Neutral Citation Number: [2021] EWCA Crim 927

Case No: 202100743 B2, 202100744 & 202100746

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM The Crown Court at Sheffield
Judge Richardson Q.C.
T20197130

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2021

Before:

VICE-PRESIDENT COURT OF APPEAL (CRIMINAL DIVISION)
(LORD JUSTICE FULFORD)
MR JUSTICE GOSS
and
MRS JUSTICE MOULDER DBE

- -

Between:

Regina	**Applicant**
- and -	
Nazir Ahmed	**Respondent**
Mohammed Tariq	
Mohammed Farouq	

(APPLICATION BY PROSECUTION FOR LEAVE TO APPEAL UNDER SECTION 58 CRIMINAL JUSTICE ACT 2003)

- -
- -

Mr Tom Little Q.C. (instructed by the **CPS Special Crime Division**) for the Applicant
Mr Imran Khan Q.C. and Ms Chloe Gardner (assigned by the **Registrar of Criminal Appeals**) for the Respondent **Nazir Ahmed**
Mr Icah Peart Q.C. (assigned by the **Registrar of Criminal Appeals**) for the Respondent **Mohammed Tariq**
Ms Katy Thorne Q.C. (instructed by **assigned by the Registrar of Criminal Appeals**) for the Respondent **Mohmmed Farouq**

Hearing date: 6 May 2021

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Approved Judgment

Lord Justice Fulford VP:

Under the Sexual Offences (Amendment) Act 1992 no matter relating to the two alleged victims shall during their lifetimes be included in any publication if it is likely to lead members of the public to identify either of them as the victim of the present alleged offences. This prohibition applies unless waived or lifted in accordance with the Act.

Introduction

1. On 8 March 2021, Judge Richardson Q.C., the Recorder of Sheffield, ordered the stay of an indictment against the three respondents containing 10 counts charged under the Sexual Offences Act 1956. These alleged historic sexual offences against two complainants.

2. On 9 March 2021, following an overnight adjournment, the applicant gave notice that the prosecution intended to appeal against the ruling, and the usual undertakings in these circumstances were provided.

3. The accused are three brothers, and the allegations relate to events in the late 1960s/early 1970s. The police investigation began on 17 May 2016 following a telephone call from "F" in which she described having been sexually abused by Nazir Ahmed ("NA") when aged 5. In due course, "M" reported sexual abuse by NA, Mohammed Tariq ("MT") and Mohammed Farouq ("MF"). This included the allegation that NA had penetrated his anus with his penis.

4. The key events in the proceedings are as follows: on 26 February 2019 the accused were charged; their first appearance in the Crown Court was on 17 April 2019; an application to dismiss counts 3 and 4 (accusations against NA of attempted rape against F) was refused on 14 June 2019 (we interpolate to note this was the only application to dismiss); the trial was vacated on 6 January 2020 due to the hospitalisation of leading counsel for NA; the trial then fixed for the summer of 2020 was vacated due to Covid-19; on 15 February 2021 the case was listed for trial (the court having refused a defence application on 4 February 2021, supported by all three accused, to break the fixture on the basis that two counsel had become unavailable due to overrunning trials); on 15 February 2021, the judge dismissed an application to stay the case based solely on "category one" abuse of process, albeit he did not provide a ruling, instead indicating that he would review the situation at the conclusion of the prosecution case; the jury were thereafter discharged on 22 February 2021 (the fifth day of the trial) after they had heard the prosecution's opening speech and the recorded evidence-in-chief of F; and on 8 March 2021 the judge delivered the terminating ruling, as set out above.

5. Before this court, the prosecution seek i) to reverse the order staying the proceedings and ii) a direction for the case to be remitted to the Crown Court to be heard before a different judge. Under section 67 Criminal Justice Act 2003 ("CJA 2003"), the Court of Appeal may not reverse a ruling on an appeal under this part of the Act: "*unless it is satisfied (a) that the ruling was wrong in law; (b) that the ruling involved an error*

of law or principle, or (c) that the ruling was a ruling that it was not reasonable for the judge to have made."

A Preliminary Procedural Issue

The Issue

6. Before we consider the merits of the submissions by the prosecution, a preliminary issue has been raised as to whether the court has jurisdiction to consider this application insofar as it relates to MF and MT. On 12 July 2019 and 14 April 2020 respectively MT and MF were determined by the judge to be unfit to be tried, pursuant to section 4(5) of the Criminal Procedure (Insanity) 1964 ("1964 Act"). As a result, under section 4A 1964 Act, the trial against MF and MT did not proceed (albeit it continued against NA) and instead the jury were asked to decide if they were satisfied that they did the act or made the omission "*charged against* (them) *as the offence*" (see [9] below). As a result of the judge's ruling this process self-evidently was terminated. Section 58 CJA 2003 permits the prosecution to challenge rulings of the Crown Court which bring proceedings in a particular case to an end. One of the limitations in this regard imposed by section 58(1) is that "*(t)his section applies where a judge makes a ruling in relation to a trial on indictment at an applicable time and the ruling relates to one or more offences included in the indictment*". MF and MT argue that section 58(1) CJA 2003 was drafted in deliberately narrow terms. It is contended that MF and MT, following the finding of unfitness, did not face a "*trial on indictment*" and that the appellant consequently has no right of appeal against the ruling in relation to them. MF's plea was vacated on 16 February 2021 and MT was never arraigned. It is highlighted that no conviction or sentence could result from this procedure (in *R v H* [2003] UKHL 1; [2003] 1WLR 411 the House of Lords expressly observed that this procedure was not deemed to involve the determination of a criminal charge (see 16] and [18])); instead, certain orders can be made pursuant to section 5 of the 1964 Act (see [10] below). Sections 15 and 16 of the Criminal Appeal Act 1968 (see [12] below) provide for different rights of appeal in relation to these findings. It is noted that there is no right for a defendant who has been determined to be unfit to appeal in person or to choose his or her own counsel as they are not considered competent to appeal in their own right (*R v H* at [5] and *R v Roberts* [2019] EWCA Crim 1270 at [34] and [38]). Furthermore, if the accused successfully argues that the finding he or she did the act or made the omission is unsafe, the prosecution are unable to apply for a retrial. It is suggested that this procedure is consequently separate and distinct from a trial on indictment and that the trial of the issue for MF and MT simply "*ran alongside*" the trial of NA and it was not part of the "*same process*".

7. MF and MT rely on observations of Rose LJ VP in *R v M, R v Kerr, R v H* [2001] EWCA Crim 2024; [2002] 1 Cr App R 25 to the effect that the provisions relating to Preparatory Hearings, including those governing appeals, did not relate to a 4A 1964 Act procedure, because, as the Vice-President stated, the Criminal Procedure and Investigations Act 1996 ("CPIA") "*applies to trials on indictment for criminal*

offences. Section 4A hearings are not trials on indictment" (see [17]). It is suggested that by analogy no right of appeal exists under section 58 CJA 2003.

