Neutral Citation Number: [2019] EWCA Crim 1570

Case No: 20180070 B5 / 201800895 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM LIVERPOOL CROWN COURT
HHJ WATSON QC
201800770 B5 / 201800895 B5

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/09/2019

Before:

LORD JUSTICE COULSON

MRS JUSTICE CHEEMA-GRUBB
and
HHJ MICHAEL CHAMBERS QC

- -

R v

SANDRA JONES

MICHAEL MISZCZAK

- -
- -

Mr Edward Henry QC and Mr Matthew Scott (instructed through Direct Access)
for the **Appellants**
Mr Michael Scholes (instructed by the CPS) for the Respondent

Hearing date: 19th July 2019

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Approved Judgment

Lord Justice Coulson :

1. Introduction

1. This is a case to which the provisions of the Sexual Offences (Amendment) Act 1992 apply. No report of this case can be published if it is likely to lead to the identification of either of the victims. This judgment has been anonymised accordingly.

2. On 1 February 2017, following a month-long trial, the appellants were unanimously convicted at Liverpool Crown Court (HHJ Watson QC and a jury) of a number of offences of cruelty, assault and rape of a child under 13. The victims were their two foster daughters, ST (born 17.3.87) and CT (born 18.1.88). On 23 February 2017, the first appellant ("Jones") was sentenced to 14 years imprisonment with an extended licence period of 1 year. The second appellant ("Miszczak") was sentenced to 25 years imprisonment with an extension period of 3 years.

3. Their application for permission to appeal against conviction was refused by the single judge. When it was referred to the full court, at a hearing on 11 June 2019, the application was modified so that the only ground that was pursued concerned the agreed evidence of a witness, Ms Rachael Pickett, a counsellor who dealt with CT during 2003/2004. The complaint was that Ms Pickett had been wrongly treated as an expert witness. Permission to appeal was granted on that basis only.

4. At the conclusion of the appeal hearing on 19 July 2019, we acknowledged that mistakes had been made in relation to the evidence of Ms Pickett but that, when considered in the context of the evidence against the appellants as a whole, and the clear directions to the jury in the summing up, those mistakes did not undermine the safety of the convictions. The appeals were therefore dismissed. We said that we would provide our detailed reasons for that conclusion at a later date. These are those reasons.

2. The Indictment

5. ST and CT were sisters. There was a connection between their natural parents and Jones, which led to the girls being fostered by the appellants from 1994 onwards. The family home was in the North West of England.

6. Counts 1 and 2 consisted of specific allegations of cruelty on the part of both Jones and Miszczak against ST (count 1) and CT (count 2). Some of the particulars of the cruelty alleged were common to both girls, such as making them eat their own and their sister's vomit; physical abuse by the use of slipper and belt on their bare skin; punching, hair-pulling and the like; and forcing the girls to "play fight". There were particular allegations involving ST (including mocking her following a suicide attempt), and particular allegations involving CT (including holding her head under water and putting a knife to her throat).

7. Count 3 concerned Jones only and involved an allegation that in 2001 or 2002 she hit ST on the head with a metal pole used to unlock the loft.

8. Counts 4, 5, 6 and 7 were allegations of indecent assault against Miszczak only. Count 4 alleged the licking or touching of ST's face and chest during the play fights and

Count 5 concerned similar allegations involving CT. These incidents were said to have occurred on a regular basis between 1994 and 2000. Count 6 was a specific count relating to the touching of CT's vagina in the bathroom when she was between 13 and 15 years of age, whilst Count 7 was a multiple incident count alleging indecent assault of CT on at least 5 occasions between 1995 and 2002.

9. Counts 8, 9, 10 and 14 were, with one exception, also counts against Miszczak only. They all concerned the rape of a child under 13. Count 8 concerned a specific incident of the anal rape of CT when she was between the ages of 6 and 8. Count 9 was a specific count of vaginal rape of CT when she was between the ages of 7 and 10. On this count, Jones was also indicted for assisting Miszczak to rape CT by punching her repeatedly in the vagina.

10. Count 10 was a multiple incident count of vaginal rape of CT, with the rapes said to have occurred on at least 6 occasions between 1995 and 1998. Count 14 was a similar count (this time being said to have occurred on at least 8 occasions) involving the vaginal rape of ST when she was between the ages of 14 and 16. Those were all counts against Miszczak alone.

3. The Evidence at Trial

11. There was extensive evidence at the trial. The Crown relied on the detailed evidence of CT and ST. They also called evidence from two of their school friends, Sian Roberts and Lauren Vanderhoek. In addition, there was evidence from two of CT's counsellors in 2003/2004, Rachael Pickett and Brian Newton. Both defendants gave evidence in which they strenuously denied the allegations. Miszczak also adduced evidence from his daughter Nina by his first wife, and a friend, Julie Shortiss. Jones adduced evidence from Luke, her son (who was a small child at the time of the relevant events), her second husband and two of his daughters, and a Ms Hamlet, who had been a friend of Jones for 50 years.

12. Inevitably, the principal evidence again Jones and Miszczak came from CT and ST. Because of the length of time between the first complaints and the trial, the judge summarised that evidence in the chronological sequence in which it was obtained. That was, in our view, a sensible approach to take and we adopt it in our summary of the evidence below. The video interviews to which we refer were all played as part of the evidence in chief of CT and ST.

