Neutral Citation Number: [2020] EWCA Crim 1016

Case No 201902132 C4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT KINGSTON-UPON-THAMES
HER HONOUR JUDGE KENT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/20

Before :

LORD JUSTICE HICKINBOTTOM

MR JUSTICE SPENCER
and
THE RECORDER OF NOTTINGHAM
HIS HONOUR JUDGE DICKINSON QC
(sitting as a Judge of the Court of Appeal (Criminal Division))

- -

Between :

R

Respondent

- and -

ALEXANDER PHILO-STEELE

Appellant

- -
- -

Peter Clark (assigned by the **Registrar of Criminal Appeals**) for the **Appellant**
David Malone (instructed by **CPS Appeal Unit (Special Crime Division)**) for the **Respondent**

Hearing date: 24 July 2020

- -

Approved Judgment

Lord Justice Hickinbottom :

Introduction

1. This appeal concerns offences to which the provisions of the Sexual Offences (Amendment) Act 1992 apply. In addition to the complainants who are the subjects of the counts with which we are particularly concerned, it will be necessary for us to refer to other complainants who made allegations against the Appellant but in respect of whom the Appellant was not charged or was found not guilty. No matter relating to any of these complainants, to whom we shall refer as "V", "W", "X", "Y" and "Z", shall be included in any publication if it is likely to lead members of the public to identify any of them as the victim of any of those offences or as a complainant.

2. On 9 May 2019 in the Crown Court at Kingston-upon-Thames before Her Honour Judge Kent and a jury, the Appellant was convicted on 11 counts of various offences of child sexual abuse committed against three male complainants, W, Y and Z. On 25 July 2019, he was sentenced by the same judge to an extended sentence of 14 years comprising 12 years' imprisonment and an extension period of 2 years.

3. At trial, the Appellant was represented by Peter Clark and Rebecca Lee of Counsel instructed by Nigel Richardson of Hodge, Jones and Allen. Whilst it seems that, immediately after he was found guilty, the Appellant had expressed to Mr Richardson disappointment at the verdicts and (non-specific) dissatisfaction with his trial representation, he confirmed that he wished the same counsel to continue to appear on his behalf. Mr Clark was thus instructed to, and did, settle grounds of appeal against both conviction and sentence.

4. On 9 December 2019, Morris J granted leave to appeal against conviction, but refused leave in relation to sentence. In respect of the conviction appeal, he granted a Representation Order restricted to one counsel, i.e. Mr Clark.

5. On 18 December 2019, on behalf of the Appellant, Mr Richardson renewed the application for leave to appeal against sentence; but, when that was sent to the Registrar, he added:

> "Mr Philo-Steele instructs us that he has dispensed with the services of both trial counsel and will be instructing further counsel in due course. In the circumstances, we must also cease acting and we would ask that you communicate directly with him at HMP IOW Parkhurst."

6. The Appellant did not renew his application for legal aid in respect of sentence. He gave no reason for dispensing with the services of counsel. Mr Clark assumed that he intended to fund his appeal privately. In any event, Mr Clark wrote to the Registrar asking to be released from any obligation under the Representation Order.

7. We understand from the Appellant that, primarily through his mother, he tried to find alternative counsel, but without success. In the meantime, the Registrar wrote directly to the Appellant asking him to confirm that he was instructing other counsel, but received no reply. The Appellant explained to us that that was because he had not received that letter, or any chasing correspondence, from the court; and we accept

that, although these letters were clearly sent, he did not receive them in prison. As no reply had been received from the Appellant, the Registrar instructed Mr Clark to appear at the hearing of the conviction appeal before us, which he did.

8. At the hearing, Mr Clark and the Appellant explained the position to us. The Appellant did not give us – and does not appear to have ever given anyone – an explanation of why he did not wish Mr Clark to continue to represent him, other than his disappointment at the result of the trial. He has never suggested any way in which he considers Mr Clark and/or Miss Lee have been professionally wanting; and, in particular, he has not suggested that the grounds of appeal and supporting advice are deficient or that he wishes to pursue any ground of appeal not already adumbrated there. We certainly cannot see any deficiency in the grounds. Even taking into account the disruption caused by coronavirus, the Appellant has had more than reasonable time to instruct other counsel. It is in the interests of not only the complainants but the Appellant himself that this appeal is brought to a conclusion without further delay.

9. Consequently, at the hearing, despite the Appellant's apparent but entirely unparticularised misgivings, we indicated that, in relation to the conviction appeal, we would be pleased for any assistance Mr Clark could give us, over and above his full and helpful written grounds. In the event, we are very grateful for the assistance he gave us by way of oral submissions. We do not consider that the submissions in support of the appeal against conviction could have been better put.

10. In respect of sentence, Mr Clark did not consider that it would be appropriate for him to make oral submissions in circumstances in which the Representation Order did not require him, and the Appellant did not wish him, to do so. That was a proper and understandable position for him to take. As we indicated at the hearing, we shall treat that renewed application as a non-counsel application.