The Statutory Provisions

8. It is useful to set out the relevant statutory provisions, save as addressed above.

9. Section 4A 1964 Act provides:

> *"Finding that the accused did the act or made the omission charged against him.*
> (1) This section applies where in accordance with section 4(5) above it is determined by a court that the accused is under a disability.
>
> (2) The trial shall not proceed or further proceed but it shall be determined by a jury—
>
> (a) on the evidence (if any) already given in the trial; and
>
> (b) on such evidence as may be adduced or further adduced by the prosecution, or adduced by a person appointed by the court under this section to put the case for the defence, whether they are satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, that he did the act or made the omission charged against him as the offence.
>
> (3) If as respects that count or any of those counts the jury are satisfied as mentioned in subsection (2) above, they shall make a finding that the accused did the act or made the omission charged against him.
>
> (4) If as respects that count or any of those counts the jury are not so satisfied, they shall return a verdict of acquittal as if on the count in question the trial had proceeded to a conclusion.
>
> (5) Where the question of disability was determined after arraignment of the accused, the determination under subsection (2) is to be made by the jury by whom he was being tried."

10. Section 5 1964 Act establishes:

> *"Powers to deal with persons not guilty by reason of insanity or unfit to plead etc.*
> (1) This section applies where–
>
> […]
>
> (b) findings have been made that the accused is under a disability and that he did the act or made the omission charged against him.

(2) The court shall make in respect of the accused–

(a) a hospital order (with or without a restriction order);

(b) a supervision order; or

(c) an order for his absolute discharge.

(3) Where–

(a) the offence to which the special verdict or the findings relate is an offence the sentence for which is fixed by law, and

(b) the court have power to make a hospital order,
the court shall make a hospital order with a restriction order (whether or not they would have power to make a restriction order apart from this subsection).

[…]"

11. Section 5A (4) 1964 Act sets out:

"(4) Where–
(a) a person is detained in pursuance of a hospital order which the court had power to make by virtue of section 5(1)(b) above, and
(b) the court also made a restriction order, and that order has not ceased to have effect,
the Secretary of State, if satisfied after consultation with [the responsible clinician] that the person can properly be tried, may remit the person for trial, either to the court of trial or to a prison.
On the person's arrival at the court or prison, the hospital order and the restriction order shall cease to have effect."

12. Turning to the Criminal Appeal Act, by sections 15, 16 and 16A:

"15. Right of appeal against finding of disability.

(1) Where there has been a determination under section 4 of the Criminal Procedure (Insanity) Act 1964 of the question of a person's fitness to be tried, and there have been findings that he is under a disability and that he did the act or made the omission charged against him, the person may appeal to the Court of Appeal against either or both of those findings.

(2) An appeal under this section lies only—

(a) with the leave of the Court of Appeal; or

(b) if, within 28 days from the date of the finding that the accused did the act or made the omission charged, the judge of the court of trial grants a certificate that the case is fit for appeal.

16. Disposal of appeal under s. 15.

(1) The Court of Appeal—

(a) shall allow an appeal under section 15 of this Act against a finding if they think that the finding is unsafe; and

(b) shall dismiss such an appeal in any other case.

(3) Where the Court of Appeal allow an appeal under section 15 of this Act against a finding that the appellant is under a disability—

(a) the appellant may be tried accordingly for the offence with which he was charged; and

(b) the Court may, subject to section 25 of the Criminal Justice and Public Order Act 1994 make such orders as appear to them necessary or expedient pending any such trial for his custody, release on bail or continued detention under the Mental Health Act 1983; and Schedule 3 to this Act has effect for applying provisions in Part III of that Act to persons in whose case an order is made by the Court under this subsection.

(4) Where, otherwise than in a case falling within subsection (3) above, the Court of Appeal allow an appeal under section 15 of this Act against a finding that the appellant did the act or made the omission charged against him, the Court shall, in addition to quashing the finding, direct a verdict of acquittal to be recorded (but not a verdict of not guilty by reason of insanity).

16A. Right of appeal against hospital order etc.

(1) A person in whose case the Crown Court–

(a) makes a hospital order or interim hospital order by virtue of section 5 or 5A of the Criminal Procedure (Insanity) Act 1964, or

(b) makes a supervision order under section 5 of that Act,
may appeal to the Court of Appeal against the order.

(2) An appeal under this section lies only–

(a) with the leave of the Court of Appeal; or

(b) if the judge of the court of trial grants a certificate that the case is fit for appeal."

Discussion

13. Addressing, first, some of the discreet arguments advanced skilfully by Ms Thorne Q.C. on behalf of MF and succinctly supported by Mr Peart Q.C. on behalf of MT, although MF and MT do not have a right of appeal from a determination of unfitness in person, they have a route of appeal under section 15 Criminal Appeal Act 1968 against a finding that they are under a disability or did the act/made the omission charged against them. The inability to do so personally is an inevitable consequence of the finding of disability, given, as Davis LJ observed in *R v Roberts* at [34], "[…] *the psychiatrists have concluded and the Crown Court has accepted* […], *the accused's approach is distorted by his mental incapacity such as to render him unfit to participate in the trial process (which is to be taken as extending to an appeal)*". Accordingly, contrary to Ms Thorne's contention, the prosecution – if correct in their submissions – would not be afforded an appellate route which ought to be available personally to the unfit individual.

14. It was highlighted by counsel on behalf of MF and MT that the prosecution has the right to appeal in relation to a terminatory ruling in the context of a "*trial on indictment*" (section 58 (1) CJA 2003). This, it is submitted, needs to be contrasted with the more general wording of section 18(1)(a) Senior Courts Act 1981 which excludes any right of appeal to the Court of Appeal from any judgment of the High Court "*in any criminal cause or matter*" (unless specifically excepted). We consider this comparison to be of no moment, given there would have been no reason for Parliament to have chosen the latter very broad phrase when addressing a right of appeal that only relates to specific rulings by a Crown Court judge. These are markedly different expressions, used in dissimilar circumstances.

15. The submissions founded on the circumstances of preparatory hearings are without substance. The governing statutory provisions are, again, markedly different, as, by way of example, set out in section 29 CPIA:

"*Power to order preparatory hearing.*
(1) Where it appears to a judge of the Crown Court that an indictment reveals a case of such complexity, a case of such seriousness, or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing—

(a) before the time when the jury are sworn, and

(b) for any of the purposes mentioned in subsection (2),

> he may order that such a hearing (in this Part referred to as a preparatory hearing) shall be held.
>
> (1A) A judge of the Crown Court may also order that a preparatory hearing shall be held if an application to which section 45 of the Criminal Justice Act 2003 applies (application for trial without jury) is made.
>
> (1B) An order that a preparatory hearing shall be held must be made by a judge of the Crown Court in every case which (whether or not it falls within subsection (1) or (1A)) is a case in which at least one of the offences charged by the indictment against at least one of the persons charged is a terrorism offence.
>
> (1C) An order that a preparatory hearing shall be held must also be made by a judge of the Crown court in every case which (whether or not it falls within subsection (1) or (1A)) is a case in which–
>
> (a) at least one of the offences charged by the indictment against at least one of the persons charged is an offence carrying a maximum of at least 10 years' imprisonment; and
>
> (b) it appears to the judge that evidence on the indictment reveals that conduct in respect of which that offence is charged had a terrorist connection."
>
> (See also sections 7 – 11 Criminal Justice Act 1987: preparatory hearings in cases of fraud of seriousness or complexity.)

