumstances, we grant leave to appeal against conviction in the second trial, but we dismiss the appeal.

96. **MR RAGGATT:** My Lord, the representation order covered only the first trial. Would your Lordship extend it to cover both?

97. **LORD JUSTICE HOLROYDE:** We will. You may have a representation order for leading counsel for the purposes of the preparation of the appeal and for today. Mr Raggatt, before we leave the case – and repeating, if I may, our thanks to both of you; we have been very grateful for your help – can I just ask you one matter about sentence? There is no appeal, I do not think, against sentence?

98. **MR RAGGATT:** No.

99. **LORD JUSTICE HOLROYDE:** And nothing I say may be taken as encouraging a course which has not been taken. But, according to the Criminal Appeal Office Summary, the extended sentence came first, with the consecutive determinate term coming after that. Now, I do not know if the Summary is accurate or not, but if it is, it seems to us at least arguable that they are the wrong way around. The problem of putting them that way round is that when the appellant becomes eligible for consideration of release from the extended sentence –

100. **MR RAGGATT:** Yes.

101. **LORD JUSTICE HOLROYDE:** - he will still be a serving prisoner for another 18 months.

102. **MR RAGGATT:** I see the force of that, my Lord.

103. **LORD JUSTICE HOLROYDE:** Well, as I say, I am not looking to promote an appeal if you have advised against it. We simply wanted to draw it to your attention so that you can reflect upon it and if, upon reflection, you feel that the learned judge may, unintentionally, have expressed his sentencing in terms which have a more serious adverse result for the appellant than the judge would have intended –

104. **MR RAGGATT:** Yes.

105. **LORD JUSTICE HOLROYDE:** - then you may wish to make an application.

106. **MR RAGGATT:** I am grateful for that, my Lord. I simply had not thought about that

and I am grateful to your Lordship for mentioning it. Could I have a period of time to reflect?

107. **LORD JUSTICE HOLROYDE:** Yes, of course. It may be that our Summary simply was not drafted with a focus on this point and it may be that careful scrutiny of the precise records may show otherwise. I do not know if Miss Moore can assist?

108. **MISS MOORE:** I genuinely cannot recall.

109. **LORD JUSTICE HOLROYDE:** All right. Mr Raggatt, all we say is this. We suggest that you may wish to look into this in a little more detail.

110. **MR RAGGATT:** I will do.

111. **LORD JUSTICE HOLROYDE:** See whether it does, in fact, make a difference to the appellant which might be the subject of an arguable ground of appeal. If you concluded that it did, there could be no objection to your advising in terms which indicated that the point was raised by this court simply as a matter for consideration and without any suggestion as to the strength of any point one way or the other.

112. **MR RAGGATT:** No. Thank you, my Lord. I shall do exactly that. I will speak to your Lordship's associate.

113. **LORD JUSTICE HOLROYDE:** Yes.

114. **MR RAGGATT:** I am going to take it that my Lord would not think it out of the way if I took the 28 days that one normally has for sentence –

115. **LORD JUSTICE HOLROYDE:** Well, I do not think that you should do that, Mr Raggatt, because all we have done is raise the point for your consideration.

116. **MR RAGGATT:** My Lord, yes.

117. **LORD JUSTICE HOLROYDE:** Should any application be made, you will need to satisfy the court as to why an extension of time should be granted. So, having invited you to consider considering it, we cannot go further and, in any way, tie the hands of any future determination of the extension of time.

118. **MR RAGGATT:** If my Lord thought that that was what I was trying to do, I did not mean to –

119. **LORD JUSTICE HOLROYDE:** No, I am not suggesting that.

120. **MR RAGGATT:** I was just giving some sort of indication as to the sort of thing that might arise.

121. **LORD JUSTICE HOLROYDE:** All right. Does that cover everything?

122. **MR RAGGATT:** For my part, yes.

123. **LORD JUSTICE HOLROYDE:** Miss Moore?

124. **MISS MOORE:** My Lord, yes.

125. **LORD JUSTICE HOLROYDE:** Thank you very much.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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