The Facts

11. The grounds of appeal against conviction are few and narrow, concerning the trial judge's refusal of two applications made on behalf of the Appellant under section 41 of the Youth Justice and Criminal Evidence Act 1999 ("section 41"); but the background is unfortunately lengthy and complex. We are grateful to Mr Clark for setting it out so comprehensively in his advice. Given the nature of the grounds, we can deal with the facts relatively briefly.

12. The Appellant was born in 1983, and was a child carer or nanny, which he did both voluntarily and professionally. Three episodes during his time in that occupation are particularly relevant.

13. The first episode occurred in 2003, when the Appellant was 20 years old. On 14 June 2003, the Appellant attended a children's birthday party for V, a 6 year old boy who was the son of a friend of the Appellant's mother. W, another boy aged 6, was V's best friend and was also at the party with his mother, Mrs W. The Appellant played with the children and, at the end of the party, gave his telephone number to W, who was keen to see V and the Appellant together again in the future. A couple of weeks later, on 28 June 2003, W rang the Appellant, and an arrangement was made that W, V and the Appellant would go to the park together later that day. Mrs W took W to

the park, where they met the Appellant. Although the circumstances of his non-attendance were in dispute at trial, in the event V did not come to the park; nor later, when it was agreed that W could go to the Appellant's house, did V go there either.

14. The Appellant lived with his mother. Following telephone conversations between Mrs W on the one hand and W, the Appellant and his mother on the other, it was agreed that W could stay the night there. It is uncontroversial that the Appellant and W, both naked, had a bath together that evening, and the Appellant washed W's penis and bottom using his hand and soap; and that the Appellant and W shared a bedroom that night.

15. On his return home, W told his mother that, whilst in the bath, the Appellant had touched his penis and bottom, lifting up his private parts, and cleaning both. The Appellant had asked W to wash him, but he had refused. In the bedroom, the Appellant had told him to take his clothes off, which he did briefly before putting them back on. He had got into the bed with the Appellant, briefly, before sleeping on the floor.

16. His mother reported this to the police. The Appellant was arrested and interviewed. An Achieving Best Evidence ("ABE") interview was conducted with W in which, without prompting, he said he was worried about the Appellant coming back and "putting his big willy in my bum". On 7 July 2003, a statement was also taken from Mrs W, in which she described how W had told her that the Appellant had "sucked his willy", an allegation not made to the police by W himself either then or later.

17. On 18 August 2003, the Appellant was charged with indecent assault on a male, and bailed. However, proceedings were discontinued on 25 November 2003. Many of the documents having been destroyed, by 2019, the reasons for the discontinuance could not be established; but the police had kept some records, including a transcript of both W's ABE interview (although not the recordings themselves) and Mrs W's statement of 7 July 2003. The retention of those meant that, when the police were investigating the allegations made by Y and Z in 2018 (to which we shall return), they linked the matters and re-contacted W who gave a further ABE interview in January 2019. In that, he generally reiterated the version of events he had given in 2003. He alleged that, when washing him in the bath, the Appellant had "molested" him. He also alleged that, in the bedroom, the Appellant had tried to pull down his boxer shorts and had attempted to touch him.

18. No statement was taken from V in 2003; but he was ABE interviewed in 2019. In that interview, he said:

    i) He remembered one occasion in 2003 when the Appellant was in bed with him, when he held him very closely and touched him "in a strange way"; but V could not recall the circumstances in which they were in bed together nor could he recall where the Appellant had touched him.

    ii) V recalled staying at W's house, and "he [i.e. W] had a weird relationship for a child towards sex". He would watch pornography, and he wanted to kiss his friends. He wanted to play games when they stripped, and they would cuddle and suck each other's penis. At school, he would go to the toilets with his friends, and they would kiss and give each other "blowjobs".

19. As a result of the allegations made by W, in 2019, the Appellant was charged in respect of what allegedly happened in the bath (count 7 indecent assault), and of what had happened in the bedroom (count 8 attempted indecent assault). The Appellant accepted that he had washed W's penis and bottom, but only for the sake of good hygiene and the touching was not sexual. He denied that anything untoward had happened in the bedroom, and in particular denied trying to pull down W's pants.

20. The second episode occurred in 2016, when the Appellant was 36 years old. He was employed by the mother of a 7 year old boy, X. The Appellant had met the mother, Mrs X, for the first time on 15 September 2016, when she informally interviewed him for the position of nanny. He got the job. His first day was 19 September 2016 when Mrs X and the Appellant met X from school and he went home with them. Mrs X went out for the evening, and left X in charge of the child, under the supervision of the woman who had formerly held the nanny position. It was that woman's evidence that she told the Appellant that X could bath himself; and Mrs X's evidence was that she had told him not to bath X because he could bath himself. The Appellant denied he was told that.

