IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2024] EWCA Crim 364

CASE NO 202302259/B5

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 13 March 2024

Before:

LORD JUSTICE EDIS
MRS JUSTICE FARBEY DBE
THE RECORDER OF SHEFFIELD
HIS HONOUR JUDGE JEREMY RICHARDSON KC

REX
V
JASON GRUNDELL

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MISS A SMART appeared on behalf of the Appellant
MR M MORLEY appeared on behalf of the Crown

J U D G M E N T

LORD JUSTICE EDIS:

Introduction

1. This is an appeal against conviction by leave of the single judge.
2. The provisions of the Sexual Offences (Amendment) Act 1992 apply. Therefore, no matter relating to the complainant in this case shall, during her lifetime, be included in any publication if it is likely to lead members of the public to identify her as the victim of an offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act. We will refer to her as "C" which is not an initial designed to reflect any part of her name. It stands for complainant.
3. On 8 June 2023 in the Crown Court at Leeds before His Honour Judge Batiste and a jury, the appellant was convicted of two counts of rape against C. Count 1 alleged an offence committed on 6 January 2020 and count 2 an offence on 3 February 2020, probably during the morning of that day. We record, although we do not have to decide any question in relation to sentence, that on 31 July 2023 the appellant was sentenced to an extended sentence of 17 years, comprising a custodial term of 13 years and an extension period of four years. Those sentences were imposed concurrently in respect of both of the counts of which he had been convicted. Other orders were made, as is usual in cases of this kind, but nothing now turns on them.
4. The appellant has leave to argue three grounds of appeal against conviction. We shall set those out later in this judgment but in summary each of them raises in a different way the judge's decision that evidence concerning an incident on 4 February 2020 should be admitted. The incident concerned occurred in the early hours of the morning of 4 February which was the day after the second offence of rape had allegedly occurred. It appears that the period of time between that alleged rape and the incident with which we

are concerned was about 14 hours or thereabouts.

The facts

5. C met the appellant in December 2019 and a consensual sexual relationship began which resulted in the appellant moving in to live with C in her property. Very soon after that on 28 December they were involved in a car crash as a result of which C was in hospital for 10 days. The appellant visited her every day. She said that while she was in hospital the appellant had begun to behave towards her in a more controlling way and she said in relation to her own condition that she was unable to look after herself in any way at all. She was taking a lot of pain medication (morphine) and this had a drastic effect on her ability to function physically. She had broken her back, and was catheterised immediately after the accident had taken place.
6. The first count alleged an offence of rape which it was said took place in the hospital on 6 January. By that date C had been in hospital for nine days or so. On that evening the appellant refused to leave after his visit and argued with hospital staff following a dispute which had taken place earlier in the day about how much medicine C had been given.
7. C was staying in a private room. She said that the appellant got into bed with her and pulled the sheet over them and began to touch her. C felt as though she could not say "no". The appellant asked her to touch his penis but she could not move and said: "We are not doing this" and that it was not appropriate in a hospital. The appellant then moved her onto her side and lifted her right leg and had sexual intercourse with her. Her evidence was that she had told the appellant that she did not consent. She had said "no", she did not want to and that she was sore, catheterised and could not move properly.
8. The following morning nursing staff attended the room and said that there had been complaints about the appellant being aggressive the previous night and that he had to

leave. The hospital staff's evidence was that he became angry. He said he was not leaving without her and would be back to collect her following her discharge. Medical staff advised that she needed to demonstrate that she was fit for discharge before that could happen but he refused to wait and took her home. C said to him that she did not want to leave because she was not fit to do so but she went with him in the end.

9. Count 2 related to a second incident which, as we have said, was said to have occurred on 3 February. This was at C's home. She had passed out on the bathroom floor. The appellant carried her to bed, cleaned up and put clothes on her. At the time she was bleeding from what she thought was a miscarriage and was feeling unwell. Later that day when one of her children was at school the appellant got into bed with her and they watched a film. While in the bed the appellant became erect and began to touch her. She said that she did not feel well and asked him to stop. He made her touch his penis and then got on top of her and had sexual intercourse with her. She said that she had told him "no". She had tried to scratch him to get him off her but she had no strength or energy physically to resist him.