16. Section 58 CJA 2003 applies, therefore, when a judge makes a ruling in relation to a trial on indictment and the decision relates to one or more offences included in the indictment. Section 29 CPIA, in contrast, concerns cases of real complexity, seriousness or length as revealed by the indictment (on which there is to be a trial); cases when there is an application to hold a trial without a jury; and cases when at least one of the offences charged by the indictment against at least one of the persons charged is a terrorism offence, or the indictment reveals a terrorist connection. As Rose LJ stated, this regime established by the CPIA applies to trials on indictment for criminal offences. The present procedure is entirely distinct and it was not, for MF and MT, a trial on indictment.

17. On a plain reading of the section, we agree with Mr Little Q.C. for the Crown that although the section 4A 1964 Act procedure does not involve the jury returning a verdict on the indictment, the jury nonetheless are asked to make a decision "*as respects the count… on which the accused was being tried… that he did the act… charged against him as the offence*"**.** The reference to "*charged against him*" clearly refers to the indictment. Thus, in our judgment, the section 4A procedure is entirely dependent on the existence of the indictment, without which this issue would not have arisen. The jury are asked to decide whether the individual did the act or made the

omission charged in the indictment as the offence (all three defendants had been sent to the Crown Court, and an indictment against them had been preferred under section 2(6) Administration of Justice Act 1933). Put otherwise, take away the indictment and the offences contained therein and the section 4A procedure would not arise.

18. In section 58 CJA 2003 the words used are "*in relation to a trial on indictment*". The language "*in relation to*" is a broad formulation and given its natural meaning can be said to refer to something which relates to or is connected with "*a trial on indictment*". In our judgment, given that broad language, the scope of section 58 CJA 2003 is not dependent on whether the procedure at the time of the ruling (*i.e*. the section 4A hearing) amounts to a "*trial on indictment*". The fact that (by virtue of section 4A(2) 1964 Act) the "*trial*" is no longer proceeding does not take the ruling outside the broad language in section 58 of "*in relation to*" a trial on indictment. For the reasons set out above, in our view the section 4A procedure is in relation to an indictment and the ruling relates to or is connected with a trial on indictment. We conclude, therefore, that the judge made a ruling "*in relation to a trial on indictment*", and which related to one or more offences included in the indictment. As a result, the prosecution has a right to appeal under section 58 CJA 2003.

The Facts

19. Given the Crown has a right of appeal as regards all three respondents, we turn briefly to the relevant facts in the case. As set out above, on 17 May 2016 F telephoned police and reported that she had been sexually abused by her cousin (NA) when she was 5. On 19 May 2016 F participated in an ABE interview in which she described two separate occasions (whilst in bed at night) when NA had pressed his erect penis against her. It appears that this occurred when she was five years of age and staying with her family at NA's family home, following the return of her family from Kashmir. She was unable to recall the address but provided a description of the garden.

20. NA was interviewed on 27 May 2016 and made no comment.

21. On 29 May 2016 M telephoned the police and reported that he had been sexually abused as a child by someone "*very prominent*." On 31 May 2016 F received a LinkedIn "*friend request*" from M, her brother, from whom she had been estranged for 20 years. M indicated, "*I have evidence against that paedophile*" and gave his mobile telephone number. F telephoned M the following day. She recorded the conversation during which M said that he had been abused by NA as well as by MF and MT ("*all three of 'em abused me*").

22. On 6 July 2016 M gave an ABE interview in which he stated that the three defendants used to rub their erect penises in between his legs and buttocks. On some occasions they ejaculated. In addition, NA had penetrated his anus.

23. In interview, the three accused denied the offences. NA and MT suggested the offences could not have occurred given the living and sleeping arrangements at one or both of the relevant properties. MF suggested as regards M's allegations that, "*He's lying. He's got something against my brother and that's why he's doing it, for* (NA)".

The Terminatory Ruling

14. The judge delivered an ex-tempore "*indicative*" ruling on 26 February 2021 in which he stayed the indictment following the late disclosure by the prosecution (see [4] above), which resulted in the collapse of the trial. This was largely duplicated in his reserved ruling of 8 March 2021, to which we now turn. The judge highlighted the following matters:

i) The allegations are "*extremely old*", stemming from the late 1960s and early 1970s, and this was the third attempt at commencing the trial;
ii) If the trial was adjourned, the proceedings could not recommence until, at the earliest, the first months of 2022;
iii) The judge "*harboured grave misgivings about the wisdom of this prosecution*" and he considered it "*far from a strong case*", factors which he suggested he ignored;
iv) The trial process would have enabled a fair trial, notwithstanding matters such as the complaints as to what F had said concerning the allegations, her dislike of NA and her contact with M;
v) There was, "*an overwhelming need for there to be scrupulous attention to detail in relation to disclosure. This is where in my judgment the problem arises in this court in this case*", in that significant disclosure ("*a heap of material*") had occurred after the trial commenced and there had been no adequate explanation as to why this was took place 13 months after the trial had originally been planned to commence;
vi) "*There appears to* (have been) *a massive and fundamental failure to exercise the CPIA disclosure regimen on the part of the prosecution*", which was not only a matter of "*grave concern*" but was "*shameful*", "*disgraceful*", a "*calamity*", "*outrageous*", "*comprehensively to be deplored*" and was "*as if an incendiary device had been thrown in our midst*";
vii) The late disclosure had "*exponentially expanded*" the subject of cross-examination of the witnesses of fact and the officers who investigated the case;
viii) The prosecution were not being punished for the late disclosure;
ix) The judge was "*gravely disquieted by what* (he had) *read in relation to the alleged contamination which may or may not be able to be covered by future cross-examination*".
x) The judge was "*extremely concerned by the alleged failure of the police to follow up reasonable lines of enquiry*";

xi) "*A fair trial is possible in an antique case but when there is an antique case the court must always ensure that fairness is at the core of all decision making. This particularly applies to disclosure"*;

xii) As a result of the Covid-19 pandemic, the Crown Courts are under immense pressure of work and cases have to be carefully managed, with little room for manoeuvre; timetables need to be kept meaning the proceedings could not recommence until, at the earliest, the first months of 2022; and

xiii) It was "*completely unacceptable*" for the prosecution to ask for "*one more bite of the cherry*" (*viz.* an adjournment), given that this "*antique case*" had "*proceeded at a pace which can only be described as bordering on glacial*"; "*the prosecution are basically asking me to condone the proposition that if they make a mess of things during a trial, a fundamental mess, they should be given an opportunity to put it right and have another go. There will be times when this is permissible. There will be other times, perhaps exceptionally, when it is not*".