21. X went abroad for two nights that week, and for three nights the following week, leaving the Appellant in charge of X. On her return from the second visit, X told her that the Appellant "gave good massages" and, whilst X was naked, had massaged his (the child's) legs, back, bottom and penis. He said that the Appellant had also washed his penis and bottom when he had a bath.

22. Mrs X reported that to the police, and X was ABE interviewed when he essentially repeated his version of what had happened. The Appellant accepted that he had washed X's penis and bottom, but (he said) only for the sake of good hygiene and he denied having been told not to wash him. He accepted that he had massaged the boy, but denied that the boy was naked when he did so and denied massaging his penis or testicles.

23. The Appellant was charged with five of counts of sexual assault on X between 27 and 30 September 2016, and was tried at Southwark Crown Court. During the course of the trial, the defence made an application to allow in evidence of (and question Mrs X about) earlier inappropriate touching of X by another man – apparently the boyfriend of his nanny – when X was 3 years old. The judge allowed that application.

24. At the end of the trial, on 13 June 2018, the Appellant was acquitted on all counts.

25. The third episode chronologically overlaps with the second to an extent. In the summer of 2017, the Appellant met the mother of four children, Mrs YZ. The two older children were girls. The younger two, Y (aged 7) and Z (aged 6), were boys. The Appellant did not visit their family home until December 2017. However, in the summer of 2018, the Appellant had a number of outings with the children. After being acquitted of the offences against X in June 2018, he used to take the children swimming. During that summer, he and the family became closer. He helped look after the children, including bathing them at the request of Mrs YZ. There were times when he was in sole charge of some or all of the children. Mrs YZ lived with her children in a modestly sized flat, with two bedrooms; but they had a tent in the garden, in which the Appellant sometimes stayed.

26. On 25 August 2018, the Appellant and the family went camping on Box Hill, in two tents. Mrs YZ slept in a tent with the girls. The Appellant slept in the other tent with Y and Z.

27. In September 2018, the Appellant and Mrs YZ temporarily fell out, but contact soon resumed. On 29 September, the Appellant took Z to a Hamleys as a birthday treat. When they returned to the house, no one was there; and the Appellant bathed Z before Mrs YZ and the other children returned. That night, the Appellant and Z slept in the tent in the garden. On 30 September, they all attended Z's birthday party, which was in the form of a picnic in the park.

28. On 6 October 2018, the Appellant and Mrs YZ argued again. The reason for this falling out was in dispute. However, in the early hours of 11 October 2018, Mrs YZ submitted an online complaint to the police about the Appellant, in which she alleged that he was blackmailing and harassing her. He had accused her of being mentally unstable, and had said that, if she did not go for psychotherapy, he would report her to social services with a view to having the children taken away from her. The Appellant denied this: he said he did think that Mrs YZ urgently needed help, but he would not have done anything to have had the children removed from their mother.

29. Later that day, Mrs YZ spoke to both the social services department and the children's school. That evening, she told the children they should not speak to the Appellant anymore. During that conversation, she said that Z told her that the Appellant had "touched his private", and Y went on to say that he had "tried to touch" him as well. Mrs YZ went online and made a further report to the police in respect of these child sexual abuse allegations.

30. Both boys were ABE interviewed. Z said that the Appellant had touched his privates in the tent a few times (reflected in counts 1 and 2 sexual assault on the eventual indictment, as with other pairs of counts, the first count being specific (in this case, touching on his birthday) and the second specimen for touching in those circumstances on at least two other occasions). The Appellant had put his hand through the gaps in his pyjamas, under which he was wearing pants. Z said that, when the Appellant had washed him, he had washed his privates (counts 1(a) and 2(a) sexual assault), and on two occasions he had put his finger into Z's anus (counts 3 and 4 sexual assault by penetration, each being a specific count). The first occasion was just before his birthday (when Y was also present), and the second was on his birthday (when the Appellant and Z were alone).

31. Y said the Appellant had pulled his trousers down and touched his private in his underpants once when they were in the tent (count 5 sexual assault). He said the Appellant had shown them his penis when they had been in the tent. He said the Appellant had bathed him between two and four times, and, with a soaped hand, he "goes round the bum and private" (counts 5(a) and 6).

32. The Appellant accepted that he had washed the penis and bottom of each boy when bathing them, but only because they had poor hygiene and needed it; and they could not wash themselves adequately. He denied that the touching was sexual; and he denied ever putting his finger into Z's anus, touching or attempting to touch the penis of either in the tent, and showing the children his penis.

33. As we have described, the Appellant was found guilty of each of those 11 counts. He was found not guilty on a further count of making an indecent photograph of a child.

The Background Applications

34. Immediately before and during the trial there were a number of applications, those of significance to this appeal being as follows.

35. First, before the trial commenced, it was submitted on behalf of the Appellant that the court should stay the counts relating to W as an abuse of process, because a fair trial of those counts was impossible as significant material such as the ABE interview recordings, the Appellant's interview under caution, the custody record and any forensic evidence had been lost and the reason for the discontinuance in 2003 could not now be ascertained. Alternatively, it was submitted that the 2003 charges involving W should be severed from the 2018 charges involving Y and Z. Judge Kent refused both applications. In this appeal, the Appellant makes no complaint about that ruling.