13. The first evidence in support of the allegations comprised CT's first and second video interviews, recorded by the police in the North West in February and March 2005. At the time CT was just 17 and had left the appellants' house less than two years before. Her first video interview dealt primarily with the allegations of cruelty (Counts 1 and 2). CT gave clear evidence about the various events, such as being made to eat her own vomit; the use of the slipper and the belt at least twice a week; Jones punching her and holding a knife to her throat; and the "play fighting" when she and her sister were made to fight topless, during or after which Miszczak would lick their faces and breasts.

14. In the first interview, CT also gave specific evidence about particular events, such as ST being hit with the metal pole (Count 3) along with broader evidence of cruelty,

such as her head being held down in the water of the paddling pool (one of the examples of alleged cruelty in Count 2).

15. In the second video of March 2005, CT talked about the indecent assault when Miszczak had put his hand on her vagina in the bathroom (Count 6). She also gave other evidence of sexual conduct on the part of Miszczak, such as his showing her child porn and saying: "I could be doing something like that to you". The second interview also involved a summary of CT's evidence in relation to each of Counts 1 – 6.

16. In response to the content of those two interviews, Miszczak and Jones were themselves both interviewed by the police. The judge dealt with that next part of the history in his summing up at pages 50 – 51 of the transcript. They denied the allegations.

17. ST had moved back into the appellants' house when CT moved out in 2003 and she was still living there when she too was interviewed in July 2005. Her statement said that Jones and Miszczak had treated her well and that CT's allegations were untrue.

18. A little less than two years later, in March 2007, ST went herself to the police. Her interview was again videoed. Her evidence was very different to the statement she had given in July 2005. She said that her statement had been untrue. Instead, she said that she had been groomed by Miszczak for sex from the age of 14. She gave detailed evidence about his repeated rape of her, during which Miszczak had almost always ejaculated. She said that she was raped as often as 4 times a week. ST also explained why she had denied CT's allegations originally; she said it was because the appellants had provided the only family she had ever known.

19. Miszczak was again interviewed, and again he denied the allegations.

20. By March 2009, CT had moved to Cornwall. Indeed, it is a feature of this case that not only, by their own admission, did CT and ST not get on as children, but they had very little to do with one another as adults. Accordingly, when CT went to the police in Cornwall in 2009, they were apparently unaware of ST's separate allegations in the intervening period.

21. In the two interview videos produced by the Cornish police, CT reiterated some of the allegations of cruelty (such as the topless fighting and the licking) and the event when Jones hit ST over the head with the metal pole. However, in these interviews CT concentrated on Miszczak's sexual abuse of her.

22. Accordingly, CT gave evidence about Miszczak's indecent assault of her and his repeated touching of her between her legs (Count 7). She gave graphic and detailed evidence about the specific incident of anal rape (Count 8), which evidence the judge summarised to the jury at pages 67 – 69 of the transcript of his summing up. This had occurred when CT was somewhere between the ages of 6 and 8. She also gave evidence of the first vaginal rape (Count 9) together with evidence about Jones punching CT between her legs in order to numb the area in order to permit the rape to take place. Thereafter, there was evidence of the multiple incidents of rape which happened when CT was between 7 and 9 and, less frequently she said, when she was

between 9 and 13 (Count 10). CT confirmed that Miszczak had ejaculated either inside her or over her.

23. It is unclear what happened after those interviews in 2009 because the next significant event did not occur until January 2015. Then it was ST who went back to the police. She made a series of allegations which closely mirrored those which had been made 10 years previously by CT, including the enforced topless playfighting, the licking by Misczacz of their faces and chests, the beatings to their head, body and legs, and the event when Jones hit her with the metal pole. There were further denials in interview by Jones and Miszczak but it was that interview with ST that led eventually to these proceedings.

24. As we have noted, each of the video interviews with CT and ST formed part of their examination in chief. After the judge had reminded the jury of those interviews, he then dealt in his summing-up with the evidence of CT and ST in cross-examination. It appears that it was repeatedly put to both CT and ST that the events to which they were referring did not happen. Each was adamant that they had. When inconsistencies were put to them, they dealt in detail with how and why any such apparent inconsistencies had arisen. In cross-examination, CT was adamant that there had been no collusion or even communication between her and ST about the allegations. For example, she said that before the interviews by the Cornish police in 2009 she had not talked with ST about the details. She said simply: "we can't talk about the details". She confirmed that the sisters had never been close. The judge also reminded the jury of ST's cross-examination which again refuted the suggestion that she was making up these allegations.

25. The other evidence called by the Crown came from Sian Roberts and Lauren Vanderhoek. That evidence was contained in statements which were read to the jury. They had not themselves witnessed any of the events relevant to the Counts noted above. However, Sian Roberts' evidence went to the issue of recent complaint, because she recalled being told by ST that Jones had hit her with the metal pole and that, on other occasions, she had been beaten. Sian Roberts saw bruising round ST's thighs, waist and ribs. Lauren Vanderhoek saw bruising round ST's neck.

26. In addition, there was also evidence from Rachael Pickett and Brian Newton, counsellors who counselled CT in 2003/2004, the period between CT leaving the appellants' house and her going to the police for the first time. The evidence of Ms Pickett, which was read in its edited and agreed form, is dealt with in greater detail in below.

