



*The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under these provisions, where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. As such, the victims in this judgment are not referred to by their real names.*

Neutral Citation Number: [2019] EWCA Crim 2287

Case No: 201801896 C2

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CROWN COURT AT KINGSTON UPON THAMES**  
**His Honour Judge Lamb QC**  
**T20167423**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20/12/2019

**Before:**

**LORD JUSTICE IRWIN**  
**MRS JUSTICE ANDREWS DBE**  
and  
**HIS HONOUR JUDGE AUBREY QC**

-----  
**Between:**

**Edward Gabbai**  
**- and -**  
**The Queen**

**Appellant**

**Respondent**

-----  
**Sarah Forshaw QC and Orla Daly** (instructed by **Hodge Jones and Allen LLP**) for the  
**Appellant**  
**Simon Russell Flint QC** (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 8 November 2019  
-----

**Approved Judgment**

## Introduction

1. On 6 April 2018, the appellant, Edward Gabbai, was convicted of two counts of rape contrary to Section 1(1) of the Sexual Offences Act 2003, and sentenced to terms of 7 and 13 years imprisonment, to run consecutively. This is an appeal from those two convictions.
2. At trial, it was the prosecution's case that the appellant raped three women ("HM", "VG", and "NR") over a three-year period. HM alleged anal penetration against her will, in the context of an otherwise consensual sexual relationship, characterised by a mutual interest in extreme bondage, dominance, sado-masochism ("BDSM") practices (count 1). VG's allegation was based on the removal of a condom during otherwise consensual sex (count 2). NR alleged violent vaginal, anal and oral penetration without her consent (counts 3, 4, and 5).
3. It was the appellant's case that he had engaged in sexual activity with the complainants, but only ever with their consent. The only element of sexual activity he denied was the claim by NR that he had penetrated her anus, although he somewhat qualified that denial in evidence. The convictions relate to the vaginal rape of VG (count 2) on 23 March 2016, and the anal rape of NR on 4 December 2016 (count 4). The appellant was acquitted of the other counts.
4. The appellant appealed initially on four grounds. He was granted leave on 25 October 2019. The grounds were:
  - i) The trial judge failed to mention in the route to verdict document that any penetration of NR's anus had to be intentional before guilt could be established;
  - ii) The judge erred in refusing to allow evidence that NR had made six previous, and at times inconsistent, complaints of rape or sexual assault against six separate and unconnected individuals;
  - iii) The judge erred in refusing to allow the jury to hear extrinsic evidence that VG had a particular interest in rough, violent sex;
  - iv) The judge erred in directing that the complaints made by VG and NR could be treated as cross-admissible.
5. Before us the appellant sought leave to appeal on the further grounds that:
  - i) The prosecution failed to serve a bad character notice, which was required if cross-admissibility was to be relied upon, and the judge failed to give a ruling on that in advance of closing speeches;
  - ii) The verdict on count 4 was illogical, inconsistent with verdicts on counts 3 and 5, and a verdict that no reasonable jury could have reached.
  - iii) Alternatively, that the judge's direction as to consent in relation to count 4 was inadequate and misleading.

6. We allowed the appeal, and quashed the convictions as being unsafe. We now give our reasons.
7. Given the nature of the grounds of appeal, the facts concerning the cases of NR and VG will need to be set out in some detail. Though the events relevant to VG occurred first in time, for reasons which will become clear, a review of the events relating to NR fall to be explored first.
8. Section 1 of the Sexual Offences Act 2003 provides that:
  - “(1) A person (A) commits an offence if –
    - (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
    - (b) B does not consent to the penetration, and
    - (c) A does not reasonably believe that B consents.
  - (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.”

### **The Case Concerning NR**

9. Later in this judgment we refer in more detail to the record of conversations between NR, her general practitioner and her psychiatric team, bearing on previous accounts of rape, and on the complainant’s expressed doubts as to whether her own past accounts were true and accurate.
10. However, there were agreed facts before the jury in the following terms:
  - “31. On 20<sup>th</sup> October 2016, [NR] was admitted to the Maytree Centre for the maximum five-day stay.
  32. The Maytree Centre is a respite centre for those in suicidal crisis.
  33. Whilst at Maytree, [NR] was noted as saying, amongst other things, the following:
    - a) she went out of her way to hurt herself and put herself in dangerous situations;
    - b) this would include walking alone at night when it was dark;
    - c) that she “counts tubes and speeds and looks at traffic”;
    - d) she said that “in a way if (she) gets murdered it won’t look like suicide”;

e) she is unable to look in the mirror or at her body.

