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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday 5 June 2019

B e f o r e:

LADY JUSTICE NICOLA DAVIES DBE

MR JUSTICE MARTIN SPENCER

HIS HONOUR JUDGE PICTON

R E G I N A

v

DEAN HACKETT

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Miss Heather Oliver appeared on behalf of the **Appellant**
Mr Simon J Connolly appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

LADY JUSTICE NICOLA DAVIES:

1. On 24 October 2017 in the Crown Court at Basildon the appellant was convicted of a single count of sexual assault contrary to section 3 of the Sexual Offences Act 2003. On 28 November 2017 he was sentenced by the trial judge to 20 months' imprisonment suspended for 24 months, which included a rehabilitation activity requirement and 250 hours of unpaid work. Pursuant to section 5 of the Protection from Harassment Act 1997 the appellant was made the subject of a restraining order until further order.
2. He appeals against conviction by leave of the full court.
3. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence, which prohibits publication of any matter which is likely to lead members of the public to identify the victim of the offence.

Facts

4. The appellant and the complainant, 'JH', had been in a relationship for 18 months prior to the date of the complaint. Their relationship ended on 13 March 2017. Both parties were subsequently in contact using messaging and emails. On 18 March 2017 the complainant reported to the police through a helpline that she had been sexually assaulted by the appellant the previous day. She provided a statement setting out her allegations, the appellant was interviewed by the police on 22 March 2017.
5. The prosecution case was that on the evening of 17 March 2017 the complainant attended the appellant's house in order to confront him about an email received by her that day in which he alleged that she had been unfaithful to him with another man. On arrival, the appellant let her in. He was wearing only a towel having just had a shower. JH asked him about his accusation. The appellant grabbed hold of her upper arms and tried to cuddle her. He was telling JH that he loved her. The appellant started to cry, saying he could not be without her. JH told him that she did not feel the same way. The appellant grabbed JH, started kissing her mouth and neck, but she resisted and asked him not to. JH became pinned against a piano in the appellant's living room. He touched her all over her body and tried to unzip her jeans. The appellant touched JH's breasts under her clothing but over her bra. He put his hand inside her jeans and touched her stomach. He rubbed his hand on her vagina over her jeans. The appellant thrust against JH and asked her to have sex. She could feel that his penis was erect, she refused to have sex and pushed him away. The appellant caught his leg on a chair and fell. He pulled JH down so that she was crouching on the floor. He removed his towel and tried to put her hand on his penis, which she believed she touched briefly. The appellant was kissing JH's neck. She got up and went into the toilet, where she was sick. She managed to get out of the house although he was trying to prevent her leaving. On her return home JH reported something of the incident to her daughter.
6. The appellant's account was that he opened the door to his property having just come from the shower. JH barged past him and confronted him about who he thought she had been sleeping with. JH "came at him" and pushed his chest a few times. She pushed him, caused him to stumble over a chair and hurt his hand. JH came over to him to look at his hand and to apologise. They had a brief conversation about their relationship and she left

the property. Her allegations of touching are fabricated, the only other incidents of physical contact between them occurred when JH took hold of the appellant's arm in order to look at it, their heads may also have touched during this exchange. The appellant did not try to prevent JH from leaving, nor did he ask her to have sex with him. He did not have an erect penis, she was not sick.

7. Prior to his conviction the appellant, aged 42, was of previous good character.

The trial

8. On the morning of the trial the prosecution served a Bad Character Notice, the application being advanced under section 101(1)(c), (d), (f), (g) of the Criminal Justice Act 2003 ("the 2003 Act"). The Crown sought to rely upon matters set out in the statement of JH relating to "previous incidents of abuse and aggression by the defendant towards the complainant", in particular:

- (a) an incident at Tenerife Airport in June 2016 which was described as "an abusive overreaction to a minor inconvenience";
- (b) verbally abusive conduct repeated in the ensuing months when the defendant was in drink towards the complainant and her children;
- (c) the events on 5 February 2017 when the appellant attended JH's home address in the early hours of the morning, he started banging and punching doors and windows, screaming and shouting outside the property. The police were called and issued him with a harassment notice;
- (d) unpleasant remarks made in emails to JH and insults to her children.

9. It was the Crown's submission that:

- (a) pursuant to section 101(1)(c):

"It is important explanatory evidence that will help the jury understand the background relationship and of course the events leading up to the end of the relationship will help the jury understand the true nature of the events on 17 March 2017."