36. Second, the prosecution applied to have evidence from the 2018 trial of the counts involving X to be admitted as bad character evidence, namely X's ABE interview, a transcript of his cross-examination and edited transcripts of Mrs X and other witnesses. Following a ruling by the judge, the evidence from the 2018 trial was adduced in the 2019 trial in agreed form. As we have already described, the evidence of Mrs X at that earlier trial included reference to X, when he was 3 years old, having been the subject of inappropriate sexual touching by another man; but that was not included in the agreed evidence. We shall return to that evidence, which was the subject of a separate (the second) section 41 application, shortly (see paragraphs 54-61 below).

37. Third, the prosecution also applied to have the part of V's 2019 ABE interview that referred to the Appellant touching him admitted as bad character evidence. It was apparently the initial intention of the Crown to have the whole of his ABE interview adduced, including that part which concerned the sexualised behaviour on the part of W. However, during the course of the trial, the prosecution indicated that it wished to introduce the bad character evidence, but not V's evidence about W. The defence did not agree. That led to two applications. First, the prosecution applied to adduce W's evidence of having been in bed with the Appellant as bad character evidence. The judge refused that application. Second, the defence applied under section 41 to adduce V's evidence of W's sexualised behaviour in 2003 (the first section 41 application), which we deal with below (see paragraphs 41-53 below).

The Section 41 Applications: Introduction

38. The two applications at the heart of this appeal were those made on behalf of the Appellant under section 41 of the Youth Justice and Criminal Evidence Act 1999, to which we have just referred.

39. Under the heading, "Restriction on evidence or questions about complainant's sexual history", section 41 provides:

"(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—

(a) no evidence may be adduced, and

(b) no question may be asked in cross-examination,

by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—

(a) that subsection (3) or (5) applies, and

(b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

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

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

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

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

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

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

that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or

asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subsection applies if the evidence or question—

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

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

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

(7) Where this section applies in relation to a trial by virtue of the fact that one or more of a number of persons charged in the proceedings is or are charged with a sexual offence—

(a) it shall cease to apply in relation to the trial if the prosecutor decides not to proceed with the case against that person or those persons in respect of that charge; but

(b) it shall not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge.

(8) Nothing in this section authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section."

40. At trial, each of the two section 41 applications made by the defence was refused. The only ground of appeal against conviction is that the judge erred in refusing them and, as a result, the convictions are unsafe.

The First Section 41 Application

41. Once the prosecution had made clear that it did not intend to adduce all of V's ABE interview but only that part which went to bad character (see paragraph 37 above), the defence applied for the V's ABE evidence of W's sexualised behaviour when aged 6 and prior to any involvement of the Appellant. They also applied to ask W about sexualised behaviour with V and another boy, and about viewing pornography, before his 2003 complaints against the Appellant.

42. The application was made under the section 41(3)(a) gateway, i.e. it was submitted that it related to a relevant issue in the case that was not an issue of consent, namely whether the detail of W's account came from sexual activity on the part of the

Appellant or from some other sexual activity which provided an explanation for his knowledge of such activity. That was a specific example of an issue falling within section 41(3)(a) given by Lord Hope of Craighead in A (No 2) [2001] UKHL 25; [2002] AC 45; [2001] 2 Cr App R 21 at [79(c)] which, he said, might be particularly pertinent in the case of young complainants.

43. It was said by Mr Clark that such evidence would be informative as to why W might falsely attribute sexual activity – and, in particular, to his mother falsely attribute oral sexual activity – to the Appellant, as the defence contended he had done. Without hearing this evidence of sexual activity with his peers when aged 6, the jury might assume that his evidence could only reflect sexual experience at the hands of the Appellant, because they might suppose that a 6 year old would be insufficiently familiar with the subject matter of his complaints to be able to invent them. It was submitted that, in pressing for this evidence to be adduced, the defence were not seeking to impugn W's credibility; and, in respect of section 41(2)(b), it was submitted that the refusal of leave to adduce the evidence would render any conclusion of the jury on that issue – and, hence, any adverse verdict – unsafe.

44. Judge Kent refused the application. Later, in a patently careful written ruling handed down on 2 April 2019, she gave her reasons for so doing.