“34. On 1<sup>st</sup> November 2016, during a psychiatric assessment, [NR] told Dr Sanchez that she was “always putting herself in danger, found it hard to say no, but there were lots of other times she didn’t when she wanted to say no”.

35. On 14 November 2016 [NR] was referred to the Haringey Complex Care Team following a psychiatric assessment. It was recommended that her dose of fluoxetine (for depression) should be doubled to 40mg per day.

36. On 28<sup>th</sup> November 2016 it was noted by her GP that her mood had dropped sharply. She was told to go to A&E immediately and was offered an ambulance or taxi to take her, which she declined. Medical records show that the dose was duly doubled on 1<sup>st</sup> December 2016.”

11. On 3 December 2016, NR spent the evening with friends in the Angel area of London. At the end of the evening she and her friend met the appellant and, leaving her friend, NR entered an Uberpool taxi with the appellant to travel to south London. Prior to this, NR and the Appellant were complete strangers. They exited the taxi together and entered a house in Battersea which the appellant was looking after whilst the occupants were away. From this point, their accounts given in evidence diverge.
12. It was the complainant’s evidence that the appellant became almost immediately very violent. When upstairs, he pushed her onto the bed, slapping her in the face very hard and strangling her whilst she cried out, screamed and attempted to wriggle away from the appellant. He removed his and her clothing and forced her to perform oral sex on him, before forcing her to engage in vaginal and anal intercourse. At one point, after noticing blood on both of them, NR and the appellant moved to the bathroom to wash. He then pushed her to the ground, so her head and chest were being pushed to the floor and penetrated her anus with his penis. At this point NR noticed that the appellant was filming on his phone. In other words, her evidence was that all sexual activity with the appellant was non-consensual.
13. It was the appellant’s case that the oral and vaginal penetration was consensual, and that there was no anal penetration. Throughout the trial, the appellant maintained that he had not penetrated the anus of NR, but he did concede that he could not entirely exclude the possibility of unintentional anal penetration.
14. The video recorded by the appellant is approximately three minutes long. It shows NR and the appellant in a bathroom, with NR kneeling in front of the appellant.
15. The transcript is agreed by the parties, and reads as follows:  

“(NR and Gabbai are already in the bathroom)  
Gabbai: Put your face up, keep your eyes closed  
NR: (demonstrates)  
Gabbai: Tell me you’ll do anything you want  
NR: I’ll do anything you want  
Gabbai: Do you know what happens if you miss obey?”

NR (shakes head)  
Gabbai: You're shaking your head (slaps)  
NR: No, don't, don't, don't  
Gabbai: Close your eyes. Hands behind you. Now.  
NR: (demonstrates)  
Gabbai: Arse in the air  
NR: (demonstrates)  
Gabbai: Stay there for me  
(Gabbai searches for a condom and returns, putting it on)  
Gabbai: Say, "Please"  
NR: Please  
Gabbai: Louder, I can't hear you  
NR: Please  
Gabbai: Good  
(Gabbai inserts penis)  
NR: Ouch, ouch, ouch. Please, don't. No, please, no. Ouch (crying).  
Please, don't, please, don't  
Gabbai: Do you want me to stop?  
NR: (shakes head)  
Gabbai: Say it clearly, say it clearly  
NR: No  
Gabbai: No, you don't want me to stop. You want me to keep fucking you.  
Say it clearly for me  
NR: Mm-hmm (nods head)  
Gabbai: There's a good girl. Suck (indicates)  
(NR sucks Gabbai's fingers)  
Gabbai: Good girl"

16. It appears to us that, all along, a central issue in the case concerning NR was a rather striking conflict between the oral evidence of the complainant and the video evidence.