27. Mr Newton's evidence was read because he was too unwell to attend the trial. He explained that he had seen CT in 2004/early 2005. He said that he found CT "very reluctant to engage". He said that on one occasion, when she had an injury, she said that Miszczak had caused the injury by punching her in the face on the way home from school [1]. Mr Newton said that CT went on to tell him: "I've been abused". She

[1] It is to be noted that CT's evidence was that Mr Newton had got the wrong end of the stick in relation to that specific point. She said her injury had not been caused by Miszczak.

told him that she had been sexually, physically and mentally abused by the appellants and that both she and her sister had been subjected to this abuse. He said that he told CT that these were serious allegations and that there would be repercussions for everyone if this was reported. Subsequently, CT contacted the police. In addition, Mr Newton said that CT had told him about being made to eat her own vomit and about Miszczak indecently assaulting her.

28. Miszczak gave evidence at trial in which he denied all the allegations. Part of his defence was that he had erectile dysfunction following an accident at work, so that he was incapable of many of the acts alleged. Much was made by the Crown of his failure to mention that point in his earlier interviews. There was also evidence that Miszczak had been sent to prison for dishonestly claiming benefits to which he was not entitled. The judge gave a proper bad character direction in relation to that evidence which is not now criticised. Miszczak also gave evidence about what he had described as his "open relationship" with Jones.

29. Miszczak relied on expert evidence relating to his erectile dysfunction, and evidence from his older daughter Nina and a friend Julie Shortiss, neither of whom saw the events in question.

30. Jones gave evidence in which she too denied all the allegations. She also called her son Luke, who had been just 7 when CT left the house in 2003, and evidence from her new husband Keith, and his daughters, who said that they had never been subjected to any violence. Finally, she called Ms Hamlet, a friend for 50 years. In the event, at least part of Ms Hamlet's evidence was consistent with what CT and ST had said about Jones hitting ST with the loft pole, a point made by the judge in his summing up at page 166 of the transcript.

4. The Legal Directions

31. The judge gave standard directions in relation to his function and that of the jury and the burden of proof. Importantly, he gave a clear and unequivocal direction about the need for separate treatment of the different allegations in the indictment. He said at pages 4-5:

> "The next thing to observe, of course, is there are two defendants, Mr Miszczak and Ms Jones, both on trial and there are a number of counts on the indictment. Please remember to consider both of them separately, consider each count that they face separately and return separate verdicts in relation to both defendants and all of the counts. It is not a question of lumping them all together, we have different allegations and different allegations against different defendants and different roles said to be played in some of the counts where they are jointly charged. So it comes to this: your verdicts may be the same in respect of both defendants or they may be different. Your verdicts may be the same in relation to all the counts that a defendant faces or they may be different; they do [not] all have to be the same. It all depends whether the prosecution have made you sure of guilt in respect of a particular defendant on a particular count. So please remember to consider them separately as individuals and with the charges that I've summarised at point 4."

32. This was a reference to a separate document which the judge had provided to the jury entitled:

> "A Guide to Jury deliberations – this is a brief reminder of some of the legal directions and DOES NOT replace the full directions given by the Judge."

Amongst those written directions were the following:

> "4 We must consider the complainants separately, both Ds separately and every count separately and return separate verdicts on all counts…
>
> 15 Complaints to another. When ST/CT told someone else about what D did and that other person repeats the details of the complaint, this evidence is not independent of ST/CT; but we can consider the time that the complaint was made and the consistency/inconsistency of the complaints if we wish.
>
> 16 Expert evidence. This is evidence of opinion about matters outside our experience and knowledge. It is only part of the evidence. We can have regard to it but do not necessarily have to accept the evidence of either of the experts."

33. As we shall see below, these written directions about the limited relevance of evidence of complaint, and about the approach to expert evidence, were expanded during the judge's summing up. They are important because of the issues now raised about the judge's treatment of Ms Pickett's evidence.

34. The judge also gave clear directions as to the timing of the trial and the problems of delay. At page 16E he reiterated that the only thing that really mattered was, despite the delay, whether the jury was sure that what CT and ST said was true. He said:

> "But it comes down to this, does it not, that you decide whether the witness' evidence of the essential events is reliable? Whatever the time, whether it was yesterday or 20 years ago, you decide whether what CT said or ST said in terms of the essential events is [that] reliable; are you sure of it? If you do have concerns do they affect just a small part of the evidence or do they affect the whole thing?"

5. The Evidence of Rachael Pickett

(a) The Agreed Evidence

35. Rachael Pickett began her witness statement by saying that she was a counsellor between June 2000 and January 2009, working with young people who had suffered from psychological trauma, "encompassing sexual, physical and mental abuse". She said she counselled CT from June 2003 for a period of 12 – 18 months. It was the Crown's case that the fact of this counselling was important for two linked reasons. First, it showed that CT's complaints about the appellants had been made shortly after the relevant events had occurred. Secondly, because the evidence was that CT had been forced to leave the house that she had previously shared with the appellants only a few months before, it meant that it was these counselling sessions which gave CT the first opportunity to confront her past.

36. In her witness statement, Ms Pickett gave evidence about her counselling sessions with CT. That witness statement was the subject of agreed editing by counsel then instructed by Jones (Ms Baillie) and Miszczak (Mr Potter). Significant deletions were made, particularly to the later sections of the statement. However, the remainder of the statement was agreed. Importantly, it appears that one reason why the edited version of the statement was agreed by both the appellants' then counsel was so that it could be read as evidence to the jury, without the need for Ms Pickett to give oral evidence. Both Ms Baillie and Mr Potter have subsequently confirmed that they thought that this was a significant tactical advantage to the appellants, because it would inevitably lessen the impact of what Ms Pickett said.