- (b) under section 101(1)(d):

"It is relevant to an important matter in issue, i.e. who was the aggressor on 17 March 2017 (the defendant says that it was the complainant who was abusive and aggressive, but if the defendant had been aggressive and abusive in the past, he is more likely to have behaved as alleged on the 17th)."

- (c) under section 101(1)(f):

"It is relevant to correct the false impression given by the defendant in his interview that the relationship had only been a good one marred perhaps by her jealousy ... and although they had their ups and downs it was not his bad behaviour that had caused the breakdown but (reading together with the email messages) her unfaithfulness."

- (d) under section 101(1)(g):

"The defendant has made an attack on the complainant in his interview, saying in particular that she was aggressive and assaulted him on the night, that she had been secretive and unfaithful with a person called Mark."

10. In ruling upon the application the judge described it as "to a large extent an application under section 101(1)(f) and (1)(g)". He accepted that it was also the Crown's application that the evidence was important explanatory evidence pursuant to section 101(1)(c) and relevant to an important matter in issue between the defendant and the prosecutor, 101(1)(d). The judge said that he was "concentrating really on the force of the prosecution's submission, namely that it becomes admissible because of the way the defendant in interview ... attacked the character of the complainant". As to the specifics of the evidence:
- (a) The Tenerife Airport incident: the judge accepted that to a large extent it was about a different set of circumstances, he would allow evidence only of the fact that there were rows in Tenerife and on the return journey.
 - (b) The judge stated that it seemed perfectly proper that the complainant be allowed to give examples of the defendant's verbal abuses in the course of their relationship, but it should not stray beyond the identified example in the prosecution's written application.
 - (c) Harassment: there would be evidence of the harassment notice and the complainant would be able to give her account of what led to the making of that notice.
 - (d) Emails: the judge allowed the evidence of the emails to be admitted insofar as it related to JH but excluded any evidence relating to the children. He described it as "not relevant", "highly prejudicial" and "unsubstantiated".

The judge summarised the effect of his ruling in this way:

"So bare skeletons so far as Tenerife is concerned; verbally abusive words, she is entitled to give; the details of the harassment event leading to the notice, and the emails as they are, but no mention of any unkind remarks made concerning the children."

The summing-up as to the law

11. In written directions under the heading "History of the relationship", the jury were given the following written directions:

"In the course of JH's evidence you heard about other incidents involving the defendant. The alleged outbursts at a Spanish airport following a holiday, incidents of name calling and the behaviour outside JH's home in early February resulting in the harassment order. You have also seen emails between both the complainant and the defendant before the alleged incident on 17 March.

You have heard about the events and emails for two reasons. Firstly, the prosecution contend that it is background material concerning their relationship and secondly because Mr [Hackett] in his interview and in his evidence has accused JH of using violent behaviour when she visited his address on 17 March. The prosecution submits that as a result you should

also know about allegations of his earlier alleged violent behaviour towards her. It is, they say, evidence which may help you in deciding the issues in this case. But remember that he is a man with no previous criminal convictions as I have already directed you."

12. In the course of his oral summing-up the judge repeated the written direction. The judge gave the full good character direction.

Grounds of appeal

13. Following the hearing by the full court, a third ground of appeal has been added with leave of the Court. The grounds are:
 - i. The basis upon which the bad character evidence was admitted was flawed, and the scope of the material which was allowed to feature in the trial was significantly too broad.
 - ii. The manner in which the bad character evidence was utilised in cross-examination of the appellant was inappropriate. It went beyond the scope of the bad character ruling and gave rise to substantial unfairness.
 - iii. The judge's directions to the jury concerning the bad character evidence were inadequate.

Ground 1

14. It is the appellant's contention that the basis upon which the bad character evidence was admitted was unclear from the judge's ruling. We agree. As four gateways were referred to in the prosecution application and the judge's ruling, the appellant's counsel, Miss Oliver, who was not trial counsel, has with skill and clarity addressed the merits of each.

Section 101(1)(c): "important explanatory evidence"

15. Section 102 of the 2003 Act identifies such 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."
16. The essence of the Crown's case in respect of what occurred on 17 March 2017 was not of a volatile or aggressive argument characterised by verbal abuse. It was framed as an attempt by the appellant to reignite the couple's relationship through uninvited and unwelcome sexual advances amounting to sexual assault. The alleged fractious background of arguments and unpleasant remarks made by the appellant to JH had little relevance to the issues at trial. It does not appear to have been JH's evidence that the behaviour on 17 March formed part of a pattern in their relationship. It was not said to be repeat or even escalation of similar sexualised behaviour in the past. The bad character evidence does not explain why the appellant would wish to make sexual advances towards JH on 17 March. JH's prompt for attending on 17 March was as a result of a specific email

which she had received from the appellant. The jury would not have found it impossible, or indeed difficult, to assess the events of 17 March without reference to the bad character evidence. It was understandable without it. The value of the bad character material for understanding the case as a whole was not substantial. The issue was whether the appellant sexually assaulted JH, not whether he was generally mean or spiteful towards her.