23. The judge summarised his conclusions as follows:

> "I am very conscious that the complainants in this case may feel cheated and there is a public demand that justice must be done whereby the guilty are brought to judgment. There is an equally important principle that the administration of justice must not be degraded or brought into disrepute. In this case it is accepted that I have to make a judgment as to whether to proceed has so degraded (sic) the trial process by what has occurred having regard to all the circumstances of the case. I have come to the conclusion that enough is enough and this case passes the threshold where I can intervene. There are a range of factors:
>
> i) This is an antique case.
> ii) It is not in my judgment a strong case. The allegations, although serious, are vague and occurred when M and F were very young.
> iii) The defendants were only a little older in some instances and teenagers in others. It is difficult to say because no one knows precisely when the allegations are supposed to have occurred with any level of precision.
> iv) It is speculative whether all of the counts would have survived a submission of no case to answer.
> v) The court has several levers at its disposal to cope with much of the above. A trial would have been just about fair and satisfactory.
> vi) Two of the defendants are under a disability and cannot make any meaningful defence. They cannot support their brother who faces a conventional trial. It is likely they would have given material evidence in support of him.

vii) This case has not proceeded as it should and it seems to me that certain lines of enquiry have not been pursued by the police as they should until very belatedly and this has fostered other real concerns.

viii) The disclosure regimen in this case is not merely a lamentable failure, as the prosecution accept, but in my judgment it has been a disgrace. It has caused a trial to collapse.

ix) It has not been shown to me, I make clear, that the police have behaved improperly. That cannot be said on what I have seen. I would not even begin to make such an assertion without a vigorous enquiry as to what happened. That cannot be undertaken in a hearing of this kind. Matters have been raised which might cause concern if they should be found to have occurred. I cannot make at present such findings. However, I have every reason to believe the disclosure regimen has been blinkered and executed in an exceptionally poor fashion.

x) It is nothing short of disgraceful to have disclosed material at such a late stage such that an already much delayed trial has had to be aborted. This is an exceptional case. In fact it is so exceptional that I can state I have never taken such a course as this ever before."

[…]

"In this old, and to my mind far from strong, case the self-inflicted damage to the prosecution has so undermined the integrity of the process by causing a much delayed trial to abort is of such seriousness that I must grant a stay. The backdrop which I have sought to describe simply reinforces the necessity for this case to stop. When a calamity of the kind created here by the prosecution has occurred it degrades the whole system of justice and must not be allowed to continue. To give the prosecution after all this time an opportunity to try to put matters right, and there is no guarantee that is possible, would be inimical to the system of justice in this country. Parties are not permitted to keep on having another go."

24. The judge suggested the stay was imposed because it was necessary to protect the integrity of the criminal justice system because of a violation of the process of the court (in this regard the judge accepted the submissions of Mr Little as regards the two categories of abuse of process, see below at [65] *et seq.*) and in the judge's words, "*It is clear the court may intervene to stay proceedings when what has happened so offends the sense of justice of the court and also its sense of propriety in relation to those proceedings that to permit the continuation of the case would lead to the degradation of the administration of justice. To take such course would be very exceptional*."

The Details of the Disclosure

25. Bearing in mind the judge's ruling, it has been necessary to track the course of disclosure in this case. The starting point is NA's defence statement, dated 20 August 2019, in which it was suggested the two alleged victims had fabricated mutually supportive accounts. It is averred that M lied to support F (his sister) because a reconciliation with her was necessary to resolve a difficulty concerning an inheritance from their mother. F's cooperation, previously withheld, was needed for this purpose. Appendix A, attached to the defence statement, included 55 separate disclosure requests. A number of these focussed on particular items of information to which there had been reference in the documentation in the case. These included details of all contact between F and M and the police in relation to the allegation against NA (1 and 39); details of all accounts given to the police by F and M regarding the allegation against NA (2 and 40); details of all communications between F and M, including by way of text messages, all social platforms, MSN and LinkedIn (4); confirmation that the police had read the entirety of M's personal journal in order to establish whether there is anything requiring disclosure (5); "*confirmation that the police have accessed and reviewed all of* F and M's *phones, computers and other electronic devices to establish whether there is any material which requires to be disclosed*" (6 and 42); "*confirmation that the police have accessed and reviewed all of* F and M's *social media platforms to establish whether there is any material which requires to be disclosed*" (7 and 42); "*confirmation that the police have read and reviewed all of* M's *counselling records* […] *to establish whether there is any material which requires to be disclosed*" (8); in the context of an allegation in the defence statement that F had been ill with some sort of infection when she arrived in the UK from Pakistan: "*details of the illness suffered by* F *when she came to the UK* […]" (9); "*confirmation that the police have read and reviewed all of* F and M's *medical records* […]" (10 and 45); there were a series of requests for "*details of all steps taken, actions created and enquiries made by police*" as regards 14 suggested defence witnesses (18 – 31); M's medical records (44); "*details of any disciplinary proceedings (whether completed or not) or other misconduct in relation to police officers involved in this case"* (51); and "*details of any previous convictions and/or misconduct in relation to prosecution witnesses*" (53).

26. These 55 requests were not ignored. They were answered item by item in an undated and unsigned response. We interpolate to note that we strongly deprecate the failure, frequently encountered in paperwork of this kind, to reveal on the face of the document when it was completed, when it was served and the identity of the author. It was indicated that some further material was to be disclosed, some material was to be sought from the police for review to establish whether it was disclosable, some of the requests for further enquiries were not considered to constitute reasonable lines of enquiry and some material was not considered disclosable. In many instances, the prosecution set out the documentation that was relevant to the request, whether it had

been reviewed and the course the Crown proposed to take as regards disclosure. Taken at face value, this was a detailed and informative response.

27. The following particularly notable points are, however, to be highlighted. The prosecution had reviewed M's personal journal and disclosed certain extracts. The police did not consider it a reasonable line of enquiry to review all of F and M's social media platforms, the contents of their telephones, computers and other electronic devices or the social media communications between F and M (in any event M had indicated he did not use social media). Certain counselling notes in relation to F had been served and others had been sought and were to be reviewed on receipt. The police had served an item relating to F's illness when she was five, and otherwise indicated there was no disclosable material. The police had reviewed the entirety of F's and M's medical records and, save for one item, there was nothing further to be disclosed. The police had reviewed the position as regards each of the 14 defence witnesses and, except for a few items, there was nothing additional to be provided.

28. On 4 November 2019 there was a further request for 19 items of disclosure on behalf of NA, in a document entitled "*application for disclosure pursuant to sections 7 and 8 of the Criminal Procedure and Investigations Act 1996*". This was a misnomer, in that no disclosure application was made to the judge. These requests included a repetition of the request for all contact between F and the police "*in relation to the allegation against* NA" (1); the entirety of the audio recording of a telephone call on 17 May 2016 (F's first complaint to the police in the context of this case, the justification being that "*factors such as inflections of voice and displays of emotion are likely to indicate truthfulness/lack thereof*") (2); all the extracts from F's journal copied by a police officer (3); confirmation that the police have "*accessed and reviewed all of* F and M's *phones, computers and other electronic devices to establish whether there is material which requires disclosure*" (4 and 14); the notes of AR who provided counselling to F (5); "*full details of the police enquiry into* NH *to whom* F *disclosed she had been abused*" (7); the decision log concerning the approach of not speaking to 13 of the proposed defence witnesses set out in the defence statement (8); "*details of all social services enquiries made, notes taken, reports produced in relation to the allegation made by* F *in May 2017 that the defendant's grandchildren were at significant risk of harm from him*" (9); "*details, other than those already disclosed, of the allegation of sexual abuse made by* F *Leicestershire police*" (10); "*details of all steps taken, actions raised and enquiries made in relation to allegations of sexual abuse made by* ZA" (this is justified on the basis that M "*is known to be prone to exaggeration and fabrication; the defence wish to explore any inspiration, influence or any similarities between* M's *account and any abuse allegation by his ex-wife* ZA" (11); "*details of all steps taken, actions raised and all enquiries made in relation to* F *reporting her brother to the police for*

harassment" (12); the audio recording of the telephone report by M to the police on 29 May 2016 (13); "*details of all steps taken, actions created and enquiries made by the police in relation to* M's *disclosure of the abuse to* (an ex-colleague) *around 8-10 years ago*" (15); the pocket notebooks of the officers who met and took a statement from two individuals in relation to F's disclosure of the abuse to them (16 and 17); and there were three other specific requests.