37. In order to analyse fully the complaints now made about this evidence, we have separated out the important passages in the statement as follows:

> a) "My role is to work on a one to one basis with young people, aged 13 – 25 years who are suffering from psychological trauma, encompassing sexual, physical and mental abuse..."
>
> b) "In my experience when dealing with children who have suffered any of the above abuse or trauma, they are very guarded and reluctant to engage with a counsellor; until they are secure they can trust that counsellor. That trust can sometimes take a long time to gain from the child due to the deep-rooted nature of the abuse. Children of abuse have distinct traits, in both their appearance and demeanour, whilst not all children bear the same traits, these can include being quietly spoken, "closed contact" including lack [of] eye contact with you, they are physically withdrawn and appear to make themselves smaller when in the company of others, amongst other outward signs..."
>
> c) "CT was physically a small child in stature, timid and withdrawn in her demeanour. She displayed no eye contact with me and was very, very quietly spoken, so much so that at times I would have to attempt to lip read what she was saying during our sessions."
>
> d) "My overall impression of CT was that she was "damaged" and suffering the effects of abuse, which given the above appeared traits, would not have been over a short period of time..."
>
> e) "As time when on and CT's confidence in the therapeutic counselling process and our relationship strengthened, she began to disclose incidents of physical and mental abuse by her step-parents, Michael and Sandra Miszczak. During these sessions, CT would become physically upset, very emotional, crying and she appeared mentally fragile..."
>
> f) "As a result of the depth of these disclosures, I took the unique step of offering her 2 hours for each appointment to ensure she was able to take time and feel strong enough to leave the counselling room. This is a step that I've never repeated and is an indication of the level of my concern I had for CT..."

g) "In our work I encouraged CT to use expressive techniques that she already showed an interest in to outlet her feelings, such as writing poetry, whilst I do have copies of some of the poems these do not actually specify abuse but there is an implied abuse from the intensity of feelings expressed. The content of these poems always expressed the pain of abuse and emotional neglect, and the resulting impact upon her self-esteem. At times, she also wrote letters to the abuser, no abusers were ever named in these, but the implication was male for the same purposes. Copies of letters were never sent to abusers as it was purely a therapeutic process to benefit CT. Again the content was very powerful *and believable* (emphasis added)…"

h) "As it was some time since I've counselled CT, I can only recall some instances that she disclosed, however, I am unable to put specifics or an actual date on the disclosures. I recall her describing a particularly harrowing event when she had vomited and been made to eat the vomit. This stands out in my mind because I found it appalling. I cannot recall the exact details, but from CT's account this had had a lasting effect on her; she became very emotional when retelling the event, which left her in tears. I recall after CT had left the session, it brought me to tears such was the emotion and the effect it had on both the child and myself..."

i) "I recall a time when, for some reason, Miszczak was on a TV documentary and CT had known this was coming up. I watched the programme as CT had spoken a lot about Miszczak during our sessions and I was attempting to put a face to the person she had stated was her abusers. I also have a recollection that at the time, there seemed to be an implication that Miszczak had 'shared' the girls sexually with his friends on a family holiday. Although I cannot be more specific as to the nature of the acts against CT or her sister ST, the location or the individuals involved, again I can remember being disturbed by these disclosures..."

j) "Whilst I have been requested to recall specific incidents which are now over 12 years old and struggle to give any specific details of these disclosures CT suffered; this case remains one of the most disturbing and powerful in my continued vast experience of counselling young people..."

k) "In my professional opinion, her emotional presentation and physical demeanour at all times was in keeping with the victim of physical, sexual and emotional abuse... I have now, and have always held a deep belief in the truth of all that she ever shared with me."

(b) The Application to Treat Ms Pickett as an Expert

38. There had never been any suggestion, either before the trial or when her evidence was read, that Ms Pickett was an expert witness. However, in the housekeeping session with the judge before closing speeches, Mr Scholes for the Crown indicated that, in his closing address to the jury, he was going to treat Ms Pickett as an expert witness. He indicated what he was going to say about her. Mr Potter, for Miszczak, agreed that Ms Pickett was "a highly qualified counsellor with all the accreditations that Mr

Scholes has read out". However, he said that he wanted to reflect upon the application and might wish to make a submission about it. That seemed to accord with the judge's view that it was a matter that should be revisited "when we are all a bit more up to speed". Ms Baillie made no comment.

39. It appears that, through inadvertence on all sides, this issue was never revisited. In his closing submissions, Mr Scholes did what he said he would do, and referred to Ms Pickett as an expert. Neither Mr Potter nor Ms Baillie demurred from that, or sought to challenge that description. The judge apparently accepted it because, when he gave the usual directions about expert evidence, he included Ms Pickett as one of the experts to whom he was referring.