### **The Direction on Intentional Penetration (Ground 1)**

17. The "route to verdict" document provided to the jury by HHJ Lamb QC broke down the offence of rape into a series of questions, in an attempt to make the offence more easily navigable. The questions were as follows:

**"Question 1: Are you sure that D penetrated the anus of NR with his penis?"**

If your answer is "Yes", go to question 2.

If your answer is "No", your verdict will be "Not Guilty"

**Question 2: Are you sure that when D penetrated NR's anus, NR did not consent to it?**

If your answer is "Yes", go to question 3.

If your answer is "No", your verdict will be "Not Guilty"

**Question 3: Are you sure that D did not genuinely believe that NR consented to the penetration of her anus?**

If your answer is “Yes”, your verdict will be “Guilty”.

If your answer is “No”, go to question 4.

**Question 4: Are you sure that D’s belief in NR’s consent to the penetration of her anus was unreasonable?**

If your answer is “Yes”, your verdict will be “Guilty”

If your answer is “No”, your verdict will be “Not Guilty”

18. It is the appellant’s case that this omitted a key aspect of the offence of rape relative to Count 4 (the anal rape), namely that penetration must be intentional. When the route to verdict was provided by the judge in draft, it did not include the first question as to the fact of anal penetration. Counsel for the appellant, Ms Sarah Forshaw QC, requested that the trial judge amend the document to include that step. This clarification, however, only addressed the question of whether there was anal penetration, and not whether any anal penetration was intentional. As we have said, the appellant had been explicit that there was no anal penetration, but if there was it was not intentional.
19. If the jury concluded that the relevant penetration was anal but the appellant had intended to penetrate her vagina, such accidental anal penetration could not have formed the basis for conviction. Thus, the argument goes, the jury might mistakenly have reached a guilty verdict without determining a critical matter of fact, and a necessary ingredient of the offence.
20. In light of the acquittal of oral and vaginal rapes (counts 3 and 4), this omission is said to be significant. Given that the jury could not be sure that the vaginal or oral intercourse constituted rape, then intercourse which was intended to be vaginal would be unlikely to found a conviction.
21. The Crown, for their part, drew our attention to the extent to which the judge had elsewhere directed the jury in reference to the requirement that the penetration must be intentional. The route to verdict, the Crown submitted, is not intended to be a recital or repetition of all the relevant legal issues in a summing up. The members of the jury had been provided with the statutory definition of rape. It was not the appellant’s principal case that the anal penetration had been accidental, but rather that it had not happened at all. Consequently, it was argued, even if there was an omission from the route to verdict document, this was not determinative, as the jury clearly rejected the appellant’s argument that he did not penetrate the anus of NR.
22. In the summing up the judge recited the statutory definition of rape, including a brief recital of the requirement that the penetration be intentional. He directed the jury in the following terms:

“[I]f the jury are sure about the absence of consent and they are sure about the absence of reasonable belief, it is no defence for A to say, ‘I didn’t intend to rape’. Go back to the statutory definition right at the beginning. A person commits an offence

if he intentionally penetrates. That is the only point at which intentional comes into the statutory definition. The penetration, I am going back to that passage on intention, see the statutory definition.”

23. There was thus, at least, a dissonance, between the direction and the working document the jury had been given. We consider that the route to verdict document was deficient.
24. We note the recent decision of this court in *R v Lewis* [2019] EWCA Crim 710, where the issue was whether a conviction was unsafe because the recorder had told the jury that the route to verdict document was “a guide, you are not forced to follow it”: see paragraphs 35 to 41. The court concluded that could not render the conviction unsafe. The jury in that case “... were aware that they needed to answer the questions set out in the “steps to verdict” document. There is nothing to suggest that they did not follow that course” [41]. That judgment does nothing to undermine or limit the importance of the “steps/route to verdict” given to juries, but rather emphasises the significance of these guides for juries.
25. The problem arising here is that if the jury took the route to verdict as their approach, it is possible they may have missed the importance of the requirement for intentional anal penetration. Such documents are of very great use in criminal trials, but it is essential that the key steps which are in issue are included in the document, precisely because juries may rely heavily upon them.
26. Taken on its own, in the light of the direction given and the fact that the jury had a copy of the statute, it may be that this deficiency would not have brought this court to conclude this conviction was unsafe. However, this issue does not stand on its own.