29. Again, these 19 requests were not ignored. They were answered item by item in a further undated and unsigned response. A few additional matters were disclosed; otherwise, the police provided details of the material that was either in their possession or was available to them and they explained that no further disclosure was to be made, with – in the main – explanations for that stance (*e.g.* there was no further material or the line of enquiry was not considered reasonable).

30. We stress that there were no further requests for disclosure for 14 months until, on 1 February 2021 (shortly therefore before the trial), NA served a "*Further application for disclosure pursuant to section 8 of the Criminal Procedure and Investigations Act 1996*". This again was a misnomer, in the sense that no section 8 application was made to the judge. The document contained 25 disclosure requests. These included the audio of F's call to the police on 17 May 2016 (1); there were requests for full details of the records on the Crime Reporting Information System ("CRIS"), the Sexual Offence Investigation Technique ("SOIT") log and the major incident enquiry officer's notebook (2, 3 and (4); whether "F *or anyone else* (spoke) *to the NSPCC*" (5); details of the risk to F's grandchildren as explained by her to social services (6); the time of one of the counselling sessions on 17 May 2016 (7); some particular documents referred to by DW and NS (8) and (9); the date and time of attempts by the police to communicate with MN and any accounts taken by MN (10); confirmation that the entirety of F's journal had been reviewed by the trial prosecutor (11); a copy of the first account of M following his telephone call to the police and before the ABE interview (12); confirmation that F's telephone and emails have been reviewed for the day she called the emergency services (999), social services and M, along with confirmation that there had been no contact between them prior to the telephone call, the transcript and audio of which has been disclosed (13); confirmation from F's telephone of the date and time of the recorded telephone call between F and M (14); details of the enquiries made following F's allegation of sexual abuse by her cousin A; there were requests for specific items (16, 17, 18, 20 and 21); the audio recording of M's complaint to the police on 29 May 2016 (19); details concerning certain witness statements, including why they were unsigned (22 and 23); and there were certain general disclosure issues raised (24 and 25).

31. Yet again, these 25 requests were not ignored. They were answered item by item in a further undated and unsigned response. A few additional matters were disclosed, such as certain witness details (16)) or it was indicated they were about to be disclosed, such as the audio recording of M's original telephone call to the police on 17 May 2016 (1); the NSPCC were downloading the two relevant telephone calls (5); and otherwise, once more the police provided details of the material that was either in their possession or was available to them and they explained either that further enquiries were being made or that no further disclosure was to be made, with – in the main – explanations for that stance (*e.g.* there was no further material or the line of enquiry was not considered reasonable).

32. In a document dated 10 February 2021 entitled "*Application for Disclosure*" by NA general concerns were expressed about the late disclosure of two statements dated 12 December 2019 and 7 May 2020 from F, which revealed that there was material on her telephone dating back to 2015 and 2016 of relevance to the case. Concern was expressed that communications between F and M had not been reviewed, given the possibility of collusion between them. There were seven specific requests: the circumstances in which the witness statements of those to whom F disclosed alleged abuse came to made (1); details of communications between F and these witnesses (2); details of communications between M and other prosecution witnesses (3); counselling records relating to F and M since they reported the allegations of abuse (4); "*any individuals spoken to/communicated with by the police and not relied upon* (5); the circumstances in which the recently served witness statements came to be made (6); and notes of all contact between the police and SM since her report to the police (7).

33. On the same day, 10 February 2021, lawyers acting for NA wrote to Ms Reid of the Crown Prosecution Service suggested that F had made false allegations to social services and the police about MN. In the circumstances, a request was made for disclosure of "*all material generated by the allegations*".

34. Disclosure then occurred between 16 and 22 February 2021 following the commencement of the trial, as follows:

> (a) Certain records of contact between the officer in the case and the complainants and between the disclosure officer and the complainants, as contained in various notebooks;
>
> (b) CATS Logs (Child Protection Incident Reports, which recorded the steps taken in the investigation, along with supervision reviews);

(c) Email communications between the complainants in 2016;

(d) Email communications in 2020 relating to a family inheritance;

(e) Email communications between F and her brother R;

(f) Certain social services referral records;

(g) Counselling notes relating to counselling that F underwent after completing her witness statement, along with earlier counselling notes that had been obtained during the investigation from the counsellor;

(h) A record of a complaint made in the summer of 2020 against the CPS by the complainants into the handling of the case;

(i) The recordings of two telephone calls made by F to the NSPCC in 2016;

(j) A limited number of additional witness statements which had not been served as used evidence;

(k) A report from the disclosure officer following a manual check on F's mobile telephone conducted at court; and

(l) A letter in relation to M's appearance before the Traffic Commissioner.

35. A further 17 items were disclosed on 4 May 2021. These included the counselling records which had now been obtained. The only outstanding item of disclosure concerns safeguarding visits to the respondent's relatives. It was stated that these records "*will be reviewed on receipt*".

36. The mistakes as regards disclosure were significant. These have been carefully analysed by the prosecution and have been set out in a comprehensive document for our assistance. The CATS logs relating to the investigation of the complaints from F and M were incorrectly listed by the disclosure officer on the MG6D (the schedule of sensitive unused material). The Crown Prosecution Service Reviewing lawyer failed to review the items on the MG6D and consequently failed to realise that some of this material should have been placed on the MG6C (the schedule of non-sensitive unused material) and disclosed before trial. Prosecuting counsel was not provided with a copy of the MG6D before trial, a step which should have occurred. The disclosure officer omitted to assess the contents of his and the investigating officer's notebooks and consequently neglected to identify entries that should have been disclosed. Certain additional statements obtained by the police after charge were either not

scheduled on the MG6C as they should have been, or they were incorrectly scheduled and were not served as evidence. Of note in this context, two additional statements from F taken in December 2019 and May 2020 should have been disclosed/served long before 8 February 2021 (the week before the trial). The police failed properly to record all the contact with the complainants. The records that were made were not comprehensively scheduled on the MG6C, with the result that not all the lines of enquiry relating to contact with and between the complainant were identified and pursued. The police failed to enquire, and the reviewing lawyer did not consider, whether there might be counselling notes in addition to those already obtained by the police shortly after F's original complaint, in the sense that counselling continued. The police and the reviewing lawyer failed to notice the reference to contact with the NSPCC in the counselling notes that had been obtained. The police incorrectly notified the reviewing lawyer that M did not have social media accounts, as he had a Facebook account (NA had sent him a "friend request" in 2017). The police failed to seek and identify all the relevant third-party material relating to actions taken by social services following receipt from the police of the complaints by F and M. Similarly, they omitted to investigate separate complaints of sexual abuse made by ZA, someone who had given a witness statement during the investigation of F and M's complaints. The reviewing lawyer did not consider whether the complaints by F and M to the Crown Prosecution Service in July 2020 about the handling of the case was disclosable (this went to the issue of the complainants acting together and having the confidence to complain). It is to be stressed that these many failings have now been rectified, to the extent necessary (with the reservation that disclosure is an ongoing process and it is possible that other items may be disclosed in due course). It has been of considerable assistance to this court to have the benefit of this thorough and unalloyed critique by the Crown of the disclosure process.