Section 101(1)(d)

17. The Crown's bad character application identified the matter in issue as: "Who was the aggressor on 17 March? If the defendant had been aggressive and abusive in the past he is more likely to have behaved as alleged on the 17th." It is submitted that it does not follow that because the appellant had argued in the airport, had been abusive in the past towards JH orally and/or in emails and had gone to her house to remonstrate with her in February 2017 that he would be more likely to sexually assault her on 17 March. As previously stated, this was not an allegation of violence or of loss of temper. Thus, his propensity to "behave as alleged on the 17th" was as a sexual predator and this was not established by the evidence sought to be admitted.

Section 101(1)(f)

18. Evidence of bad character is admissible under this gateway if it is evidence to correct a false impression given by a defendant.
19. At interview, the appellant was asked a number of questions about his relationship with JH and how it ended. While acknowledging disagreements, arguments and at least one previous short break in the relationship, the appellant painted a generally positive picture of their relationship and denied suggestions put to him on the basis of JH's account that he was controlling and possessive. In broad terms this account of the relationship was maintained at trial.
20. The appellant contends that the Crown's application purports to focus on whether the relationship between the appellant and JH was a good one and the reason why it broke down. Such issues are said not to be relevant as to whether he sexually assaulted her on 17 March. Further, the admissibility of such evidence must always be subject to the criterion of relevance. Had the interview been appropriately edited, the scope of the issues before the jury could have been limited. Even allowing for the interview as it was presented to the jury, the appellant was doing no more than giving his own account of the relationship. It does not follow that he was necessarily creating a false impression of the generality of the relationship.

Section 101(1)(g)

21. Evidence of bad character is admissible if the defendant has made an attack on another person's character.
22. It is accepted on behalf of the appellant that this section does not exclude allegations of misbehaviour which are an integral part of the defence case. The appellant in his police

interview, his Defence Statement, in cross-examination of the complainant and in his evidence accused JH of behaving towards him in an aggressive manner on 17 March. In addition, there was the suggestion taken up at trial that JH had been unfaithful with another man. It is accepted that these could be conceived as attacks on her character. However, it is the appellant's contention that in the circumstances of this case the judge should have exercised his discretion pursuant to section 101(3) in order to exclude bad character evidence on the grounds of fairness.

23. The purpose of gateway (g), as for the earlier law, is to enable it to be shown that the defendant's word is not worthy of belief. As Moses LJ said in *R v Hearne* [2009] EWCA Crim 103, adopting the earlier words of Lord Lane LCJ in *R v Powell* (1982) Cr App R 165:

"... it is only fair that the jury should have before them material on which they can form their judgment whether the accused person is any more worthy to be believed than those he has attacked ..."

It is the appellant's case that the bad character evidence could have no real bearing on the appellant's credibility, or at least no bearing of such significance that the unfairness attendant on not admitting it should be risked. The attack on JH's character arose primarily from the integral mechanics of their interaction on 17 March. This limited attack does not justify the admission of disputed and peripheral evidence about the appellant's behaviour during the demise of their relationship.

24. Further, the attack on JH's fidelity should have been largely excluded from the evidence at trial. No application was made pursuant to section 41 of the Youth and Criminal Evidence Act 1999 ("section 41") in order to cross-examine the complainant about the truth or otherwise of her suspected infidelity. Such an application would have been inappropriate and any such cross-examination rightly excluded on the basis of relevance. The fact of the appellant's suspicions as to JH's infidelity may have been relevant to the events of 17 March as it explained JH's attendance at his address, but the jury could and should have been directed that the issue whether those suspicions were or were not well founded was entirely irrelevant. It was wrong for the Crown to seek to allow the appellant's suspicion as expressed at interview to become a gateway to admit unrelated and prejudicial bad character evidence when the issue as to the truth of that suspicion was wholly satellite litigation. Further, in respect of those various applications, they were all subject to the court's discretion pursuant to section 78 of the Police and Criminal Evidence Act 1984.