10. Those were the facts of the two offences charged. The incident which is the subject of this appeal took place, as we have said, about 14 hours later in the early hours of the morning. C said that they had had an argument. During it the appellant told her that she was a "shit mum" to her children, had ruined his life and that it was her fault she got injured in the car crash, although he had in fact been the driver at the time. She said that he grabbed the back of her hair and pulled her towards him, as though he was going to headbutt her, although he did not do this. C said that she asked him to stop screaming at her because the children were in bed and she moved towards the stairs. The appellant said he did not "give a fuck" and tried to push her down the stairs. She moved back

towards bedroom and he threw her around and onto the bed, perhaps about four times, calling her a "slag" and repeating that she was a "shit mum".

11. She said that she managed to get out of the house, get into her car and lock herself in. She was however followed by the appellant who in the street shouted at her through the window and headbutted the windscreen of the car. The sounds from the street of him shouting and the activity towards the car and towards C was witnessed directly by a neighbour whose statement describing these things was read to the jury as undisputed evidence. It happened also that during this part of the episode while she was in her car, C telephoned her mother who was able to hear in the background shouting and screaming coming undoubtedly from the appellant. Her statement also was read to the jury.
12. The position was therefore that there was no dispute about the part of the incident which happened in the street, although the appellant had denied when interviewed the allegations of violence inside the house.
13. The appellant did not give or call evidence in his defence. He had given an account in interview. He said then that the incident in hospital had simply not happened. There had been no sexual conduct between the two of them in that place on that day. He agreed that he had told C to discharge herself and that he had taken her home. He said that this was because she was not being treated properly at the hospital and that she had been given an overdose of some drug.
14. He described the relationship between the two of them after her discharge as being a resumed sexual relationship in which there were a number of occasions when they had consensual sexual intercourse together. He said that C had complained to him that she always had to "come on" to him and asked whether he still found her attractive. He agreed that on the morning of 3 February (count 2) sexual intercourse had taken place but

he said that this was consensual. He agreed that she was bleeding and said that he had used a condom for this reason.

15. The issues therefore in relation to count 1 were whether any episode of sexual intercourse had taken place at all and in relation to count 2 whether an agreed incident of sexual intercourse had taken place with consent, or whether (if not) he had reasonably believed that such consent had been given.

16. The appellant was also interviewed about the incident on 4 February which culminated in the behaviour in the street which we have already described. He said that there had been an argument about why she was always "coming on" to him. She had been annoyed because he did not have a job and was not bringing in any money to the house. He agreed that he had raised his voice and said that she had scratched him with her fingernails. He said he had not headbutted the car and had not pulled at her inside the house.

The arguments below

17. The procedural position which resulted in the judge's determination that the evidence concerning the incident on 4 February was admissible was perhaps unfortunate, although no one was at fault in that regard. Both counsel who conducted the trial, and who have conducted this appeal before us today, were instructed late in the proceedings:
Mr Michael Morley for the prosecution and Miss Ayesha Smart for the appellant.
Previous counsel had proceeded on the basis that the incident of 4 February would be admitted. There had been no bad character application determined and no response to any bad character application being served either. Such documents were created when the issue became apparent as soon as Miss Smart had familiarised herself with her brief and conferred with the appellant. She certainly did not delay in making her position in

regard to this admissibility issue quite clear to all concerned. However, the result of this was that the judge had to analyse the position and take a decision without having as much time to reflect on the relatively complex issues involved as he no doubt would have liked.