37. The prosecution has further sought to assist the court by analysing the causes of these extensive failings. It is considered that an excessively narrow view of disclosure was adopted by the police and the reviewing lawyer. All the accounts provided by the complainants, including notes made by them, should have been considered for disclosure at an early stage given that their credibility was in issue. Once it was clear that collusion on their part was material to the case, lines of enquiry regarding contact between them should have been pursued. Whilst some relevant material was either not scheduled or wrongly scheduled, a failure by the reviewing lawyer at the outset personally to consider the schedules and all the items on them meant that some material which met the disclosure test, or which raised further reasonable lines of enquiry, were not identified early. It is to be stressed that relevant disclosure has now occurred from the complainants' mobile telephones, M's work computer (to the extent it was used to communicate with F), the counselling notes, the NSPCC and communications with certain other individuals.

"Category Two" Abuse

65. Lord Dyson JSC provided a clear statement of the two species of abuse in *R v Maxwell* [2010] UKSC 48; [2011] 2 Cr App R 31 at [13]:

> "It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will 'offend the court's sense of justice and propriety' (per Lord Lowry in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 74G) or will 'undermine public confidence in the criminal justice system and bring it into disrepute' (per Lord Steyn in *R v Latif and Shahzad* [1996] 1 WLR 104, 112F)."

65. In *Warren and others v Attorney- General of Jersey* [2011] UKPC 10; [2012] 1 AC 2012 Lord Dyson observed that:

> "26 [...] the balance must always be struck between the public interest in ensuring that those who are accused of serious crimes should be tried and the competing public interest in ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute. […]"

66. This was echoed by Lord Thomas CJ in *R v Norman* [2016] EWCA Crim 1564; [2017] 1 Cr App R 8, when he indicated that a stay will be granted where the court concludes that in all the circumstances a trial will offend the court's sense of propriety and justice or will undermine confidence in the criminal justice system and bring it into disrepute. Lord Thomas observed:

> "23. This involves a two-stage approach. First it must be determined whether and in what respects the prosecutorial authorities have been guilty of misconduct. Secondly it must be determined whether such misconduct justifies staying the proceedings as an abuse. This second stage requires an evaluation which weighs in the balance the public interest in ensuring that those charged with crimes should be tried against the competing public interest in maintaining confidence in the criminal justice system and not giving the impression that the end will always be treated as justifying any means. How the discretion will be exercised will depend upon the particular circumstances of each case, including such factors as the seriousness of the violation of the accused's rights; whether the police have acted in bad faith or maliciously; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability of a sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the accused is charged."

67. As Holroyde LJ observed in *Josephine Hamilton & Others v Post Office Limited* [2021] EWCA Crim 577 at [66]: "*Category 2 abuse is by its nature rarely found*".

R v Boardman and R v Salt

68. In terms of the application of these principles, we have found it instructive to consider two decisions. First, in *R v Boardman* [2015] EWCA Crim 175; [2015] 1 Cr App R 33 p. 504 the defendant was charged with a number of counts of stalking. The case was not progressed satisfactorily by the prosecution. As helpfully summarised in the headnote, the police had provided the Crown Prosecution Service with the relevant telephone call data and cell site data. On 14 March 2014 the prosecution served the defence with the case papers, including a list of exhibits which referred to a master CD of call data. The CD was not provided. In his defence statement, the defendant denied that the phone used in the alleged offences either belonged to him or, to his knowledge, had ever been used by him, although he accepted that he had met some of the victims. The defence solicitor asked the prosecution for a full copy of the calls made to and from the two relevant telephones. Three days later, on 12 May 2014, the plea and case management hearing took place when the defendant pleaded not guilty, and the trial was fixed for 15 October 2014 (estimated length three days). No specific order was made (or sought) in respect of the telephone or cell site data: the defence had asked the prosecution, and there was no reason to believe that the CPS would not comply with the request to produce copies of what were, after all, exhibits in the case. In the absence of compliance, however, on 24 June 2014, a follow up letter was sent. By 18 August the relevant CD or CDs had not been sent and the defendant's solicitors sent a letter repeating the contents of the defence case statement and indicated that consideration was being given to the instruction of a cell site expert (for which legal aid had been extended). Despite repeated requests, the master CD of call data was only provided to the defence a few days before the trial was due to start, and there were difficulties as regards the format in which was disclosed. Therefore, a few days before the commencement of the trial, significant evidential material (*viz.* evidence on which the Crown sought to rely) was served and required expert analysis which would take three weeks to complete. The defendant sought an adjournment and the prosecution agreed this was appropriate.

69. The judge ruled that owing to delay on the part of the prosecution, the evidence which consisted of evidence of telephone call data records and telephone call cell site evidence would be excluded pursuant to the provisions of section 78 of the Police and Criminal Evidence Act 1984. The ruling brought the prosecution to an end and the Crown applied for leave to appeal the terminating ruling under section 58 of the CJA 2003. The judge had found that there had been a lamentable failure on the part of the prosecution. It had not provided the data to which the defendants had been entitled. The case should not have been put off for a period of nine months and in the

circumstances it would be unfair to allow the telephone evidence in. At paragraph 38, this court said:

> "The directions at the plea and case management hearing were plain; the CPS were not entitled to expect that no sanction would follow unless the case had been brought back to the court for a further order: the resources of the court cannot be expected necessarily to extend to what might be described as the provision of a "yellow card". Obviously, every case will depend on its own facts but the willingness of this court to support trial judges in the exercise of their discretion in discharging these responsibilities is equally clear in cases of this nature."

70. The court held that the judge had been fully entitled to reach the conclusion that he did and was entitled to support from this court. The court however pointed out that under Criminal Procedure Rule 1.1 the defence had a duty to alert the court to the problems of non-disclosure. The judgment concluded as follows:

> "40. Before leaving this case, however, it is necessary to sound notes of warning. First, […] the fact that the defence solicitors did not alert the court to the problems of non-disclosure at a time when something could have been done about it (but left the complaint so late that the trial date could not be met) meant that the court was deprived of the opportunity of an earlier listing to resolve the issues and maintain the trial date. It would be perfectly open to the judge to decide that the consequences of such a failure of duty on the part of the defence should be to reject a complaint of prejudice consequent upon the need for an adjournment. In each case, the impact of whatever breaches are established will be for the judge to assess, bearing in mind the particular circumstances of the case and the overriding objective.
>
> 41. Secondly, the court will not support (and, to the contrary, will be extremely critical of) attempts to administer interrogatories of the type that this defence case statement contained, going beyond a request for disclosure of unused material but, rather, on the face of it, seeking to impose a burden on the police to undertake investigations on their behalf. It takes time and effort to respond to these requests (even if only to refuse them); the defence also have the responsibility of ensuring that their requests are addressed to no more than the law permits and to seek to go further is to abuse the process that the 1996 Act set up. Similarly, merely to assert that an extension will be sought before notifying defence witnesses is insufficient to comply with the rules and is not acceptable.
>
> 42. Finally, it should not be thought that this decision can be used to create a trap for the prosecution generally or the CPS in particular by the over-zealous pursuit of inconsequential material which does not go to the issue, all in the hope that the CPS will fall down and that an application can be made which has the effect of bringing the prosecution to an end. Such conduct is itself an abuse of the process

> of the court and judges will be assiduous to identify it and impose sanctions on those who seek to manipulate the system."