(c) The References to Ms Pickett's Evidence in the Summing Up

40. There was an unattributed reference on page 41 of the summing up to the evidence of 'the counsellor' about demeanour. On behalf of the appellants, Mr Henry QC said that this was a reference to an inadmissible element of Ms Pickett's evidence. The judge said:

> "You know from evidence that we will come to tomorrow, I suspect, of what [counsellor's] view of the trauma is and the effect of trauma and the ability of people to speak, whether any of that is engaged. That is all something that is entirely in your province" (page 41F-G)

41. This is a discrete point and we can deal with it shortly. First, this is not a reference to the evidence of Ms Pickett alone; Mr Newton, the other counsellor, gave similar evidence about demeanour (and CT's reluctance to engage), and no criticism is made of his evidence on that point. Secondly, as explained in more detail below, evidence of demeanour is admissible, provided that the jury are warned that they cannot place undue emphasis upon it. This jury was so warned. And thirdly, the judge's observation rightly made plain that, ultimately, what really mattered was whether or not the jury were sure that what CT and ST told them was true.

42. The reference at page 41 aside, the judge dealt with Ms Pickett's evidence very shortly and in one place in the summing-up. The relevant passage runs from page 110D to page 115G (some 6 pages out of a summing-up that ran to a total of 168 pages). This principally consisted of a reminder of the evidence which we have already set out at paragraph 37 above. However, the following express warnings and/or observations as to expert evidence were also included:

> "So Rachael Pickett is the first of a number of witnesses who give evidence of opinion. Opinion evidence is not normally admitted... Experts are in a different category... The reason that you are allowed to hear about opinion in those matters is because the law recognises that there are some areas where there are experts and we are not, so they are allowed to give their opinion on matters where we do not have expertise ourselves. The position is that that does not mean to say you have to accept what any expert says without further thoughts; please examine the evidence of any expert and evaluate it for the same strengths and weaknesses as you would any other evidence. Just because somebody has a swanky title, whether they are professor or doctor or this that or the other, does not mean to say there they

> are going to tell the unvarnished, accurate and completely unimpeachable truth. You are entitled to and should examine any expert in their opinion for strengths and weaknesses." (page 111)
>
> "Where there is no dispute between an expert you might wish to give effect to the opinion, but if you see good reason to reject the opinion of any expert you are entitled to do so. If you do accept the evidence the weight you attach any conclusion is something for you to decide. So that is at bullet point 16[2], how to approach expert evidence. It is only part of the evidence." (page 112C-D)

43. Then, having summarised the evidence that Ms Pickett gave, the judge went on to repeat that Ms Pickett could not give evidence about whether the abuse had actually happened and stressed the limitations of her evidence generally:

> "So within that statement there are the two aspects: firstly, she is trying to recall and saying in the statement what she was told and, secondly, the point she is not an eye witness to it but that is what she was being told in that period 2003 to late 2004 and she is giving a professional view. She did observe how CT was in counselling and her opinion is that the signs that she exhibited were consistent with someone who had been the subject of physical, sexual and emotional abuse, but that is as far as she can go and it is your task to really assess the prosecution's allegations as to whether these allegations are proved so that you are sure."

6. The Appeal

(a) The Decision of the Full Court

44. At the hearing on 11 June 2019, the full court granted the requisite extension of time and granted leave to appeal against conviction "on the grounds relating to the evidence of the witness Ms Rachael Pickett". Giving the judgment of the court, Martin Spencer J noted that Ms Pickett's evidence was not thought at the time to comprise expert evidence but that it was subsequently admitted as such. He said that "if the opinion evidence of Ms Pickett was wrongly admitted, this had the potential to make these convictions unsafe. We emphasise it would be for the full court to decide whether the conviction are in fact unsafe. At this stage we do no more than recognise an arguable case such that leave to appeal should be granted."

(b) The Subsequent Documents and Submissions

45. By their order, the full court directed the parties to make written submissions identifying "the boundaries of the evidence which it was contended could legitimately have been given

> (a) by the witness Rachael Pickett; and
>
> (b) by counsellor instructed as an expert witness who had not personally dealt with either of the complainants CT and ST."

[2] That summary direction about expert evidence is set out at paragraph 32 above.

46. The appellants' written submissions were dated June 25th 2019. They largely focused on the complaints about the statements of opinion in Ms Pickett's evidence and set out what was said to be the very limited evidence from her statement that she was entitled to give. The remaining part of the submissions, from paragraphs 22 to 28, dealt with the legitimate boundaries of expert evidence that an independent counsellor might give. It concluded that such evidence "would be limited to commenting on the purpose and quality of counselling given by Ms Pickett." It went on to note that "it is hard to see how any such expert evidence could properly be admissible as part of the prosecution case, not least because of the danger of 'oath-helping'. Irrespective of having no prior knowledge of the complainant, the counsellor (like Ms Pickett before her) would be trespassing well beyond her competency and expertise."

47. The Crown's document in response, dated 10th July, accepted that some elements of Ms Pickett's evidence should not have been admitted, notwithstanding the original agreement by all counsel. However, Mr Scholes disputed the extent of the limitations sought to be imposed by the appellants and maintained that a good deal of her read evidence remained admissible.

48. As to the legitimate boundaries of expert evidence from a counsellor, there was very little in the Crown's document that added to or disputed the appellants' submissions. Mr Scholes agreed that, in a case of this sort, it was very difficult to see what expert evidence a counsellor who had not seen CT or ST could provide.