Ground 2: Cross-examination of the appellant

25. The rigorous cross-examination of the appellant began shortly after lunch on 20 October, it continued until the end of the day, it recommenced on Monday 23 October from 10:30 until approximately 13:00. The transcript of the cross-examination runs to 78 pages. Pages 36 to 45 deal directly with the events of 17 March, at page 65 there is reference to emails following the event on the 17th and at page 69 to the fact that after the alleged events in the appellant's home both the complainant and the appellant separately and later attended the nearby Village Inn.
26. A number of areas of cross-examination are identified as being relevant to the appellant's case on ground 2:

- i. The Tenerife Airport incident was not left as "bare skeleton". The appellant was cross-examined as to the specifics, for example, the language he used. This evidence had not been adduced from the complainant.
- ii. The appellant was cross-examined about his drinking in relation to the airport incident, the 5 February incident and about going into therapy. The complainant did not allege that the appellant was motivated or influenced by drink on 17 March.
- iii. Cross-examination relating to upsetting JH's children. This appears to go behind the spirit of the judge's ruling excluding the emails in which the appellant referred to the children.
- iv. The appellant was cross-examined about behaving badly in the relationship. It was suggested that he was pushy, overwhelming and controlling.
- v. He was cross-examined as to money issues, asked as to whether JH was struggling with money, and criticised for seeking to recover property from her.
- vi. The appellant was questioned at length as to the source and timing of the allegations relating to JH's infidelity. The questions are said to amount to a direct and unwarranted challenge to his character. The complainant had not been cross-examined as to the veracity of these allegations as they were irrelevant to the core issues in the case. No section 41 application was made. Thus, to allow the questioning as to the appellant's belief meant that the Crown went behind the shield of section 41, which protected the complainant from being questioned about the allegations of infidelity, and used it as a sword against the appellant.

27. In *Stirland v Director of Public Prosecutions* [1944] AC 315 at 327, it was held that:

"The fact that a question put to the accused is irrelevant is in itself no reason for quashing his conviction, though it should have been disallowed by the Judge. If the question is not only irrelevant but is unfair to the accused as being likely to distract the jury from considering the real issues and so lead to 'a miscarriage of justice' ... it should be disallowed, and, if not disallowed, is a ground on which an appeal against conviction may be based."

28. The appellant relies upon the fact that much of the appellant's cross-examination focused on irrelevant peripheral detail, unconnected to the issues in the trial and going beyond the scope of the bad character ruling of the judge. It is said to be highly prejudicial and had the potential effect of undermining the character of the appellant in the eyes of the jury. In accordance with the principle in *Stirland* (above) it should not have been allowed, and, as it was, the appellant's conviction is now unsafe.

Ground 3: The judge's legal direction

29. The appellant's contention is that the judge failed to direct the jury that they had to be sure of the bad character evidence before they could rely upon it. The judge did not point out that much of the evidence was disputed, nor did he remind the jury of the conflicting pieces of evidence. The judge failed to direct the jury to decide the extent to which, if at all, the evidence established that for which the parties relying upon it contended.

30. The judge did not identify the purpose for which the evidence adduced might be used, if the jury were so sure of it so that they could rely upon it. In accordance with the Crown Court Compendium, the following guidance is given:

"In every case the judge, when identifying the purpose for which evidence may be used, should also identify any potential misuse of such evidence arising e.g. from prejudice, and warn against such use."
31. The jury was not directed as to the use of such evidence nor were they directed as to the uses to which it should not be put. This is particularly important as there was no exclusion of the question of whether the bad character evidence established a propensity to behave in the manner alleged, i.e. the jury was not told that none of the bad character evidence which they had heard made it more likely than not that the appellant committed the offence.
32. Further, the judge did not address the potential weight and significance of the evidence. In the Crown Court Compendium it is stated:

"Where the apparent weight of the evidence admitted under these provisions comes to be diminished in the light of other evidence, careful directions must be given to the jury to assist them in assessing weight and deciding whether or not there is real significance to the evidence."
33. The judge did not point out that even if the jury were sure of one or more parts of the bad character evidence, they did not prove anything on their own but were a part of the jury's consideration of the case as a whole. In a case where much of the bad character evidence was tangential to the real issues, this risked giving such evidence an undue prominence in the minds of the jury.
34. It is the appellant's case that the deficient direction on bad character compounded the issues raised by the manner in which the appellant was cross-examined and the scope of the material that was adduced purportedly under the bad character gateway, thus cumulatively creating prejudice such as to render the appellant's conviction unsafe.