71. The second decision is *R v Salt* [2015] EWCA Crim 662; [2015] 2 Cr App R 27. In that case the defendants were charged with rape, false imprisonment and assault by penetration. The judge stayed the proceedings as an abuse of process, finding that the Crown's failure to make proper disclosure of unused material had been so fundamental that, although a future trial could be held fairly and notwithstanding the seriousness of the charges, the court ought to mark its condemnation by allowing a stay. On the first day of the trial the officer in the case arrived at court with three boxes of material which neither counsel nor the CPS had seen. Counsel for the prosecution asked the officer in the case to prepare a revised schedule of unused material based on material in the possession of the police. This resulted in a revised schedule containing over 25 further items. Although this version of the schedule was expressed as being complete, it was not. The trial proceeded, and evidence was called. On the fifth day of the trial counsel for the prosecution asked that a senior police officer and another detective constable carry out a full and independent disclosure exercise. 31 items were added to the schedule of unused material, taking the number to 82. On the sixth day of the trial, a further eight items were disclosed. On the seventh day of the trial, a further 14 items were added to the disclosure schedule; counsel for Daryl Salt made it clear that he could not cross-examine any further witnesses until the disclosure was reviewed and completed. The judge, unsurprisingly, was highly critical of the way the case had been conducted by the CPS and the police and discharged the jury. A further 22 items were then added to the schedule of unused material, including schedules of all recorded contact between the police and each of the defendants. As in the present case, by the time of the hearing for the stay the judge was satisfied, as he found in his ruling, that disclosure was as complete as it reasonably could be and in the state in which it should have been prior to the trial. In his ruling on the category two abuse application, the judge observed:

> "I have come to the conclusion that the failures in this case are so fundamental and far reaching as to make this a truly exceptional and unique case. Notwithstanding the seriousness of the charges, I take the view that this abuse is so exceptional the court ought to mark its wholesale condemnation of the prosecution by allowing a stay and refusing the prosecution the right to pursue the case."

72. There was further late disclosure prior to the hearing of the prosecution's appeal against the judge's ruling, which only occurred after orders from this court. It was emphasised in the judgment of the court that the judge did not make a finding of bad faith and the trial judge had concluded that a fair trial was possible in a reasonable time.

73. On appeal by the prosecution from the judge's decision, this court considered several factors:

    a) The gravity of the charges;
    b) The denial of justice to the complainants;
    c) The importance of disclosure in sexual offences;
    d) The necessity for proper attention to be paid to disclosure (at [50] "*It has always been apparent that, in cases of historic sexual abuse, disclosure will be important and proper steps be taken to ensure that it is dealt with in an orderly manner*".
    e) The nature and materiality of the failures (at [53] "*this court pointed to the importance of proper procedures being put in place for an intelligent approach to disclosure and the necessity for disclosure officers to receive proper training*";
    f) The failures by the defence lawyers;
    g) The waste of court resources and the effect on the jury; and
    h) The availability of other sanctions;

74. The court concluded that there was a very strong public interest in grave offences being tried and the complainants having their allegations determined at trial. The documents that were not disclosed were of limited materiality. Set against that, the conduct of the CPS and the police had been reprehensible and the sanctions that a court can impose on them to secure adherence to the principles of justice lack proportionality. A fair trial was possible and there had been some lack of proper compliance by one of the defendants with the Criminal Procedure Rules. The court concluded at [72]:

> "Balancing these considerations, we have concluded that on this occasion it would not be in the interests of justice to stay these proceedings on the basis that their continuation would undermine public confidence in the administration of justice. We have every sympathy with the position in which the judge was placed; we fully understand his robust and justified condemnation of the CPS and the North Yorkshire Police, but after reviewing all the circumstances and looking at other considerations to which the judge did not refer, we consider that on this occasion the proceedings should continue. We set aside the stay."

Discussion on Category Two Abuse

75. In what might be described as a preamble to his conclusions, the judge emphasised that "*this was the third attempt to start this trial*", albeit a fair trial remained possible. On several occasions he described the proceedings as antique and noted they had proceeded at "*a glacial pace*". He repeated he did not base his decision, first, on delay; second, on his view that the case was not strong (this was stated five times); and, third, on the fact that he harboured misgivings about the prosecution. He emphasised that cases need careful management during the Covid-19 pandemic, due to the pressure of work.

76. Against that background, we return to the judge's "*range of factors*" which seemingly underpinned his decision (see [23] above). The first six, with respect to the judge, were irrelevant to category two abuse. The antiquity of the allegations, certainly on these facts, did not have any materiality. The prosecution had not been responsible for the earlier adjournments or for the delay in reporting these alleged crimes. Although the judge emphasised that the weakness of the prosecution case was irrelevant, he repeatedly returned to this issue in his judgment, and included it in the "*range of factors*" he identified in the context of explaining his conclusions. Having decided that this was not category one abuse, the levers available to him to control the trial and the degree to which he had confidence in the fairness of the proceedings (having concluded a fair trial was possible) were not germane. The position of MF and MT as being under a disability, and their inability to advance a meaningful defence or support NA were equally of no relevance to category two.

77. The judge correctly identified, we emphasise, the remaining factors which he highlighted, namely that the prosecution had neglected to pursue proper lines of enquiry and they had failed in significant respects in their disclosure obligations. The judge used a range of strong epithets in this context (as set out at [14]); it is sufficient for us simply to observe that this conduct on the part of the police and the CPS was without doubt reprehensible.

78. The judge acknowledged that the two complainants "*are very likely to be annoyed or disappointed*" and that they may feel cheated. He referred to the "*public demand that justice must be done whereby the guilty are brought to judgment*" and he balanced this against the "*equally important principle that the administration of justice must not be degraded or brought into disrepute*".

79. As rehearsed above (see [25] – [31]), this was not a case in which the prosecution simply avoided its responsibilities. Each of the extensive requests for disclosure were answered, item by item. Instead, two important errors were allowed to emerge and

then to persist. First, the disclosure officer made a mistake by being overly restrictive when identifying the items that fell to be disclosed or areas that required further investigation, along with a failure on his part correctly to schedule or categorise all of the unused material. Second, the CPS Reviewing Lawyer neglected to review the material with sufficient care, and the disclosure officer's errors consequently went undetected.