49. At the hearing of the appeal on 19 July 2019, on behalf of the appellants, Mr Henry submitted that Ms Pickett's evidence had been wrongly labelled as expert evidence, was much too subjective, and so was almost entirely inadmissible. He said that the fact that this evidence had been wrongly treated as expert evidence would have adversely influenced the jury and therefore undermined the safety of the appellant's convictions. We should express our sincere thanks to Mr Henry for his submissions and we note that he appeared *pro bono.*

50. On behalf of the Crown, Mr Scholes accepted that Ms Pickett's evidence was inadmissible in relation to any statements of opinion, any emotive terminology, and any references to her belief in the truth of the allegations. However, he said that the evidence of Ms Pickett was not central and that the judge properly directed the jury that, ultimately, what mattered was whether or not they were sure that what CT and ST had told them was true.

(c) Issues

51. As we see it, four issues were raised on this appeal. They were:

    (i) Issue1: What was the proper scope of any expert counselling evidence?

    (ii) Issue 2: What was the proper scope of Ms Pickett's evidence?

    (iii) Issue 3: What inadmissible evidence was wrongly adduced?

    (iv) Issue 4: Do our findings on Issues 2 and 3 undermine the safety of these convictions?

52. As we have indicated, Issue 1 was largely agreed. In the light of Mr Scholes' concessions on the part of the Crown, there was also some agreement on Issues 2 and 3, although there remained a debate as to the proper boundaries of Ms Pickett's admissible evidence. The answer to Issue 4 depended on a consideration of the inadmissible elements of Ms Pickett's evidence against the background of the evidence as a whole, and the directions given by the judge.

(d) *The Outcome of the Appeal*

53. Having considered the documents and the oral submissions, we concluded that some parts of Ms Pickett's evidence were inadmissible and that she had been wrongly treated as an expert witness. However, we also concluded that, having regard to the weight of the evidence against the appellants, and the clear directions in the summing up, those errors did not undermine the safety of the convictions.

7. Issue 1: The Proper Scope Of Any Expert Counselling Evidence

54. The parties were broadly agreed that an independent counsellor who had not seen CT or ST could only give opinion evidence about counselling techniques and qualifications. That would have been of no relevance in this case. In addition, the parties were rightly agreed that an independent counsellor could not give evidence about the cause of any psychological or psychiatric condition, and they certainly could not comment on the truth or otherwise of the allegations in the case: see *WC* [2012] EWCA Crim 1478, per Moses LJ at [12].

55. We are unsurprised that counsel were unable to identify any areas of evidence which could have been the subject of expert counselling opinion in this case. Leaving aside the question of whether it is truly an expert field, it seems to us that it would only be in a very rare case, where (say) there was a dispute about the counselling techniques that had been adopted and which mattered for some reason (because it affected the value of the factual evidence of a counsellor), that expert counselling evidence would ever be relevant, and therefore admissible.

56. There is a good reason why such admissible expert evidence will be so rare. The principal reason why evidence from counsellors is admissible at all is as evidence of fact, not of the allegations themselves, but in order to show that the complaints were made at the time of the events or shortly thereafter. It is not evidence of the veracity of the allegations themselves, nor is it expert evidence of any kind. It is therefore not capable of being larded with expressions like "in my opinion". There is a real danger that such evidence crosses the line in *WC,* and is seeking to answer the question which can only be for the jury.

57. As a general rule, therefore, it is most unlikely that the evidence of an expert counsellor will ever be relevant and/or admissible in a case of this sort. That straightforward analysis (which as we understand it, Mr Scholes now accepts) should have led him to conclude that Ms Pickett was not an expert witness and he should not have sought to have her treated as such in the summing-up.

8. Issue 2: The Proper Scope of Ms Pickett's Evidence

(a) Overview

58. For the reasons set out below, we consider that parts of Ms Pickett's evidence were admissible. Other parts were plainly inadmissible regardless of whether she was properly described as an expert or not.

(b) Context and Demeanour

59. A counsellor can give evidence of the factual context in which they saw the complainant. We do not accept the appellants' complaint that Ms Pickett should not have said that she saw CT because she dealt with youths "suffering from psychological trauma, encompassing sexual, physical and mental abuse" (paragraph 37(a) above). Those were the undoubted circumstances in which the counselling of CT had taken place. It was no different to the similar evidence of context from Mr Newton.

60. In addition, some evidence from a counsellor about the demeanour of the complainant when recounting what he or she said had happened can be admissible: see *Venn* [2002] EWCA Crim 236. Of course, such evidence needs to be the subject of careful directions. But if a particular event was recounted to the counsellor, and there were obvious signs of distress when it was recounted, then (subject to the usual warnings), such evidence of demeanour can be given: see *Romeo* [2003] EWCA Crim 2844. Again, we note that Mr Newton gave evidence to similar effect.

61. Thus, we consider that the evidence identified at paragraphs 37(a), (b), (c) and (f) above was generally admissible as evidence of context and demeanour. In addition, we consider that the passage at paragraph 37(g) was admissible as providing context, except for the inadmissible statement that CT's allegations were "believable" (which plainly crosses the line noted in *WC*). We consider the separate criticism about the language in which some of these passages are expressed in Section 9 below.

(c) Evidence of Contemporaneous Complaint

62. As we have said, the principal purpose of any evidence from a person who counselled a complainant is as to recent complaint. The counsellor can therefore give factual evidence as to what he or she was told, provided of course that the judge makes plain – as Judge Watson did - that that cannot be evidence of the truth of the underlying allegation. The appellants do not contend otherwise. And whilst Ms Pickett was quite vague about the detail of what she was told, some parts of her evidence (like CT being made to eat her own vomit) chimed with one of the specific allegations in the case.