The respondent's submissions

35. Counsel on behalf of the respondent, in answer to questions from the Court, stated that it was not until the Friday before the trial was due to commence that he received instructions in the case. At that point he realised that a bad character application should be made, and it was made on the first day of the trial. Through no fault of his own, it was at that very late stage. Counsel accepted that the application should have been made earlier.
36. The Crown sought to call evidence of the appellant's bad character because it is stated to be relevant to show the appellant's drunken and verbally abusive conduct towards JH on two previous specific occasions and more generally. Further, JH gave evidence of the deterioration in the relationship in the two months leading up to the allegations. It was said to be important explanatory evidence in a case involving a sexual assault by a man who had been in a long relationship with the complainant because it provided context for the allegation.
37. Further, the Crown relies upon the account which the appellant gave in interview as to the nature of the relationship, describing what is painted as a "rosy picture" and what was

described as his "presentation of good character". It is said that the bad character evidence was admitted to balance the evidence of the appellant, albeit at that point such evidence had not been given. Further, as already stated, it pointed to the deteriorating relationship between the complainant and the appellant.

38. The Crown rely upon the fact that the events of 17 March did not occur in a vacuum; they were the unfortunate outcome of the slow deterioration of this relationship. The appellant sought to explain and justify his previous conduct and the breakdown of the relationship by attacking the character of the complainant, in particular her infidelity.
39. As to the cross-examination, it is not accepted that it was lengthy. One reason given for the time which it took are the number of answers given by the appellant which are said to be evasive. It is denied that the cross-examination was unfair, irrelevant or prejudicial to the case of the defendant.
40. As to the legal directions given by the judge, it is accepted that under the heading of "Background History" the judge dealt with Tenerife, 5 February and generalised allegations "in the round". As to the specifics of the legal direction it is said that it was "adequate"; this was not a case for "hand holding" or "micromanagement". We disagree, both with the description and submission.

Conclusion

Ground 1

41. The charge which the appellant faced was one of sexual assault alleged to have occurred on 17 March 2017. The events of the evening of 17 March were discrete as to timing and triggered by an email which the appellant had sent to JH during the afternoon of that day which she construed as indicating infidelity on her part. In our judgment evidence as to events in Tenerife 2016, a separate event in February 2017, when the appellant on each occasion was in drink, were not relevant to the allegations of sexual misconduct in March 2017. In particular when it was no part of the Crown's case that drink played a part in the appellant's conduct in March. Further, the generalised evidence of past verbal abuse or as contained in emails was, in our view, not directly relevant to allegations of sexual assault in March 2017. In our judgment none of this evidence should have been admitted pursuant to the gateways of section 101 of the CJA 2003 as it was irrelevant, prejudicial and such probative value as it contained was significantly outweighed by its prejudicial nature.
42. We accept that the complainant and the appellant had been in a relationship for some 18 months. It was a relationship which had had its difficulties, and it is unrealistic to expect either the complainant or the appellant to have given evidence which did not include reference to the past history of the relationship, which could have included emails or verbal exchanges which took place between them. That being so, if some background evidence was to have been adduced by agreement between the Crown and the defence, there should have been identification of the limits of such evidence, which then could have been the subject of judicial management.
43. In this case the judge made a ruling in order to admit that evidence. In our view if a judge is minded to permit evidence to be adduced as to background evidence it is incumbent upon the judge when ruling upon admissibility, to identify the reasons for its admission, the

parameters of such evidence, how it can be used, in particular what can be said by any witness as to that evidence, whether it be in examination-in-chief or the extent of any cross-examination, and in that ruling to give an indication of how the jury will subsequently be directed upon that evidence. In this case that was not done. The brief and somewhat general ruling of the judge appears to have permitted prosecuting counsel to embark upon a cross-examination, untrammelled by judicial intervention, which not only went beyond the ruling of the judge, it entered into areas of evidence which were peripheral, irrelevant and prejudicial to the defendant. Put shortly, having provided a brief and general ruling, the judge failed thereafter to provide any effective management of the use of such evidence.