18. What occurred was that Miss Smart submitted that the evidence of the incident 14 hours after count 2 should not be admitted because it did not fall within section 98 of the Criminal Justice Act 1988 and should not be admitted either under any gateway in section 101. She submitted that there should be some form of agreed wording that would enable the jury to have some information as to the circumstances in which C had made her allegation to the police, who had arrived in response to a summons from the neighbour immediately after that incident, and she submitted that the prejudicial aspects of the appellant's alleged conduct should not be placed before the jury. Mr Morley submitted to the judge that the case did fall within section 98 of the Criminal Justice Act 2003 because it had to do with the facts of the offences charged. He relied on a decision of this court in R v AAM [2021] EWCA Crim 1720 where the evidence was admitted in broadly similar circumstances. In that case it should be said the evidence had actually been admitted by agreement, as had once been the likely approach in this case. Although the court did say that they agreed that it did fall within section 98(a) of the 2003 Act, the actual issue which the court had to decide in these circumstances was whether the judge's direction to the jury was adequate in that case and the court concluded that it was and dismissed the appeal. In our judgment in those circumstances the decision of the Court of Appeal in that case is not of substantial assistance in resolving the issues we have to deal with.

19. Mr Morley also submitted to the judge that in the alternative the evidence was admissible under section 101(1)(c): important explanatory evidence. He said that if it were not

admitted the jury would be acting in a vacuum trying to deal with the circumstances in which the complaint of rape had been made to the police without knowing what those circumstances were.

The judge's ruling and direction

20. The judge ruled that the disputed evidence did fall within section 98(a) of the Criminal Justice Act 2003 and was admissible. After setting out the circumstances in which the issue had fallen for decision by him, which we have already described, he observed that the authorities did not disclose a clear set of guidance as to the limits of section 98(a) of the 2003 Act. There was no clear dividing line where that provision ended and the section 101 gateways for reprehensible conduct which does not have to do with the facts of the offence charged begins.

21. The judge recorded the submission which Mr Morley had made to him in these terms:

> "... it is the prosecution suggestion in this case that it has to do with the facts of the offence and is referring to she is recovering from serious injuries, and it is said that it is a continued course of indifference to potentially painful force whilst she is suffering from those injuries. It is also submitted under s.101(c) in the alternative by the prosecution that, if this evidence is not admitted, the jury would be acting, in effect, in a vacuum ... "

22. The judge then referred to the standard textbooks and reviewed a number of the very large number of authorities which had been decided since the 2003 Act came into force under these provisions. He referred to the procedural difficulty we have already described and concluded that he was satisfied that the evidence does fall within section 98(a) and was admissible, subject to the provisions of section 78 of the Police and Criminal Evidence Act 1984. He considered that provision and decided that in the exercise of his discretion he would not refuse to admit the evidence under that section.

23. He then went on to consider the alternative basis of admissibility which had been put before him by the prosecution and set out the rival submissions in relation to that. He concluded that the evidence was admissible under section 101(1)(c) and that the agreed form of wording suggested by Miss Smart would not resolve the difficulty or impossibility in understanding other evidence in the case because it would leave:

> "... open a number of questions, it may be very difficult to find an agreed form of words that would be able to satisfy both sides and, in my judgment, without it, the jury would inevitably be wondering why on earth a complaint was made fourteen hours later and would inevitably engage in speculation as to the circumstances of that delay, and would have to consider the circumstances of that delay."

24. Having admitted the evidence, the trial proceeded as we have already described. The appellant not having given evidence the judge moved to give the jury written directions of law prior to counsel's closing submissions in accordance with the usual modern practice. The direction he gave the jury in relation to the disputed evidence is in these terms:

> "There are then a number of other legal issues that arise. The first I have labelled, the alleged assault leading to the defendant's arrest. You heard evidence of an instance where the complainant alleges that the defendant assaulted her and caused her to flee to her car, lock the door and call her mother for help. This incident is alleged to have happened a number of hours after the alleged rape in Count 2, and is what led to the complaint to the police of the rapes. You have heard about this evidence because it is relevant to understand the circumstances in which the complaints were made, and it would be difficult for you to assess the circumstances of the complaint without being aware of the allegation of violence.
>
> Now, the defendant in interview disputed the allegation of violence and claimed the incident happened in a very different way. This disputed evidence is something you can consider when assessing the reliability and accuracy and credibility of the allegations, and in considering the nature of the relationship between the parties.