### **Logically Inconsistent Verdicts (Additional Ground 2)**

27. It was the Crown’s case that the sexual activity that took place with NR on 3 December 2017 was a result of the physical force, or threat of physical force, coming from the appellant. NR’s account left no room for a finding that any of the activities had been consensual. The appellant maintained that the events of that evening were role-play, pursuant to a mutual interest in rough sex, and that the activities were consensual.
28. The appellant submits that the jury’s rejection of the allegations of vaginal and oral rape (counts 3 and 5) demonstrates that they were not convinced by NR’s oral evidence. Yet, as the video is consistent with role-play and shows NR giving explicit consent, the jury appears to have relied upon the oral evidence of NR in convicting the appellant of anal rape, despite that fact that the acquittals demonstrate that the jury could not be sure of her narrative account.
29. The Crown rejects the claim that there are inconsistencies. As the video is only three minutes long, the Crown submits the aspects of NR’s narrative that are said to conflict with the video merely took place other than during those three minutes. It is further submitted that it is not reasonable to draw the inference that the acquittals on counts 3 and 5 show that the jury rejected the submission that NR did not consent. Rather, the acquittals may be based on a finding that despite a lack of consent, the appellant held

a reasonable belief in consent with respect to those acts of penetration only. As a result, there is no necessary inference that the jury have rejected NR's account, save where it was corroborated by the video.

30. We have looked with care at the video. On a straightforward viewing it appears, at least arguably, entirely consistent with role-play. There are marked disparities between the account of the event given by NR, and that which can be seen on the video evidence. There is a clear act of violence, with the appellant forcefully slapping NR across the face, but the other actions of violence recalled in the account of NR are not shown. By NR's account, marked violence should have been shown. The video does not show the appellant pushing NR to the floor, or holding her down immediately prior to the alleged anal penetration. No blood can be seen on the video, and there is no evidence that either of them has just washed. Importantly, the words spoken by NR, which are heard on the video and appear in the agreed transcript, are also absent from her account and, on the face of it, are inconsistent with it. This part of the video is important, as it shows, on a plain viewing, a giving of explicit consent by NR a few seconds after the allegedly anal penetration: "Do you want me to stop? No."
31. If the jury had convicted of the oral and vaginal rapes alleged, then it might more easily be said that the explicit consent in the video was falsified or nullified, because the whole course of events was non-consensual, flowing from physical force or threats applied by the appellant earlier, but not captured by the video. However, that argument cannot easily arise, given the acquittals.
32. For these reasons, the verdicts of guilty on count 4, and not guilty on counts 3 and 5 appear at first difficult to reconcile. However, in our judgment it can reasonably be inferred that the jury had doubts as to NR's full account of the events, but found that the penetration showed in the video was anal penetration to which NR did not initially consent, and that the appellant had no reasonable belief in NR's consent, or at least no reasonable belief in consent for the act of penetration. On this reading of the verdicts as they relate to NR, they are not clearly inconsistent.
33. The legal threshold for a finding of logical inconsistency is high. In *R v Fanning* [2016] EWCA Crim 550 it was held at [27] that:

"...absent a specific direction, it was generally permissible for a jury to be sure of the credibility or reliability of a complainant or witness in relation to one count in the indictment and not to be sure of the credibility or reliability of the complainant on another count."

The account of a complainant is divisible. Some parts may be believed and others disbelieved. In *Fanning*, at [28], this Court recited with approval the approach of Sir Igor Judge PQBD, as he then was, in *R v C* [2007] EWCA Crim 2581. At [40], in holding that the verdicts were not logically inconsistent, the Court observed:

"Here the jury was sure about the reliability of the complainant's evidence, where it was provided with a measure of independent support, but unprepared to be sure where it was



not. This was an entirely rational approach, properly seeking to give the benefit of the doubt to the defendant.”