45. First, she considered whether the allegations made by W did demonstrate any unexpected pre-knowledge of sexual behaviour, which was the premise upon which the application was made. She said:

> "1.28 I have considered the allegations carefully. There is no dispute that [W] and [the Appellant] bathed together, and that [W] stayed the night with [the Appellant] in his room in his house. The sexual behaviour which the defence submit [W] demonstrated knowledge of can be divided into 4 topics.
>
> > (1) [W]'s mother [Mrs W] said that [W] complained to her that [the Appellant] sucked his penis. However, [W] did not and has never made an allegation to police that [the Appellant] sucked his penis. This is not the subject of any count on the indictment. The defence agreed to admit this evidence to demonstrate inconsistency. The decision to admit this evidence was not dependent on the admission of [V]'s evidence. I am not satisfied that [Mrs W's] evidence of a complaint that was not made by [W] to police demonstrates that [W] had unexpected knowledge of sexual behaviour such that it is analogous to the example given by Lord Hope.
> >
> > (2) (Count 7) [W] alleges that he and [the Appellant] had a bath together when they were both naked. He alleged that [the Appellant] lifted up his private parts, cleaned his willy and his bottom. As an adult [W] alleged that in doing so [the Appellant] molested him. The behaviour alleged in this count is not in dispute. [The Appellant] accepts bathing together naked and touching

> [W] while bathing him including his genitals and bottom but denied that the touching was sexual. Given that the behaviour alleged is not in dispute although the motivation/intention is, I am not satisfied that this is evidence of a complaint by [W] that demonstrates that [W] had unexpected knowledge of sexual behaviour such that it is analogous to the example given by Lord Hope.
>
> (3) (Count 8) [W] alleged that in the bedroom [the Appellant] told him to take off his clothes. [W] took off his clothes and put them back on. [W] got into the bed briefly but got out of the bed quickly. He alleged that [the Appellant] touched his willy quickly. In the 2019 ABE [W] alleged that [the Appellant] tried to pull down his boxers and attempted to touch him. [the Appellant] avers that after the bath, he found some nightclothes for [W] and made up a bed for him on the floor next to his own bed. [W] kept getting in and out of his bed and getting into the [the Appellant]'s bed. [The Appellant] did not attempt to take down [W] shorts or try to touch his penis in the bedroom. Although the behaviour (trying to pull down his boxers and attempting to touch him) is in dispute, this behaviour is not so exceptional that a 6-year-old boy would not be expected to know about it. I am not satisfied that this is evidence of a complaint by [W] that demonstrates that [W] had unexpected knowledge of sexual behaviour such that it is analogous to the example given by Lord Hope.
>
> (4) In the ABE [W] told police that he was a bit scared that if [the Appellant] got older he might "put his big willy in my bum and it will hurt". It is clear that [W] did not allege that [the Appellant] did this to him. I am not satisfied that this is evidence of a complaint by [W] that demonstrates that [W] had unexpected knowledge of sexual behaviour such that it is analogous to the example given by Lord Hope.
>
> 1.29 In all the circumstances I am not satisfied that [V]'s evidence or the proposed section 41 questions relate to a relevant issue in the case or that a refusal to give leave might have the result of rendering unsafe a conclusion of the jury on any relevant issue in the case."

46. In any event:

i) On the evidence as it then appeared to be, the judge was not satisfied that the sexual behaviour to which V had referred pre-dated the alleged conduct by the Appellant.

ii) The judge considered it was reasonable to assume that the main purpose for which this evidence would be adduced and questions asked was to establish or elicit material to impugn W's credibility as a witness, and so could not regarded as relating to a relevant issue in the case by virtue of section 41(4).

47. On 2 April 2019, after the judge's ruling but before she had handed down her reasons, and after W had given his evidence, Mr Clark renewed the section 41 application on the basis that W had since given evidence inconsistent with the proposition that his sexualised behaviour as described by V had taken place before the alleged offences. The judge refused that renewed application, essentially on the basis that that evidence was not material because it did not affect her analysis of the sexual behaviour as set out above.

48. As his first ground of appeal, and essentially relying upon his arguments before Judge Kent, Mr Clark submits that the judge was wrong to refuse this section 41 application. He submits that the fact that, for a boy of his age, W had had a remarkably heightened sexual fascination and previous sexual activity (including oral sexual activity) was pertinent to his state of mind when making the allegations against the Appellant. No child other than W had suggested oral sexual abuse by the Appellant. Had the jury been given the opportunity of understanding the child's graphic familiarity with such activity, they may have drawn a different conclusion as to what had or might have happened; and their verdicts are consequently unsafe.

49. However, we are unpersuaded: we consider that the judge's analysis of the Appellant's behaviour as W alleged it to be to be was careful and unimpeachable.

50. The only counts in which W was the complainant were counts 7 and 8. In respect of count 7, the behaviour in the bathroom was not in dispute – the Appellant was naked in the bath with W, and washed his penis and bottom – the issue being whether such touching was sexual. For count 8, the alleged behaviour was that the Appellant tried to pull down W's boxer shorts and touch him. In our view, in each case, the judge was not only entitled but right to conclude that the behaviour as described by W was not such as to demonstrate any unexpected knowledge of such behaviour. In respect of Mrs W's evidence that W had told her that the Appellant had sucked his penis, and W saying in his ABE interview that he was scared that the Appellant might come back and "put his big willy in my bum", W did not allege that the Appellant had either sucked his penis or penetrated his anus, so it could not be said that any prior sexual experience had borne upon his allegations against the Appellant to make them less credible or reliable.