Ground 2

44. We regard it as telling that it was not until page 49 of the 78-page transcript of cross-examination of the appellant that prosecuting counsel began to ask questions as to the events of the evening of 17 March. In the pages before page 49 prosecuting counsel had asked questions about the Tenerife incident which went beyond the ruling of the judge. He asked about the detail of the February harassment incident, questions of some length were asked about the drinking of the appellant, notwithstanding the fact that it was accepted that he had subsequently placed himself in therapy and drink played no part in the incident of 17 March. The appellant was asked questions about his relationship with the appellant's children which in our view went beyond the ruling of the judge. Questions were asked of the appellant about his previous "bad behaviour" and about him being pushy and controlling within the relationship. Quite what many of these questions had to do with an allegation of sexual assault on 17 March 2017 is not easily understood by this Court.
45. Lengthy questioning of the appellant's belief that JH had been involved with another man or men took place. It did so in the absence of a section 41 application in respect of the complainant, which is highly unlikely to have been allowed. The fact that the appellant held that belief should have been sufficient for the purpose of this trial, no further questioning on this sole issue should have been permitted. We note that defence counsel raised concerns about this line of questioning. We were told by Miss Oliver today, who had spoken to original trial counsel, that trial counsel had been given short shrift by the trial judge when she raised the matter during the course of cross-examination.
46. We accept the submission made on behalf of the appellant that the cross-examination went beyond matters which were relevant as to whether the appellant had committed the offence with which he was charged. The judge should have intervened to stop or limit such questioning. The result was that much of the appellant's cross-examination focused on irrelevant and peripheral detail unconnected with the specific issues in the trial, it went beyond the scope of the bad character ruling of the judge and became unfair. We accept that the cross-examination had the potential effect of undermining the character of the appellant in the eyes of the jury.

The judge's legal direction

47. In granting leave, the full court identified three aspects of the legal direction where it was arguable that it was deficient, namely:

"(a) The judge failed to direct the jury that they had to be sure of any particular aspect of the bad character evidence before they could consider placing reliance upon it;

(b) The judge did not identify for what particular purpose [this] evidence might be used by them, even if they were sure that the contested event or events occurred as JH recounted;

(c) The judge did not point out to the jury that, even if they were sure of one or more of the contentious background matters, on their own they proved nothing – that at the best the evidence was but a small part of the case and the jury's consideration should be principally focused on the events of 17 March 2017."

48. We note that counsel would have been shown the written directions of the judge, which were replicated in his oral summing-up, and each had the opportunity to comment upon those directions. Allowing for that, we are satisfied that the concerns raised by the full court as to the three identified deficiencies in the legal direction are made out.
49. The appellant's case is summarised thus, that in many cases there is a domestic history of disputed grievances. The likelihood is that they are of little real relevance to the issues, the specific allegations and the facts of the incident which formed the charge on the indictment. Without careful management, focus on the relevant issues, evidence and consequent directions, there is a real risk that the admission of and undue emphasis upon irrelevant material will cause serious prejudice to a defendant. In admitting evidence which is lacking in relevance to the real issues to be considered by the jury, such evidence can assume prominence which outweighs any probative value. In this case bad character evidence was wrongly admitted from the outset. The wrongful admission was then compounded by an absence of appropriate judicial management and inadequate legal directions. We agree with the summary of the appellant's case.
50. The deficiencies in the legal direction compounded the issues raised by the manner in which the appellant was cross-examined and the scope of the material that was adduced under the bad character gateways. We accept the appellant's submission that individually and cumulatively the manner in which the bad character evidence was admitted, handled in cross-examination and left to the jury did give rise to substantial prejudice to the appellant such as to render the appellant's conviction unsafe.
51. For the reasons given, we allow this appeal and quash the appellant's conviction.

LADY JUSTICE NICOLA DAVIES: Are there any matters to be raised?

MR CONNOLLY: My Lady, I have taken instructions on the question of a retrial. I am instructed to make that application.

LADY JUSTICE NICOLA DAVIES: You are making the application? Are there any matters you want to deal within it, in particular the sentence passed by the court and the likelihood of the timing of any retrial? Consider the sentence of the court, what, in effect, would be left by the time of any retrial?

MR CONNOLLY: I have looked at the Digital Case System. There is an updated report on the "Response to Supervision" at T13.

LADY JUSTICE NICOLA DAVIES: We do not have it.

MR CONNOLLY: There have been something like 50 hours out of the 250 completed. There has been a limited response to the supervision and there is a conclusion that there may well be further work that should be done. Part of the difficulty was expressed as he was actively seeking the appeal and considered himself to be a victim of these events. Therefore, of course, it was difficult to engage him with the process that would otherwise have taken place because he was still maintaining his innocence. And there is, of course, the sexual--

LADY JUSTICE NICOLA DAVIES: Why do you not deal with the suspended sentence first? On retrial, the court cannot go beyond the original sentence.

MR CONNOLLY: No.

LADY JUSTICE NICOLA DAVIES: Right. So on 28 November 2017 a suspended sentence of 20 months' imprisonment suspended for 2 years (24 months) was passed.

MR CONNOLLY: Yes.

LADY JUSTICE NICOLA DAVIES: We are now in June. There is no real likelihood of a retrial before the autumn.

MR CONNOLLY: No.

LADY JUSTICE NICOLA DAVIES: No. So can I please have some realistic submissions on the suspended sentence point?