34. In our view, the conflict between the reliance on the evidence of NR with respect to count 4, and doubts as to the reliability of the evidence of NR with respect to counts 3 and 5, do not mean that the verdicts are so logically inconsistent as to render the conviction unsafe. The jury in the present case may have relied upon the complainant’s account where it was corroborated by one interpretation of the video evidence, whilst maintaining doubt as to the credibility or reliability of the oral evidence where uncorroborated. There is of course no requirement for such corroboration, but that does not mean that such an approach by this jury would be improper. As a result, this ground of appeal is dismissed.

### **NR’s History (Initial Ground 2)**

35. In the course of the trial, on 27 March 2018, HHJ Lamb QC rejected a defence application under Section 100 Criminal Justice Act 2003 (“CJA”) to adduce evidence relating to previous allegations of a sexual nature (“the undisclosed material”) made by NR. The judge also rejected a request to adduce evidence concerning NR’s previous sexual behaviour under Section 41 of the Youth Justice and Criminal Evidence Act 1999 (“YJCEA”). The undisclosed material is separate and additional to the matters in the agreed facts set out above.
36. The appellant asserted that the undisclosed material, comprised of GP notes and counselling records which detailed previous allegations of sexual assault and rape, were replete with inconsistencies and contradictions. It was material upon which the jury could conclude that these complaints were false. The materials further showed, the appellant submitted, that NR deliberately took part in consensual sexual activities and subsequently reported falsely that she had been raped or sexually assaulted.
37. It is helpful to recite some of the specific aspects of these records.
- i) Notes from the GP from April 2015 relating to an episode said to have taken place in 2011, when the complainant was 18 years of age, recording an allegation of rape: “Taken from a bar. I only said “no” half way through”.
  - ii) In relation to the same episode, notes from her assessment for the Maytree Clinic on 19 October 2016 read: “She is 18 years old. She goes out with a group of friends and drinks quite a bit of alcohol. She loses one of her group and goes out to look for her. The next thing she knows, she’s in a taxi with a stranger and is raped. She couldn’t remember all the details and wonders whether she consented to it as she is a bad person”.
  - iii) A further account, given in her second ABE interview for this case, but bearing on the same earlier episode, includes the following: “Actually hadn’t had v. much to drink. Went over to bar then memory becomes unclear. I remember being in a taxi with a man and then he took me to his house and had sex with me. I do remember telling him to stop. I don’t remember what happened after that. I think he did kind of carry on for a little while after that but I’m not .... I don’t remember very clearly. I think ... don’t think it was [non-consensual].”

- iv) In relation to an episode said to have taken place in 2014 when the complainant was 21 years of age, the complainant is noted in the course of discussion in October 2016 as saying this was an episode of “rape ... by her boyfriend two weeks ago ... didn’t think she was at risk or had the right to say no. This has happened to me before. Previous assault several years ago.”
- v) In relation to an episode said to have taken place in 2015 when the complainant was 22 years of age, again the Maytree Notes from 2016 read: “In Spain. Maybe wasn’t rape.”
38. The complainant was seen by a counsellor at university in March 2014. The complainant told the counsellor that she was raped by her boyfriend two weeks earlier. She is again recorded as saying that “she didn’t think she was at risk or had the right to say no ... this has happened to me before”. After discussion of her history of mental health problems and drug-taking, the notes record “see Thought Sheet... I took him back to my flat. I didn’t say no to begin with. Lying. Attention-seeker.” The implication of the last phrases is, or may be, that they were self-descriptions.
39. On 12 October 2016, the complainant was noted as having an hour-long telephone call with a counsellor at the Maytree Clinic. In the course of this she was noted as describing events as follows:
- “Raped three times. ‘I put myself in dangerous situations’
1. 18 years taken from a bar. I only said no half-way through.
  2. A guy forced himself on me.
  3. In Spain. Maybe wasn’t rape.”
40. The pre-admission notes to the Maytree Clinic on 19 October 2016 include the following:
- “Has suffered three rapes. Putting herself in dangerous situations (i.e. voluntarily) like walking through a park when its dark and late ... I felt she could quite easily do something impulsively, she agreed she counts tubes and speeds and looks at traffic.
- On the day she gets her results (A levels) she goes out to celebrate. She is 18 years old. She goes out with a group of friends and drinks quite a bit of alcohol. She loses one of her group and goes out to look for her. The next thing she knows she is in a taxi with a stranger and is raped. She couldn’t remember all the details and wondered whether she consented to it as she is a bad person ... Aged 19 years she rents a room with a friend and works for about 1 year. This is when she really starts to act out sexually with no regard for her safety. She often goes off with strangers and takes whatever drug they have, lets people do what they want to her, switches off ... She found it hard to say no to people... Whilst in Spain she is