51. Consequently, in our view, the judge clearly did not err in concluding that V's evidence and/or the questions that Mr Clark wished to put to W about his prior sexual experience did not relate to any issue in the case, and in particular did not relate to the issue of whether the detail of W's account came from sexual activity on the part of the Appellant or from some other sexual activity which provides an explanation for his knowledge of such activity. Without suggesting that the judge's alternative reasons for refusing the application did not have force, the application was properly refused because it failed to meet the gateway criteria.

52. In respect of the renewed application, in our view, having correctly determined the application when first made, the judge did not arguably err in curtly rejecting it

second time round. Although it may well have been that, by then, there was evidence that any sexual behaviour in which W had experimented with his peers was prior to the Appellant's behaviour towards him, the rejection of the initial application of the basis that it was after was only an alternative reason for the rejection of the application. A change in that evidence was therefore immaterial to the judge's initial conclusion that the application should be refused.

53. For those reasons, we do not consider the judge's determination of the first section 41 application was wrong, or undermines in any way the safety of the verdicts.

The Second Section 41 Application

54. A second section 41 application by the defence concerned the evidence of X.

55. As we have described, evidence from the 2018 trial (including X's own ABE interview and cross-examination, and extracts from Mrs X's evidence) was adduced in the 2019 trial in agreed form. The evidence covered by this section 41 application was limited to evidence given by Mrs X in cross-examination by defence counsel at pages 56B-57E and 73A-74B (for some reason given as pages 54E-55F and 70D-71D in the judge's ruling) of the transcript of the second day of the 2018 trial, which concerned the sexual abuse of X by another man when he was three years old which we have already briefly described. Mr Clark also wished to cross-examine Mrs X about X telling her about this prior episode. The thrust of the defence submission was that this previous sexual abuse of X was relevant because it caused or may have caused Mrs X to have had greater concern that X had been the subject of sexual abuse by the Appellant and therefore she may have suggested to X that he had been abused by the Appellant or otherwise asked him leading questions about what had happened, rendering X's allegations unreliable and any adverse verdicts in the 2019 trial based upon those allegations unsafe. Mr Clark submitted that the gateway was again section 41(3)(a), the relevant issues between the parties in the trial being, as they were in the 2018 trial, (i) whether the Appellant's touching of X's penis and bottom when bathing him was sexual and (ii) whether the Appellant had massaged X when he (X) was naked and whether he had massaged his penis and testicles. As we have indicated, this evidence had been admitted in the 2018 trial.

56. Judge Kent again refused the application. She set out her reasons in a written ruling handed down on 5 April 2019. Speaking of the evidence and proposed questions, she said:

> "1.31 In order to assess their relevance to the issues in dispute I have considered the questions and answers of [Mrs X] in the Southwark case [i.e. the 2018 trial] on the issue of previous sexual abuse carefully.
>
> 1.32 I am not satisfied that the evidence that [X] had been sexually abused in the past relates to a relevant issue in the case or that a refusal to give leave might have the result of rendering unsafe a conclusion of the jury on any relevant issue in the case.

1.33 While it is logical that the fact that [X] was sexually abused in the past may mean that [Mrs X] had a heightened anxiety or awareness of the risk of sexual abuse, the fact that [Mrs X] had a heightened anxiety or awareness does not in itself make it more likely that she would have asked [X] leading questions or suggested answers to him.

1.34 In any event there is nothing [X]'s description of the physical activity surrounding touching his penis and bottom in the bath that [the Appellant] disputes. As far as this part of the allegation is concerned it is not clear what aspect of that [Mrs X] is alleged to have led or suggested to [X].

1.35 The second part of the allegation relates to the massaging. In the transcript page 71D [defence counsel] asked [Mrs X] whether she asked [X] a leading question "did Mr Philo-Steel touch your willy, touch your penis"? [Mrs X] denied this.

1.36 I am satisfied that the fact that [X] was the victim of a previous sexual assault does not make it more likely that his mother asked leading question or suggested answers to him. I am satisfied that the questions asked of [Mrs X] that suggest that she may have been angry when she heard [the Appellant] had bathed [X] and massaged him, that she may have jumped to conclusions or asked leading questions can all be admitted without reference to the previous sexual assault. I am satisfied that the previous sexual assault is not relevant to the issue whether [Mrs X] asked leading questions or suggested answers to [X].

1.37 For all these reasons I am not satisfied that the evidence of previous sexual abuse is relevant to the issues in the case or to the defendant's defence. It is therefore not admissible under section 41(3)(a). If I am wrong, and [X] is not a complainant in this trial within the meaning of section 41, then I am satisfied that this evidence is not admissible under the normal rules of evidence because I am satisfied it is not relevant to the issues in the case for the same reasons.