80. It is to be stressed that there was no disregard of court orders. Furthermore, the defence failed to raise the unsatisfactory nature of the prosecution's response to their requests with the judge. This is an important factor, given the disclosure regime expressly provides by section 8 CPIA that, following service of the defence statement, the accused may apply for an order for disclosure of material which should have been disclosed under section 7A CPIA. Such an application may relate to material actually held or inspected by the prosecutor, as well as to any material which the prosecutor would be entitled to hold or inspect if requested. As Sir Brian Leveson P. observed in *Boardman*, "40. […] *the fact that the defence solicitors did not alert the court to the problems of non-disclosure at a time when something could have been done about it (but left the complaint so late that the trial date could not be met) meant that the court was deprived of the opportunity of an earlier listing to resolve the issues and maintain the trial date*" (see [70] above). We are acutely conscious of the diligent way in which the defence lawyers in this case have sought to protect the interests of the three accused, and it is to be emphasised that the primary responsibility for disclosure undoubtedly rested with the prosecution. Nonetheless, once a satisfactory response was not forthcoming (at the latest by 4 November 2019), it was necessary for the court to be alerted, to enable the judge to investigate the suggested failings and to make appropriate orders. It is, therefore, a relevant factor that the judge was first engaged in these difficulties at the commencement of the trial. It is insufficient for the respondents to observe that the requests were uploaded onto the digital case system; it is necessary for a formal application to be made which requires resolution by the judge.

81. In a similar vein, the defence in the written abuse of process submissions dated 22 November 2019 (following the disclosure request dated 4 November 2019) entitled "*Skeleton argument on application to stay proceedings as an abuse of process on behalf of NA*" did not refer to any of the difficulties or issues relating to non-disclosure. This skeleton was updated 14 months later on 8 February 2021 and although there was an allegation that the police had not proceeded with the investigation at speed, with the result that two potential witnesses had died (KB and KT), the present disclosure issues were not raised. It was only on 19 February 2021 (four days after the date fixed for trial), no doubt in part prompted by the disclosure process that began on 16 February 2021 (see [34] above), in a document entitled "*Defence Note Re Disclosure and Abuse of Process"* that these concerns were first set out for the court's consideration. The jury were discharged three days later on 22

February 2021. This is a relevant factor when considering whether the circumstances of this trial, following the prosecution's disclosure and investigative failings, offend the court's sense of propriety and justice or undermines confidence in the criminal justice system, bringing it into disrepute.

82. The court is left with an enduring sense that although the judge endeavoured to restrict his decision to a consideration of those matters which were truly relevant, when he came to set out the "*range of factors*" which underpinned his decision at least half of those he expressly listed should not have formed any part of the assessment or balancing exercise as required by the authorities. We well understand his evident frustration, as a highly experienced Resident Judge in the middle of a pandemic, at the needless waste of a valuable trial slot, but it was critical that he weighed the relevant considerations carefully, which included, *inter alia*, the "*very strong public interest in […] grave offences being tried and the complainants having their allegations determined at trial*" (*Salt* [72]). Applying the test set out in section 67 CJA 2003, we are satisfied that the ruling involved an error of law in that his judgment was materially influenced by several clearly important factors which should have been left out of account. It is necessary, however, to bear in mind the precise terms of section 67 CJA 2003, namely that "*The Court of Appeal* ***may not reverse*** *ruling unless it is satisfied a) that the ruling was wrong in law, b) that the ruling involved an error of law or principle, or c) that the ruling was a ruling that it was not reasonable for the judge to have made*". Not every "*error of law*", however minor or unimportant in nature, will lead the court to reverse a ruling on appeal. As in *Salt* (see [72]), in circumstances such as the present the court will need to go on to consider the sustainability of the judge's decision on the merits of the issue, notwithstanding the error of law.

83. In this regard, we stress, as we have already made clear, that we have every sympathy with the regrettable position in which the judge found himself placed. There is no doubt that the police and the CPS in different ways failed to discharge their roles appropriately, and between them they prevented the trial from being successfully commenced and concluded in February/March 2021. Set against that, the police had clearly tried to deal with all the disclosure requests (which were considerable), albeit the disclosure officer made a significant error of judgment as to the proper ambit of disclosure in certain areas and he did not log or record all the items correctly. Furthermore, the conduct of the CPS by failing to discharge the review role effectively, was reprehensible. In all the circumstances, we do not consider that the undoubted errors reach the level of grave executive misconduct which would undermine public confidence in the criminal justice system and bring it into disrepute. The failings, furthermore, were not at a level of seriousness that they outweigh the very strong public interest in the trial of grave offences (sexual offences against young people undoubtedly come within that category). In this context it is notable that even when there is grave prosecutorial conduct of considerable weight, this may

be outweighed by the seriousness of the offending and other relevant factors (see *Warren and others v Attorney General for Jersey* [2011] UKPC 10; [2012] 1 AC 22). As set out above, the failure on the part of the defence to raise these matters with the judge until after the trial had commenced and the absence of an application under section 8 CPIA are highly pertinent considerations. We have reviewed the position overall and we have conducted for ourselves the necessary balancing exercise. In our judgment the very strong public interest in these grave offences being tried outweighs the prosecutorial misconduct we have set out at length, which, although serious, is not in any event in the bracket of grave executive misconduct which undermines public confidence in the criminal justice system and brings it into disrepute. These proceedings should continue before a different judge. We therefore grant leave to the prosecution to appeal this terminatory ruling and we set aside the stay.

Postscript

84. Requests for disclosure that are drawn too widely tend significantly to undermine the proper functioning of the disclosure process. Some of the disclosure requests in the present case were excessively broad and transgressed the decision of this court in *R v CB* [2020] EWCA Crim 790; [2020] 2 Cr App R 20. Most particularly in the context of the present case, requests for investigators to review a complainant or other witness's digitally-stored communications should have a proper basis; there is no presumption that a complainant's mobile telephone or other devices should be inspected, retained or downloaded; there has to be a properly identifiable foundation for the enquiry, not mere conjecture or speculation; and in conducting a review of a witness's electronic communications, if the material is voluminous, consideration should be given to appropriately focused enquiries using search terms, a process in which the defendant should participate. Requests such as in the present case for "*confirmation that the police have accessed and reviewed all of* F and M's *phones, computers and other electronic devices to establish whether there is any material which requires to be disclosed*" and "*confirmation that the police have accessed and reviewed all of* F and M's *social media platforms to establish whether there is any material which requires to be disclosed*" were inappropriately wide ranging. The material on personal devices such as mobile telephones, laptops and tablets will usually be voluminous, and it is wholly unrealistic to expect the prosecution to consider the entirety of their contents. Instead, the disclosure requests should have been framed to assist the prosecution in making focussed, realistic and achievable enquiries.

85. We stress, therefore, that the risk for defendants is that it will be impossible for the prosecution to act on unfocussed requests.

86. The restrictions on publishing this judgment have now been lifted, given the trial concluded on 5 January 2022. Nazir Ahmed was convicted of buggery with a boy

under 11 years of age and two counts of attempted rape on a girl under 16 years of age. Mohammed Tariq and Mohammed Farouq, who had previously been determined to be unfit to be tried, were found to have done the acts alleged against them relating, as regards Mohammed Tariq, to two counts of indecent assault on a boy under 11 years of age and, as regards Mohammed Farouq, four counts of indecent assault on a boy under the ages of 8, 10 or 11 at the relevant time.