raped. Doesn't go into detail but is very clear that on both occasions she said no to the perpetrators... Back to England and has returned to study at [university]. Not reported rapes. Has since started to put herself in dangerous positions. Having random sex with just anyone. She goes out and if someone chats to her she will have sex with strangers. I asked her what she was thinking when she did this and she said she hates herself and feels she deserves no better. In a way, when she's out walking late at night, if she gets murdered it won't look like suicide... She said she wasn't exactly planning suicide but putting herself in dangerous situations would save her having to do it. I got the sense she could quite easily throw herself under a tube or walk out into traffic ... She said she went out of her way to hurt herself and put herself in dangerous situations. When she said "no" she felt like she didn't have the right to say no and even when she did she wasn't listened to..."

41. On 21 October 2016, the Maytree Clinic note records that in discussion with the counsellor, the complainant "touched on whether the sexual acting-out was more a symptom of her self-hatred. A form of self-harm".
42. In notes made on 1 November 2016, during a psychiatric assessment, the complainant again said she was raped three times, once when 18, then aged 21, and then last year (2015). She is noted as saying "tells me she is always putting herself in danger, found it hard to say no, but there were lots of other times she didn't [say no] when she wanted to say no."
43. The chronology of this material may be significant. As will be clear, in late November and into December 2016, the complainant was noted as having "active suicidal thoughts" and was under active psychiatric care, receiving antidepressant medication. Her Fluoxetine was increased in dosage on 1 December 2016. The episode involving the appellant took place three days later on 4 December 2016.

#### **NR's History: The Application at Trial**

44. It was initially argued by the appellant that the evidence of false complaints of sexual assault and rape did not require a ruling under Section 41 YJCEA, as such material was not evidence of the previous sexual behaviour of the complainant. In essence, the distinction was between the account of previous sexual behaviour and the self-doubting account of ambiguity as to consent, and unreliable accounts of rape. However, following *R v V* [2006] EWCA Crim 1901 ("*R v V*"), the appellant also submitted an application under Section 41 YJCEA to complement the application under Section 100 CJA should the initial argument fail.
45. Section 100 of the CJA, entitled 'Non-defendant's bad character' in its relevant parts reads:

"(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if –

- (a) it is important explanatory evidence,

(b) it has substantial probative value in relation to a matter which –

(i) is a matter in issue in the proceedings, and

(ii) is of substantial importance in the context of the case as a whole,

(2) For the purposes of subsection (1)(a) 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.

...

(4) Except where subsection (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court.”

46. For the purpose of argument as to admissibility, section 109 of the Act stipulates that it should be assumed that bad character evidence is true. The Court of Appeal has articulated the threshold as requiring ‘some material from which it could properly concluded that the complaint was false’ (*R v AM* [2009] EWCA Crim 618 at [22]), or “whether there was a proper basis to allege the complaints were false” (*R v Knight* [2013] EWCA Crim 2486 at [36]), or “some material from which it could properly be concluded that [a previous complaint] was false”, see *R v Conn* [2018] EWCA Crim 1751. As this Court observed in *R v Al-Hilly* [2014] 2 CAR 530: “Each case is fact sensitive and the ultimate question is whether the material is capable of leading to a conclusion that the previous complaint was false’.

47. HHJ Lamb QC found there was an insufficient evidential basis for finding that these complaints were false, and rejected the bad character application. In reviewing the relevant authorities, in particular *R v A* [2001] UKHL 25, *R v V*, *R v AM* and *R v Knight*, and examining the evidence that the allegations were false, he came to the following conclusions:

“(i) No complaint was ever investigated;

(ii) There is insufficient material capable of founding an inference that any one or more of the complaints is untrue;

(iii) Extensive satellite litigation would be involved; and

(iv) Such satellite litigation would subject NR to unnecessary, lengthy, speculative and intrusive cross examination.”