1.38 In any event, I have considered the section 41 questions and answers that are disclosed by the transcript. Understandably there was a limited description of the sexual abuse that [X] did suffer and little reference to the alleged perpetrator. However, as a result there is a real risk that the jury will be misled into thinking that [X]'s evidence against [the Appellant] are undermined by his previous experience of sexual abuse. I am satisfied that if introduced, this evidence will have the effect of impugning the credibility of [X]'s evidence contrary to section 41(4).

> 1.39 For all the reasons set out above this application is refused."

57. Mr Clark submitted that the judge was wrong to refuse the application. Had the application been allowed, it would not have required any intrusive questioning of X or any of the complainants referred to in the indictment: the questions would have been put to Mrs X. However, without evidence of this prior abuse, the jury could not properly consider X's ABE interview. What he said and how he expressed it, and what he did not say – and, most importantly, the way in which Mrs X dealt with obtaining X's version of events with the Appellant – could only be properly assessed with the advantage of knowing this important background.

58. But, again, we are unpersuaded. The main thrust of Mr Clark's submissions before us, as before Judge Kent, was that the previous abuse was relevant because it caused or may have caused Mrs X to have a greater concern about him being abused again and that may have affected the way in which she encouraged him to speak about it. She may have been more inclined to ask him leading questions.

59. However, Mrs X appears to have been very willing to have left X with the Appellant in the circumstances we have described. In respect of the Appellant's behaviour when bathing X, X did not describe anything different from that which the Appellant accepted – the issue resulted from the Appellant's denial of any sexual motivation or intention. It is not clear what leading questions it is suggested Mrs X may have asked in relation to that. In respect of the massage, in the 2018 trial Mrs X expressly denied asking X any leading questions as to whether the Appellant had touched X's "willy". Judge Kent was satisfied that questions that Mr Clark wished to put to Mrs X about whether she became angry when she heard that the Appellant had bathed and massaged X, so that she may have jumped to conclusions or asked leading questions, could be put without reference to the previous abuse; and, indeed, that previous abuse was not relevant to whether she had asked leading questions or suggested answers to X. It did not make it more or less likely. The evidence of the previous sexual abuse was therefore not relevant to any issue between the parties.

60. The application by the defence was made under section 41, and Judge Kent considered that, although not one of the complainants in the indictment, in the trial before her, X was a "complainant" for the purposes of section 41. However, as the judge said, even if section 41 did not apply (because X was not a complainant for the relevant purposes), the evidence would not be admissible under the normal rules of evidence, because it was not relevant to any issue.

61. For those reasons, we do not consider that Judge Kent erred in refusing this second section 41 application, essentially for the reasons she gave, nor do we consider that her determination of that application in any way undermines the safety of the verdicts.

Conviction: Conclusion

62. For those reasons, we dismiss the appeal against conviction.

Sentence

63. As we have indicated, the application for leave to appeal against sentence having been refused by the single judge, and renewed but without representation, we have considered the application afresh on the papers as a non-counsel application.

64. The judge sentenced the Appellant on 25 July 2019. She had the benefit of two reports. First, there was pre-sentence report of Claire McHugh dated 10 July 2019. Using an assessment tool, she assessed the risk of the Appellant committing further offences – and of causing serious psychological harm to children by committing such offences – as medium. In her view, his failure to take responsibility for and lack of insight into his actions suggested that the risk of reoffending remained. Had the abuse not been detected, the potential escalation was great; the offences were repeated and, to that extent at least, were premeditated. Ms McHugh accepted that, although this was ultimately a matter for the court, in all the circumstances, the criteria for dangerousness may be satisfied. Second, there was a report of a consultant forensic psychiatrist, Dr Rachel Daly, dated 12 June 2019. Dr Daly considered that the Appellant had no mental health problems, and that he posed a high risk of reoffending. Although he continued to deny the offences, he had expressed willingness to participate in sex offender programmes.

65. In sentencing the Appellant, Judge Kent found him to be dangerous within the meaning of Chapter 5 of the Criminal Justice Act 2003, i.e. she found that there was a significant risk to members of the public (i.e. children) of serious harm occasioned by the commission by him of further such offences; and, in respect of each of the most serious offences (counts 3 and 4 sexual assault on Z by penetration), she imposed concurrent extended sentences of 14 years comprising an custodial term of 12 years and an extended licence period of 2 years, with concurrent sentences of 8 years for each of the other offences for which he was convicted.

66. There are two grounds of appeal.

67. As the first ground, it is submitted that the judge was wrong to find that the Appellant was dangerous. First, it is submitted that the judge failed to take properly into account the positive aspects of Dr Daly's report: she said that the Appellant's physical and mental health were good and, although denying guilt and responsibility for the offences, he was willing to engage with sex offender programmes. Second, Ms McHugh considered his risk of reoffending to be only medium, and that "it may be… the experience of arrest and prosecution has been a salutary lesson to [him]"; and that assessment was apparently on the false basis that he had engaged with oral sex with W. Third, the risk posed by the Appellant could be mitigated by the mandatory statutory provisions for barring, vetting, notification and the protective measures that follow from him being an "offender of particular concern" under section 236A of the 2003 Act; and the discretionary imposition of a Sexual Harm Prevention Order (which, in the event, the judge declined to make). Looking at all the circumstances, the judge was simply wrong to make a dangerousness finding. It was that finding which opened up the availability of an extended sentence.