> However, even if you find the defendant was violent towards the complainant it does not prove that the defendant raped her and should not be used in any way as evidence to suggest that the defendant has a propensity to commit sexual offences against the complainant. It's a different type of allegation, ladies and gentlemen, you understand."

25. It is to be observed that although there is no direction included in that passage telling the jury that unless they were sure of the evidence in relation to the incident of 4 February then they should discard it, the judge had of course given the standard and very clear direction about the burden and standard of proof at the start of his summing-up in the course of his written legal directions which were not particularly long.

The relevant law

26. It is convenient now to set out the statutory framework in the 2003 Act which requires consideration in the circumstances of this appeal. Section 98 of the 2003 Act reads as follows:

> "98 'Bad character'
>
> References in this Chapter to evidence of a person's 'bad character' are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which—
>
> (a) has to do with the alleged facts of the offence with which the defendant is charged, or
>
> (b) is evidence of misconduct in connection with the investigation or prosecution of that offence."

27. Section 101 reads as follows:

> "101 Defendant's bad character
>
> (1) In criminal proceedings evidence of the defendant's bad

character is admissible if, but only if—

(a) all parties to the proceedings agree to the evidence being admissible

(b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it

(c) it is important explanatory evidence

(d) it is relevant to an important matter in issue between the defendant and the prosecution

(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant

(f) it is evidence to correct a false impression given by the defendant, or

(g) the defendant has made an attack on another person's character.

(2) Sections 102 to 106 contain provision supplementing subsection (1).

(3) The court must not admit evidence under subsection (1) (d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged."

28. Each gateway in section 101(1) of the Act identified above is accompanied by a section in the Act of its own which provides some further direction as to how it should be applied. The gateway allowing important explanatory evidence is governed by

section 102 of the Act:

> "102 'Important explanatory evidence'
>
> For the purposes of section 101(1)(c) evidence is important explanatory evidence if—
>
> (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
>
> (b) its value for understanding the case as a whole is substantial."

29. Although the matter was put before the judge without reference to section 101(1)(d), which is the gateway which permits evidence which is relevant to an important matter in issue between the defendant and the prosecution, in view of our approach to the appeal it is important to set out also section 103(1) of the Act which deals with the application of that gateway:

> "103 'Matter in issue between the defendant and the prosecution'
>
> (1) For the purposes of section 101(1)(d) the matters in issue between the defendant and the prosecution include—
>
> (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
>
> (b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect."

30. Finally, we should refer at this point to section 106 of the Act which it is unnecessary to

set out. The reason for that is the submission on behalf of the prosecution that even if the disputed evidence is not admissible under section 98(a) and is not admissible under section 101(1)(c) (the two bases on which the judge admitted it), it is admissible under section 101(1)(g) because the nature of the appellant's defence as identified in the police interview constituted an attack on C's character; it is an allegation that she lied about both alleged rapes. In view of the approach which we are going to take to this appeal it is unnecessary for us to explore that alternative submission in any detail but it is appropriate for us to record it here.

The appeal

31. The grounds of appeal, for which leave was granted, are as follows:

    1. The judge erred in adducing evidence from the complainant and two other witnesses relating to a domestic incident on 4 February 2020 as "facts of the offence" pursuant to section 98 of the Criminal Justice Act 2003.
    2. In the alternative, the judge erred in adducing the aforesaid evidence as bad character as important explanatory evidence pursuant to section 101(1)(c) of the 2003 Act.
    3. Further, and in the alternative, the judge erred in failing to exclude the aforesaid evidence in accordance with section 78 of the Police and Criminal Evidence Act 1984.