63. Accordingly, we consider that the passages at paragraphs 37(e), (h) and (j) were generally admissible. Again, the same criticism arises as to the language used.

64. The appellants complain that one of the matters about which Ms Pickett gave evidence was the suggestion of Miszczak sharing CT sexually with friends whilst on holiday (the reference in the otherwise admissible passage at paragraph 37(i) above). That was not the subject of any of the counts on the indictment, so if objection had been taken to this passage at the trial by Miszczak, the judge would almost certainly have ruled that it was inadmissible.

65. However, it is clear from the observations of Mr Potter, Miszczak's trial counsel, that he expressly considered this very point. He was content for this reference to stay in

because it had not been a point that had ever been made by CT before or since. In this way, he considered that it was further ammunition for his main attack on CT (and ST), which was based on the inconsistencies in their evidence. In this way, evidence that may well have been otherwise inadmissible was admitted not through inadvertence, but because it was thought to be in Miszczak's favour.

66. In those circumstances, we do not consider that any significant criticism can now be made of the retention of that particular reference in Ms Pickett's read evidence. This court cannot review every tactical decision made at the trial by counsel then instructed, merely because other counsel might have done things differently.

67. Moreover, we need to be realistic. There was a wealth of detail in the allegations against Miszczak, including multiple incident counts of rape and indecent assault involving both CT and ST. In those circumstances, even if we had concluded that this reference should not have been allowed into the evidence, it is quite impossible to say that it could have made any difference to the outcome of the trial. In our view, in the context of the case as a whole, it made no difference at all.

9. Issue 3: The Inadmissible Evidence

68. The evidence of Ms Pickett's opinion was inadmissible. She was not an expert. She was not therefore permitted to give opinion evidence and the references to her opinion should have been excised. The most egregious examples are her opinion that CT was "damaged and suffering the effects of abuse" (paragraph 37(d)); that CT was "believable" (paragraph 37(g)); and her "deep belief in the truth of all that she [CT] ever shared with me" (paragraph 37 (k)). These are not only inadmissible statements of opinion, but they purport to tell the jury that a particular witness is reliable, contrary to the principle stated by Lord Taylor CJ in *Robinson* (1994) 98 Cr.App.R. 370 and repeated by this court in the many cases following it (including *WC*).

69. The other legitimate complaint raised by Mr Henry concerns the language in which the other elements of Ms Pickett's evidence was couched. We emphasise that there is no place whatsoever for over-emotive language in any witness statement, particularly from a counsellor who is only giving evidence to support the timing and consistency of the complaints made. It runs the clear risk of prejudicing the minds of the jury, and it is probative of nothing.

70. On any view, Ms Pickett's witness statement fails this test. It was naively drafted, with much too much subjective comment by Ms Pickett. Mr Scholes should have seen that immediately and undertaken a rigorous editing exercise himself. Ms Baillie and Mr Potter should similarly have undertaken that exercise before agreeing to the remainder of the statement being read to the jury. It would have been a relatively easy exercise to edit the statement into an acceptable form, and one that is commonly undertaken in criminal trials like this. We are very surprised that this did not happen in this case.

71. All that said, whilst some of the language used by Ms Pickett was undoubtedly over-emotive and should have been excised, the language was itself describing matters (complaint, timing, context, demeanour) on which, save for the passages identified in paragraph 68 above, Ms Pickett was entitled to give evidence. It therefore becomes a question for us to decide, in the context of the case overall, whether the over-emotive

language used by Ms Pickett, albeit to describe matters about which she was generally entitled to give evidence, undermined the safety of the appellants' conviction.

10. Issue 4: Do Our Findings Undermine The Safety Of These Convictions?

(a) Overview

72. In our view, the errors in relation to Ms Pickett's evidence (the inadmissible evidence of opinion and the over-emotive language) do not undermine the safety of these convictions. They have no bearing on the convictions relating to ST. They were not part of the principal evidence in this case; indeed, the evidence of Ms Pickett could fairly be described as peripheral. Moreover, the judge's legal directions can have left the jury in no doubt as to its peripheral nature.

(b) Counts 1, 3, 4 and 14

73. These are the counts involving offences against ST only. They are unaffected by any issues in relation to Ms Pickett's evidence. Ms Pickett only every counselled CT.

74. Mr Henry QC submitted that it was unrealistic to divide up the counts in this way. But it seems to us that the drawing of a clear distinction between the different counts follows from the summing up. The judge was careful not to give a cross-admissibility direction, or to tell the jury that if, say, they were sure that what CT was saying was true, they could use that as evidence of bad character on the part of Jones and Miszczak in support of a conviction on the counts involving ST. On the contrary, the judge made clear that the jury had to consider the case for and against each of the complainants separately: see paragraph 31 above. That was reinforced by his summary directions (see paragraph 32 above).

75. This court must assume that the jury followed the judge's directions. In those circumstances, the counts involving ST must on any view remain wholly uncontaminated by the inadmissible elements of Ms Pickett's evidence.

(c) The Principal Evidence

76. The principal evidence on all counts in this case came from CT and ST. As the judge made plain to the jury on more than one occasion (see the directions to which we have referred at paragraphs 32, 34 and 43 above), the critical issue was whether or not the jury were sure that CT and ST were telling them the truth. Everything else was peripheral, as the judge repeatedly emphasised.