68. Second, whilst it is accepted that these offences were rightly categorised as of high culpability (i.e. category A), the judge was wrong to proceed on the basis that harm was higher than the base category 3 because the children were particularly vulnerable due to their personal circumstances. The judge took into particular account the vulnerability of the children's mothers, rather than the children themselves. In the

Sentencing Council Guideline for sexual assault by penetration, category 3A has a starting point of 6 years; and it is submitted that the judge was wrong to increase that starting point to 8 years. A discrete point is taken on enhancing the sentences imposed in respect of the sexual assaults on W on the basis that he suffered severe psychological harm as a result of the offending. In any event, it is submitted that the aggregate custodial sentence of 12 years was manifestly excessive.

69. We consider that there is no force in either of these grounds.

70. The assessment of dangerousness was ultimately a matter for Judge Kent, who had the substantial benefit of being the trial judge. She clearly took into account all aspects of the two reports, including the passages upon which the Appellant relies. Insofar as Ms McHugh was under the impression that the Appellant had engaged in oral sex with a child, that was not material to the judge's overall assessment of risk. The judge knew the correct basis for the assessment, and could have and would have read down Ms McHugh's assessment of risk to any necessary extent accordingly.

71. However, the judge's assessment was not based solely upon the reports. In careful sentencing observations, at pages 3F-5E, she set out a number of factors which she had taken into account. We need not refer to them all here, but they included the fact that it was clear that the Appellant was preoccupied with children; he claimed to have lots of experience looking after children and advertised his services as a nanny on the internet; his arrest, trial and acquittal of the serious allegations against X did not cause him to reflect on his behaviour and indeed, as soon as he was free of his bail conditions, he proceeded immediately to engage in similar behaviour with Y and Z; the Appellant has neither acknowledged wrongdoing nor expressed remorse; he has no insight into his wrongdoing; the offences against W and then Y and Z were 15 years apart and the method in which he committed the offences was very similar; and counts 3 and 4 (which included penetration) demonstrated escalation.

72. In our view, Judge Kent was not arguably wrong to assess that, even given the length of the custodial term and the protective measures that might be put in place, the Appellant presented a significant risk to children of serious harm by the commission of further offences, i.e. that he was dangerous; and that that risk could only be addressed by an extended sentence. There was an abundance of evidence in support of that conclusion. Dr Daly regarded the risk he poses as high; but, even if somewhat lower than that, on any view, the Appellant poses a significant risk of serious harm to children. The judge did not arguably err in concluding that that risk was unacceptable and would be present for more than the appropriate term of custody.

73. The first ground is not arguable.

74. With regard to the second ground, we do not consider that the judge's starting point of 8 years for the assaults by penetration was too high. The judge considered that, so far as harm was concerned, this was a category 3 case but with the category 2 feature of the particular vulnerability of the children and the vulnerability of their respective mothers (the effect on their mothers being indirectly part of their personal circumstances). Category 3A, into which the Appellant submits these assaults by penetration fall, has a starting point of 6 years with a range of 4-9 years. In our view, the judge was able to conclude that, whilst the vulnerability of Z was not such as to place the case clearly in category 2A (starting point 11 years with a range of 7-15

years), nevertheless it was a material factor in assessing the appropriate starting point. It is always open to a sentencing judge to increase from a category starting point because factors from a higher category are present. Further, as Morris J emphasised in refusing leave to appeal on the papers, there were multiple culpability A factors, providing further justification for an upward adjustment of the starting point.

75. In our view, it is simply not arguable that the judge was wrong to take a starting point or provisional sentence for the sexual assault on Z by penetration of 8 years. There were of course two such offences. No distinct objection appears to be taken to the increase from 8 to 12 years to take account of aggravating factors and the fact that the Appellant sexually assaulted two other boys (W and Y) multiple times. In any event, in our view, no proper objection could be taken.

76. As regards the sentences on counts 7 and 8 in respect of W, Judge Kent had seen W and his mother give evidence. On the basis of the evidence, she was in our view entitled to reach the conclusion of that W had suffered severe psychological harm as a result of this offending, and that this was therefore high harm as well as serious culpability offending. In any event, the sentences in respect of these counts were made concurrent to the extended sentence. We are quite sure that 12 years (plus an additional 2 years on licence) as an aggregate sentence – and it is the assessment of that with which we are primarily concerned – was not manifestly excessive or otherwise wrong.

77. For those reasons, we do not consider any ground of appeal against sentence to be arguable. Therefore, we not only dismiss the Appellant's appeal against conviction, but we refuse his renewed application for leave to appeal against sentence.