MR CONNOLLY: The reality is that the time will have passed. But of course with these sorts of offences, where there is a conviction there is an official marking of the behaviour. So if there were to be other conduct in the future, the fact of a conviction in this case of course would be relevant -- admissible, potentially -- in any other trial. There have been communications with the complainant, such that there are concerns in those prosecuting this case. This is not an isolated incident.

JUDGE PICTON: Sorry - a suggestion there has been a breach of the restraining order?

MR CONNOLLY: No. This behaviour towards this complainant is not isolated, in the sense of the allegation is abusive behaviour towards others. There are no allegations --

JUDGE PICTON: Or proceedings?

MR CONNOLLY: There are no other proceedings outstanding.

LADY JUSTICE NICOLA DAVIES: This feels to me like just vague prejudice.

MR CONNOLLY: There are reasons for prosecuting a case, and continuing to prosecute a case, where there are reasons to suspect that this incident is not isolated.

LADY JUSTICE NICOLA DAVIES: What are you saying?

MR CONNOLLY: The suggestion is that there have been other partners who have been treated in a similar way, not a sexual way as I understand it, but an abusive way. There is an element of the description of the complainant in this case of what she describes - I appreciate it is not accepted by the appellant - of what is perhaps coercive or controlling behaviour.

LADY JUSTICE NICOLA DAVIES: He is charged with sexual assault.

MR CONNOLLY: I understand.

LADY JUSTICE NICOLA DAVIES: Let us not go down the path you went down at trial. Let us keep it on the charge of sexual assault.

MR CONNOLLY: My Lady, the question to be resolved is whether there should be a retrial.

LADY JUSTICE NICOLA DAVIES: Yes.

MR CONNOLLY: The fact that the sentence was a suspended sentence and the time has passed where he has had such a sentence hanging over him, or there will be by the time of a retrial, is obviously one consideration.

LADY JUSTICE NICOLA DAVIES: Yes.

MR CONNOLLY: But there is another consideration as to whether this serious sexual behaviour should be marked by a conviction regardless of the sentence, and that is the real question if he were to be convicted.

(The Bench conferred.)

LADY JUSTICE NICOLA DAVIES: Anything else?

MR CONNOLLY: The Crown have spoken with the complainant. She is willing to attend trial. There is a restraining order preventing the appellant from contacting her or any of her children (they are named in the order). She has expressed concern that she would wish that restraining order to continue; and of course there is power for this Court to deal with that matter by referring the matter back to the Crown Court for consideration as to whether that order should in any event continue. I had some discussion with my friend in any event about whether that is a matter that would be opposed. So there is that aspect of the sentencing that the Court should and can consider.

JUDGE PICTON: But you accept that the issue of sentence is a relevant consideration when this Court is considering whether it is in the interests of justice to order a retrial?

MR CONNOLLY: I accept that of course.

JUDGE PICTON: And there will be no effective sentence that the court could impose at any retrial because of the nature of the sentence imposed and the time that has passed, save for perhaps a restraining order, in respect of which there is a specific power under the Protection from Harassment Act for this Court to remit to the Crown Court for reconsideration of a restraining order on acquittal?

MR CONNOLLY: I agree. The effect of the suspended sentence and the time that has elapsed from the original trial is of course one aspect, but another aspect is the consideration as to whether the offending behaviour should be marked or not. Of course he would be on the Sexual Offenders Register.

LADY JUSTICE NICOLA DAVIES: Sorry, could you just repeat that?

MR CONNOLLY: He would be on the Sexual Offenders Register.

LADY JUSTICE NICOLA DAVIES: As a result of the conviction? Yes. But not ...

MR CONNOLLY: Of course he is not because the conviction--

LADY JUSTICE NICOLA DAVIES: Quite.

JUDGE PICTON: He will not be now because the conviction is quashed. He could only go back on to the Register if he were reconvicted at some retrial when no effective sentence could be passed.

MR CONNOLLY: Exactly. And that is another consideration.

LADY JUSTICE NICOLA DAVIES: Any others?

MR CONNOLLY: No.

LADY JUSTICE NICOLA DAVIES: Thank you very much indeed. Yes?

MISS OLIVER: Thank you, my Lady. The report that my learned friend cites is dated 21 March 2018, as far as I can see from the Digital Case System, so it is well out of date.

LADY JUSTICE NICOLA DAVIES: Yes.

MISS OLIVER: I am instructed that all unpaid work that fell to be completed under the suspended sentence order has been done.