48. Additionally, the judge was “not persuaded that the evidence of the complaints would have substantial probative value”. It is the appellant’s case that the judge erred in his rejection of the Section 100 application, and that this evidence should have been before the jury.

49. Section 41 of the YJCEA provides that:

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

(a) no evidence may be adduced, and

(b) no question may be asked in cross-examination, by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

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

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

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

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

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

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

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

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

(ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

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

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

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

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

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

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

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

50. It is the appellant’s case that the evidence was admissible under Section 41(3)(a) on the basis that the relevant issue was not an issue of consent but, rather, the appellant’s reasonable belief in consent. The evidence demonstrated a pattern of deliberately engaging in what is described as sexual self-harm, including instances of NR describing her encounters as rape, but subsequently voicing explicit doubts as to whether these episodes were truly rapes or whether she had in fact consented. This tendency to engage in high-risk sexual activity which she later misdescribed, was relevant to the jury’s assessment of whether the appellant held a reasonable belief in her consent. Her own description of her earlier behaviour might indicate how she behaved with the appellant, in such a way as to affect his reasonable belief in her consent.
51. Counsel for the appellant applied to question the complainant about her reports of previous sexual abuse, summarised as follows:

“i) That she has variously described herself as ‘bisexual’ and ‘probably’ a lesbian but has admitted to having sexual relationships with men;

ii) That she had complained of several previous instances of sexual assault and/or rape where she was unclear as to whether she gave consent, including a specific incident when she went back to a man’s house in a taxi after a night out and had sex;

iii) That she had complained of another incident of rape when she started university involving another man but had also said that ‘I sort of let him have sex with me’ and that, although she told him that she did not want to have sex, it was ‘kind of consensual’;

iv) Whether she had particular difficulty in recalling the detail of sexual encounters after she has drunk (even modest) amounts of alcohol;

v) That she had discussed with therapists that she ‘acts out’ sexually, in the context of her experiencing self-hatred;

vi) Whether she had developed a habit of allowing herself to be controlled in sexual situations without complaint;

vii) That she had previously deliberately placed herself in what she believed to be risky or even dangerous sexual situations;

viii) That these situations have included walking in isolated areas alone at night, leading to sexual attack in Spain;

ix) That she had been so concerned about her own sexual decision making that she had discussed the issue with several mental health professionals.”

52. With respect to admissibility under Section 41(3)(a), the judge held at [9]: that “there is nothing to show that NR’s history... had any influence on D’s (Edward Gabbai) thinking or belief” and, at [10] that, there is nothing to lead to “a conclusion of the jury would be unsafe if the listed material were withheld from the jury”. Regarding Section 41(3)(b), referencing Lord Hope in *R v A*, he held that “the phrase ‘at or about the same time’ will generally be interpreted no more widely than 24 hours before or after the offence”. The judge also dismissed any claim to admissibility reliant on Section 41(3)(c)(i) on the basis that no attempt had been made to show that NR had previously experienced anything like the physical activity meted out by D.
53. As a result, the appellant was not able to establish a connection between the sexual decision making of the complainant and her desire to self-harm, and was not permitted to refer to any past incident of sexual behaviour. Hence the application was refused.