32. Miss Ayesha Smart argues these grounds in writing and orally before us and submits that because of these identified errors for which she contends the convictions are unsafe and should be quashed. She seeks to distinguish the decision of this court in AAM [2021]

EWCA Crim 1720 and, as we have already observed, we agree with her about that. She submits that the separation in time and type of the second incident of rape and of the disputed incident in the early hours of the morning of 4 February mean that the disputed incident should not be regarded as having to do with the facts of either of the offences charged, in particular the more recent of the two in count 2. In respect of section 101(1)(c) she relies on section 102 and says that all of the evidence in the prosecution case concerning the allegations of rape was perfectly intelligible without the disputed evidence. It therefore did not qualify for admission under that gateway.

33. The court invited Miss Smart to address the possibility that the disputed evidence was properly admissible under section 101(1)(d) if her first two submissions were upheld by the court. She referred to some written submissions that she had lodged before Crown Court dealing with that possibility and relying on the decision of this court in R v Hanson [2005] EWCA Crim 824. She submitted that this was not evidence of propensity and that there were no convictions giving rise to any such suggestion of propensity and that it should not have been admitted under this gateway. She pointed out that the prosecution at trial had not relied upon the gateway and had not therefore set out any basis on which it might have been admitted by that provision.

34. In relation to section 78, Miss Smart submits that the prejudicial facts of the disputed incident should have been omitted and its potential significance could have been dealt with by agreed facts in neutral terms.

35. In response, Mr Morley on behalf of the Crown effectively takes the same position as he did before the judge. In argument it was put to him and he accepted that section 101(1)(g) could not be the basis on which evidence had been admitted given the way its significance had been left to the jury by the legal directions of the judge which we have

set out above. In order to justify that legal direction the evidence would have to be admissible either under section 101(1)(c) or under section 101(1)(d). That is why it is unnecessary for us to say any more about section 101(1)(g).

36. He did however rely upon the nature of the incident itself as being relevant to the nature of the relationship between the appellant and the complainant at the time of the second offence of rape and of being relevant to his attitude at the time to the fact that she was grievously injured and had, it was thought, very recently sustained a miscarriage. Mr Morley suggested that his conduct in the early hours of the morning of 4 February showed a continued state of indifference to these particular circumstances affecting the complainant which might in other circumstances have entitled her to tenderness and care rather than the vilification which the undisputed evidence of the witnesses showed she had been subjected to in the street outside her house in which her children were asleep.

Discussion

37. It is convenient to begin by considering in overview decisions of this court and some of the commentary about them which we have considered in examining the scope of section 98(a) of the Criminal Justice Act 2003 and the proper ambit of section 101(1)(c) of the same Act.

38. The editors of Phipson on Evidence, 20th Edition at Chapter 19-25 say this:

> "As to the exact division between s.98(a) and s.101(1)(c), the authorities are in considerable disarray. There are certainly a large number of cases in which the appeal court, often impressed by the ordinary English meaning of the phrase 'has to do with', has taken a wide view of s.98(a), one embracing all of the common law res gestae categories, though it must be added that, in very many of them, it was held that the evidence in question was, in any event, also admissible through some s.101(1) gateway."

39. The editors then analyse some of those decisions and mention a lot more of them in

footnotes to this passage. We do not propose to engage in a comprehensive account of all of the different decisions referred to there, nor do we intend to attempt to extract any set of principles which all of those cases taken together might suggest. This is not an easy exercise as the editors of Phipson observe.

40. There are authorities in which this court has taken a broad view of the words "has to do with the facts of the offence charged". There are other authorities where a narrower view has been taken. After reviewing them, the editors of Phipson say this:

> "The very important case, *R. v Mullings* [2010] EWCA Crim 2820; [2011] 2 Cr App R 2, sounds a similar note. There, the prosecution had been permitted to call evidence of the accused's possession of documents indicative of support of one Manchester gang, and antipathy towards another, in order to advance its case that, when part of a group containing members of the former gang confronting those of the latter, he must have known that others were carrying firearms with intent to endanger life, and must have shared that intent. The court held that, because of the absence of any close temporal connection, that evidence did not 'have to do with' the alleged facts. An example that it gave of evidence that would satisfy s.98(a) is instructive. It envisaged evidence that the accused might, at the very time of the confrontation, have been shouting out similar sentiments of support and antipathy. The temporal connection would undoubtedly then be shown, but it is clear enough that the factual one would too, such that the shouting would properly have been accounted, at common law, part of the transaction under review. Furthermore, the court added the very important point, already adverted to in the text, that:
>
> '[t]he wider s.98(a) is construed, and the wider the embrace of evidence which "has to do" with the facts of the alleged offence, the less effective the statutory purpose becomes'
>
> With the consequence that 'the narrower view of s.98(a) is to be preferred'. This reasoning seems wholly convincing."

41. Have observed that the reasoning was "wholly convincing", the textbook then proposes that this narrower view more accurately reflects the terms of the Act and conclude:

> "However, whatever one thinks are the proper limits of s.98(a), judges and practitioners are surely entitled to a clear and consistent interpretation of this troublesome phrase. In short, what we have urgent need of here is an authoritative settlement of what really is the law."

42. We do not propose to accept the invitation, if such it is, to do anything more than is necessary to decide this case. If that is of any value beyond the circumstances of this case well and good.

43. In our judgment the principled construction of section 98 commended in *R v Mullings* is the right one. Section 98 and section 101 read together provide a route to admissibility which covers all the ways in which evidence of reprehensible conduct extraneous to the facts immediately surrounding the commission of the offence or offences themselves may be admitted. That is a carefully calibrated scheme which imposes a discipline upon the decision maker, who must in due course give the jury a direction about the significance of what has been admitted which is helpful and consistent with the statute. It is in our judgment inappropriate to permit a construction of section 98(a) which creates a wide exemption from that scheme for evidence of reprehensible conduct. It is clear in our judgment that Parliament intended that evidence of reprehensible conduct should only be admitted outside section 101 if it had "to do with the facts of the offence charged." The expression "has to do with" is indeed a broad and open textured expression viewed on its own but the expression "the facts of the offence charged" is not. For these reasons, and applying that approach to the prosecution submission that the evidence of the incident in the early hours of 4 February 2020 should have been admitted as having to do with the facts of the second rape in count 2, we have concluded that that submission is unfounded. We conclude that the judge was wrong to admit the evidence as having to do with the

facts of count 2. The 14-hour gap between the two incidents and the difference in the nature of them means that they were in truth separate events.

44. The judge ought then therefore to do what he did, in any event in the alternative, which was to go on to consider the gateways in section 101. His preferred route in applying those gateways was, leaving aside section 101(1)(g), the only one which was offered to him. In looking at section 101(1)(c), important explanatory evidence, it may be helpful briefly to refer to some of the decisions which are to be found in the books on this subject. We do not attempt a complete review but we trust that we will identify the proper approach to the provision.

45. By way of introduction, we mention the decision of the Privy Council in a Bermudan case, *Myers v Regina (and other cases)* [2015] UKPC 40, [2016] AC 314. Lord Hughes dealt with the common law proposition of the admissibility of this kind of evidence at paragraphs 51 and 52. He was dealing with the common law position because in Bermudan law the 2003 Act does not apply and the Privy Council was concerned with the common law. What they had to say serves as an introduction to the background against which section 101(1)(c) and section 102 were enacted and also as a helpful precautionary note as to its application:

> "51. A further example of justification within *Makin* for the admission of evidence which shows a defendant's bad behaviour or propensity may be afforded where the evidence is relevant to proof of the charge, and the bad behaviour unavoidably comes with it. A simple example is a trial of an allegation of violence between prisoners; the fact that the defendant is in prison will unavoidably emerge. *R v Pettman* (unreported) in the Court of Appeal (Criminal Division) in England and Wales, 2 May 1985, is often cited as a statement of this principle. Purchas LJ put it in this way:
>
> > 'Where it is necessary to place before the jury evidence of part of a continual background or history relevant to the

> offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence.'
>
> However, the kinds of case touched on in para 40 above, where a course of conduct or the history of a relationship is relevant to proof of offences charged, may also sometimes be analysed in these terms. Examples include *R v Sawoniuk* [2000] 2 Cr App R 220 at 234; *R v Williams (Clarence)* (1987) 84 Cr App R 299 and *R v Underwood* [1999] Crim LR 227. In either case *Pettman* is an example of the principle set out above, namely that departure from *Makin* must be justified.
>
> 52. The *Pettman* proposition, valid as it is, needs cautious handling if it is not to become a token excuse for admitting the inadmissible. Claims by prosecutors that the evidence is necessary to understanding of the case, or, as is sometimes asserted, to discourage the jury from wondering about the context in which the events discussed occurred, need to be scrutinised with care. It is only where the evidence truly adds something, beyond mere propensity, which may assist the jury to resolve one or more issues in the case, or is the unavoidable incident of admissible material, as distinct from interesting background or context, that the justification exists for overriding the normal *Makin* prohibition on proof of bad behaviour. Moreover, admissibility is subject to the power to exclude under *Noor Mohammed* or, now, section 93 [of the Police and Criminal Evidence Act 2006]."

46. Moving back now in time to an earlier decision of Hughes LJ (as he then was), we refer to *R v D, R v P, R v U* [2011] EWCA Crim 1474, [2012] 1 Cr. App. R 8, decided in the Court of Appeal Criminal Division on 17 May 2011. Lord Hughes in those decisions set out in paragraphs 19 and 22, the warning which he was later to repeat in relation to the common law in *Myers*. It is in similar terms:

> "19. For all these reasons, our general conclusion is that the possession of child pornography may, depending on the facts of

> the case, demonstrate a sexual interest in children which can be admissible through gateway D upon trial for offences of sexual abuse of children. It will not always be so. There may be a sufficient difference between what is viewed and what is alleged to have been done for there to be no plausible link. It may be right to exclude the evidence as a matter of discretion, particularly if its probative value is marginal. But that it is capable of being admitted under gateway D we entertain no doubt.
>
> ...
>
> 22. In one of the cases before us the judge was asked to admit the evidence on the basis that it was important explanatory evidence, that is to say gateway C. This gateway is even more open to misuse. It is designed to deal with the situation in which a jury cannot properly understand the case without hearing evidence which amounts to or includes evidence of bad character. A simple example is that the offence alleged was committed when the defendant was in prison or police custody, or involved alleged revenge for a supposed wrong done in the course of some previous criminal venture. Gateway C is, we emphasise, not a substitute for gateway D. It is not possible to dress up a failed case of gateway D as gateway C."

47. Lord Hughes presided over a court the following year in the case of *R v L* [2012] EWCA Crim 316 decided on 16 January 2012. This is a case which is not widely reported but in which the judgment contained some valuable passages which we will set out here. It is unnecessary to set out the facts of the case but enough to say that they bore some similarity to the facts of the case with which we are dealing. At paragraph 11 the court said:

> "We acknowledge the care which the learned judge gave to the ruling, but we are quite satisfied that this evidence cannot properly be described as important explanatory evidence and was not admissible through gateway (c). Gateway (c) has to be read with section 102. Evidence is important explanatory evidence if 'without it the court or jury would find it impossible or difficult properly to understand other evidence in the case and its value for understanding the case as a whole is substantial'. It is the first of those conditions which is the important one in this case, as in many

> others."

48. In paragraph 13, the court gave this warning:

> "We should also add that the fact that the jury might wonder about the delay or the time lag in reporting an incident cannot make it a sufficient basis for the admission of the evidence. Of course had it not been admitted in the way that it was, there might well have been a real possibility of it becoming admissible had there been cross-examination directed to the time lag. But the evidence of A about the offences which were alleged against this defendant was perfectly comprehensible without this evidence."