77. We consider that the evidence of CT and ST was extensive, consistent and compelling. It was not shaken in any way by their cross-examination; on the contrary, it appears that their answers to the points put to them about inconsistencies and lack of complaint at the time only served to strengthen the veracity of their accounts.

78. Significantly, the two victims had not had very much contact with each other once CT had left the appellant's house, and the Crown presented a formidable case that there had been no collusion between them. Yet the number of pieces of specific evidence that each could recall, which were so similar in nature and content, is very telling. Of course, there were inconsistences and of course those were rightly deployed by Ms Baillie and Mr Potter during cross-examination. But we are struck by the many

similarities in the evidence of CT and ST on so many different issues, many of them relatively small matters of detail.

(d) The Evidence of Complaint

79. There was also the clear evidence about the history of the complaints, by both CT and ST, over a period of almost 15 years. Of course, as the judge made clear to the jury (see for example the directions identified at paragraphs 32 and 43 above), this was not evidence which went to the veracity of the allegations themselves and was relevant only to when the allegations were first made.

80. But it is striking that, within months of leaving the appellants' house, CT had made detailed allegations of abuse to Ms Pickett and Mr Newton during her counselling sessions. Moreover, it seems clear that it was the intervention of Mr Newton led her to go the police. Thereafter, the evidence of both sisters' complaints, as recorded in their numerous video interviews, stretched from 2005 to 2015. The allegations were therefore not only detailed but made contemporaneously and, on the part of both CT and ST, with brave persistence.

(d) The Peripheral Nature of Ms Pickett's Evidence

81. In our view, when set against that evidence of ST and CT, Ms Pickett's evidence, including those passages which were inadmissible and couched in over-emotive language, was peripheral. As the judge made clear to the jury, that evidence could not go to the veracity of the underlying allegations, and went only to the timing and consistency of CT's complaints.

82. Another way of looking at the overall significance of Ms Pickett's evidence is to note that her evidence was read to the jury rather than given orally, and that, even with the necessary warnings, it was capable of being summarised in just 6 pages of the summing-up, out of 168 pages in total. That is to be contrasted with the centrality of the video and oral evidence of CT and ST, which took from pages 28 to 104 of the summing-up (including the brief references to the appellants' contemporaneous denials). We are confident that, when set against the comprehensive and consistent evidence of CT and ST, the inadmissible evidence of opinion and the over-emotive language of Ms Pickett can fairly be described as insignificant.

83. Finally, we do not consider that Ms Pickett's evidence added very much in any event. Mr Newton's evidence dealt with the same or similar matters for the period in which he was involved. His evidence closely overlapped with that of Ms Pickett and no complaint is made about it. Again therefore, that seems to us to diminish further the importance of Ms Pickett's evidence in this case.

84. For these reasons, therefore, we reject Mr Henry's oral submission that Ms Pickett was "the key witness in a finely-balanced case". In our view, the case was a strong one and Ms Pickett, whatever Mr Scholes said in his speech to the jury, was only ever a minor player.

(e) The Directions Given In Relation To Ms Pickett

85. In addition, we consider that the judge's directions in relation to Ms Pickett made quite plain to the jury that they should regard her evidence as peripheral. We have already made the point that the judge correctly directed the jury that the evidence of complaint could not go to the veracity of the allegations. The judge was also anxious to ensure that the jury did not place undue weight on Ms Pickett's opinion in any event. In the passage set out at paragraph 42 above, he reminded them that, whilst they might wish to give effect to her opinion, they were not bound to do so and that the weight that they gave that evidence was a matter for them. He repeated "it is only part of the evidence".

86. Further, when he had reminded the jury of Ms Pickett's evidence, in the passage set out at paragraph 43 above, the judge rightly pointed out that there were two aspects of her statement: the first was that she was repeating what she had been told because she was not an eye witness and secondly that she was giving a professional view.

87. The first warning was correct and would again have reminded the jury of the limits of this evidence. Although the second warning was wrong (because Ms Pickett was not entitled to give opinion evidence at all), the judge immediately went on to say that Ms Pickett's opinion was only that the signs that CT exhibited "were consistent with someone who had been the subject of physical, sexual or emotional abuse". He then qualified that evidence still further by saying that "that is as far as she [Ms Pickett] can go". The judge went on to remind the jury that the critical issue was the evidence of the allegations themselves. It was those that they had to be sure the Crown had proved.

88. In our view, these directions properly put Ms Pickett's evidence (including those parts which we accept were inadmissible and over-emotive) into its limited context. Even though parts of it were inadmissible, her evidence was properly and fairly downplayed by the judge throughout his summing up.

11. Conclusions

89. For all these reasons, therefore, we have concluded that, although Ms Pickett was not an expert, and she gave inadmissible evidence of opinion as a result, neither that, nor the over-emotive language that she used, undermines the safety of the appellants' convictions.

90. The appeals against conviction are therefore dismissed.

91. Given that evidence from counsellors is not uncommon in criminal cases, three points of potentially wider application arise from our judgment. First, it will only be in the rarest cases that expert or opinion evidence from a counsellor will be relevant or admissible. The starting point must always be that a counsellor's evidence goes only to fact. Secondly, that factual evidence will be of limited compass, restricted to the timing and nature of any complaints made during the counselling sessions. Finally, when giving that evidence, a counsellor must take great care to use objective language, and to avoid saying anything which could be construed as subjective comment or statements of personal opinion.