On my calculation, the operative term of imprisonment of 20 months will cease on 28 July of this year, and the suspension term of 24 months will cease on 28 November of this year. So the Court is absolutely right to point out that the effective sentence already has been served almost in its entirety, but certainly by the time that any retrial happened the time for that would have ceased and it is inconceivable that any court would realistically impose further months of a suspended sentence to fill the gap between this appeal and any retrial.

JUDGE PICTON: And any sex offenders registration will be dependent upon the penalty imposed at the retrial, with the court in a position where it could impose no effective penalty because of the passage of time?

MISS OLIVER: Yes. I think I agree with that.

JUDGE PICTON: The sex offenders registration period is dictated by the sentence that is imposed. In this case it was 20 months suspended, so that then produces a 10-year sex offender register ... or indefinite (I cannot remember; it does not really matter). But on any retrial, on conviction, the same sentence could not be imposed because that would be wrong in principle, bearing in mind that he has been subject to a suspended sentence for nigh on two years.

MISS OLIVER: And in relation to a restraining order, as this Court has just pointed out --

JUDGE PICTON: There is a statutory power to deal with that.

MISS OLIVER: Section 5A of the Protection from Harassment Act, this Court could remit this matter back to the Crown Court to consider whether it is appropriate effectively to impose a restraining order on acquittal. I have taken instructions, for what it is worth, and given that the appellants has absolutely no desire to contact the complainant at all, it may well be that that is not contested. I do not bind him by that.

LADY JUSTICE NICOLA DAVIES: No.

MISS OLIVER: It may be that if this Court is concerned to any degree about the public safety considerations and the complainant's concerns then that might be a sensible way of dealing

with it, rather than putting all the parties in this matter through a retrial again.

For this appellant's part, he has been punished significantly by the course of this trial, obviously by the outcome and by the length of time he has been under suspicion for this offence. It is through no fault of his own that he is here today appealing that conviction.

In terms of his employment, he worked for an NHS Trust, worked effectively for the NHS. He was disciplined internally as a result of his conviction, and resigned from his position before those proceedings could come to fruition - perhaps in the expectation of what may be considered an inevitable outcome.

His family life has been very much on hold in relation to contact he is able to achieve with his daughter as a result of this conviction.

Generally speaking, in terms of his personal wellbeing, the desire for finality is acute in this case.

For those reasons I suggest they weigh against the public interest need for a conviction where there is the residual power to impose a restraining order for either a definite or an indefinite period that would certainly allay any concerns the complainant could have. So we would say the interests of justice balance in this case mitigate against the need for a retrial.

LADY JUSTICE NICOLA DAVIES: Thank you very much. We will retire.

(The court adjourned for a short time.)

LADY JUSTICE NICOLA DAVIES: This Court is not going to order a retrial. We are of the view that it is not in the interests of justice to order a retrial given that:

- (a) in the event of a subsequent conviction following a retrial no effective sentence can be passed by the court because the suspended sentence imposed following this trial will expire by the end of November 2019, and
- (b) the concerns of the complainant can be met by remitting this matter to Basildon Crown Court for a hearing pursuant to section 5A of the Protection from Harassment Act 1997 to consider the issue of a restraining order. The hearing at Basildon Crown Court should not be by the original trial judge.

Is there anything else anyone wants to raise with us?

MISS OLIVER: I am instructed to make an application for defence costs in so far as Mr Hackett privately funded his trial in the court below pursuant to section 16 of the Protection of Offences Act. I accept I have not put anything in writing in relation to that and I do not know whether it can be done administratively in writing?

LADY JUSTICE NICOLA DAVIES: Can I make a suggestion?

MISS OLIVER: Yes.

LADY JUSTICE NICOLA DAVIES: Put in a written submission to me and I will show it to my Lords and by that time you will have had a chance to check out what the right law is.

MISS OLIVER: Thank you. I appreciate that.

LADY JUSTICE NICOLA DAVIES: Not at all.

Anything else?

THE CLERK OF THE COURT: Written submission on costs by seven days?

LADY JUSTICE NICOLA DAVIES: No, you can have a bit more latitude because I know what my week is like next week. Can I have written submissions by 10 o'clock on 17th June 2019 and send them directly to my clerk please.

MISS OLIVER: Thank you.

LADY JUSTICE NICOLA DAVIES: Anything else?

MISS OLIVER: No.

LADY JUSTICE NICOLA DAVIES: Miss Oliver, I said at the outset of this case how greatly assisted each of us was by the quality of your written submissions. That quality was replicated in court today and it is very good to see.

MISS OLIVER: Thank you very much my Lady.

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

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