49. Finally, we think it helpful to refer to paragraph 19 of the judgment where Lord Hughes giving the judgment of the court said this:

> "We make it clear, as this court has on previous occasions, that when bad character is admitted it is essential that counsel and the judge focus on the exact basis upon which it is being admitted. A case which is truly one of propensity cannot and must not be dressed up as a case of important explanatory evidence. Moreover, whatever the basis upon which evidence has been admitted, it is essential that the analysis of the evidence and the use which can properly be made of it is considered before summing-up. In the present case if the judge had addressed this evidence as evidence of propensity, we think it is very likely that she would have admitted it as such. The fact that it was in dispute would not have gone to its admissibility. She might or might not have exercised a discretion, we do not know, but in principle the evidence was admissible. If prior to summing-up she had addressed with counsel, or counsel had addressed with her, the question of how the evidence could properly be used, we think it is very likely that at that stage she might well have concluded that it could be used as evidence of propensity and if she had reached that conclusion and given a careful direction based upon it we doubt very much if anybody could have complained."

50. We understand that passage as indicating the importance of the correct analysis of section 101 and the identification of the relevant gateways as essential to the proper treatment of this evidence at all stages during the trial up to and including the

summing-up.

51. Following those decisions, we consider that it is not possible to say that the evidence concerning the allegations of rape on 6 January and 3 February was either difficult or impossible to understand in the absence of the evidence concerning the episode on 4 February. On the contrary, C's evidence concerning those two alleged acts of rape was perfectly clear and intelligible and not remotely difficult to understand. Accordingly, we consider that the judge erred in admitting the evidence under that provision.

52. However, it does not follow that he erred in admitting the evidence at all. In our judgment there was a clear basis on which the evidence was admissible under section 101(1)(d). Although section 101(1)(d), which we have set out in part above, deals with the particular significance of convictions for other offences as demonstrating a propensity, it makes it clear that that is only one of the ways in which evidence might pass through this gateway. It is also very common to see such evidence being admitted on the basis that it tends to rebut coincidence as being the explanation for two different events. But that is not the only other route through which such evidence might become admissible. The question is whether it is relevant to an important matter in issue between the prosecution and the defence. Here there was an important matter in issue between the prosecution and the defence, as the judge observed in explaining the prosecution's submission in the ruling cited above. This concerned the nature of the relationship at the time of the second rape between the C and the appellant, and his state of mind towards her, both generally and in the predicament to which she had been reduced by the car crash. The fact that he was willing to treat a woman in that condition in the way that he did in the early hours of 4 February demonstrates a state of mind in him which was

relevant to his state of mind at the time when he inflicted a different kind of abuse against her, so it was said, on the morning of 3 February to which the second allegation of rape relates.

53. In our judgment therefore the evidence was admissible. We do not criticise the judge for not identifying the proper route to admissibility in the circumstances which we have described above. The tendency which this evidence all taken together showed in the appellant to override the wishes of C was a material matter to which the evidence plainly related. That being so it would have been wholly inconsistent to exclude the evidence under section 78 on the ground of unfairness. It was being admitted because it was probative and relevant. To hold that its admissibility would have an adverse effect on the fairness of the proceedings would have been, in those circumstances, rather perverse.

54. The question then becomes: was the judge's direction to the jury on this basis adequate? There is no criticism of the direction in the grounds of appeal but we have considered it carefully, not least because we have upheld the admissibility of the evidence on a different basis from that of the judge who crafted the direction to the jury. In our judgment the direction is adequate to identify the proper basis of admissibility which we have just explained. It makes it clear that the evidence does not demonstrate a propensity to commit sexual offences against C and that its relevance is to the relationship at the material time between these two people. We have observed above that it does not contain internally a direction about the burden and standard of proof but the summing-up does. Because the direction specifically tells the jury what the evidential relevance of the material is, it seems to us that it also deals with the question of any inadmissible prejudice which might flow. In our judgment, the direction that the judge gave to the jury did properly focus their attention on the purpose of the evidence and was overall fair to

the appellant.

Result

55. In these circumstances we hold that the evidence was properly admitted and was properly treated in the summing-up and that accordingly these convictions are safe and this appeal must be dismissed.