## Analysis

54. The facts in this case are most unusual, and the issue for the judge in applying s.100 of the CJA 2003 and s.41 of the YJCEA most sensitive and difficult.
55. As a matter of logic, the material which the defence argued should be before the jury was capable of giving rise to a number of inferences. First, that the complainant placed herself in risky situations and engaged in sexual encounters with strangers. Second, that she often engaged in sex when she was at the least ambiguous as to consent, but “did not say no”. Third, that she gave a history of rapes but had never pursued a complaint of rape. Fourth, that she herself doubted her own accounts of rape: “maybe it wasn’t rape”.
56. Clearly, the second and third inferences bore on the issue of consent. Logically, however, in our judgment they also bore on her behaviour, relevant to the appellant’s reasonable belief in consent, perhaps particularly potentially confirming the appellant’s evidence and the video evidence of her behaviour. At the time of the ruling, reasonable belief in consent was an issue for the jury on all counts involving NR. The essence of the complainant’s recorded accounts of historic events, given before the evening in question, was that she engaged with strangers in sexual contact, and frequently did not say “no” even when she felt “no”.
57. The third, and particularly the fourth inference bore directly on the complainant’s credibility in making the allegations being tried.
58. In the form of agreed facts, the jury did have text messages between NR and her Mother, and messages between NR and a friend, in the course of which NR expressed some doubt as to the accuracy of her account of these events. These were before the jury, but without the information as to her history.
59. In our view, this evidence was of a striking nature, and relevant as suggestive of previous false accounts. The evidence that the complainant had doubted her own past suggestions of rape, and was ‘Lying. Attention seeker’ should have been admitted pursuant to s.100 CJA 2003. This provided an evidential foundation for a conclusion of falsity, of substantial importance in the case as a whole, and should have been before the jury.
60. The position in relation to s.41 of the YJCEA was more complex. Applying the successive steps laid down in s.41 of the YJCEA, it is clear that some of the material sought to be introduced did bear on the sexual behaviour of the complainant NR, as opposed to her reliability as a witness, and thus required leave.
61. In many cases, the issue of consent will be hard to distinguish from the issue of reasonable belief in consent. In this case the issues were distinguishable in our judgment. However, the provisions of s.41(3)(a) certainly applied.
62. Insofar as this evidence bore on reasonable belief in consent, as opposed to consent proper, it can be distinguished from having as its “main purpose” the impugning of the credibility of the complainant, within the meaning of s.41(4).



63. Insofar as this evidence did bear on actual consent, we regard it as evidence of behaviour highly similar to the evidence to be adduced by the appellant, within s.41(3)(c). We bear in mind the high threshold for similarity: see *R v G* [2016] EWCA Crim 1633. Although there was no suggestion of “rough sex” or role-play in the earlier episodes described by the complainant, that is not to exclude similarity “in any respect”, as the sub-section phrases it. The relevant similarities here are the admitted background of a chance meeting between strangers leading to an immediate sexual encounter, and to behaviour in the course of which the complainant (according to the appellant and the video) “did not say no”. However, the sexual behaviour concerned neither took place as “part of the event which is the subject matter of the charge against” the appellant (s.41(3)(c)(i) nor to any other behaviour “at or about the same time of the event” (s.41(3)(c)(ii)). Hence, even though in our judgment this evidence, insofar as it bears on actual consent, was of real materiality, it could not be admitted under this section.
64. However, this does not alter the conclusion as to the evidence we consider admissible under s100 CJA 2003. Had this evidence been admitted, the interpretation of the video evidence might very easily have been affected. As we have said, the video evidence is key as it is in apparent conflict with the account of NR. That was properly a matter for the jury. Accordingly, we find this ground made out.

### **The Case Concerning VG**

65. In February 2016 the appellant and VG met on *Tinder*, the dating web application. They started a consensual sexual relationship soon after. Some of their sexual activities were violent, and sometimes their sexual intercourse was unprotected. On 22 March 2016 they went to an address in Stoke Newington and engaged in sexual intercourse, during which time the appellant wore a condom. After cuddling for a short period, the appellant began to kiss VG and touch her between her legs. It was VG’s account that the appellant became aggressive, throwing VG around, and pinning her down, biting her neck and ear, proceeding to pick her up, put her on all fours on the bed and penetrate her vagina with his penis. During this penetration, the appellant did not wear a condom. Eventually he withdrew and ejaculated onto her back.
66. VG said she ‘had made it very clear that’ that she would only have sex with the appellant if he wore a condom. She described the sex on that evening as being particularly rough, including slapping and choking. She said that this level of violence shocked her, and made her fearful of challenging the appellant for not using a condom. The appellant’s case was that this roughness of the sex did not go beyond that with which he knew VG was comfortable, and that rough sex was something she had expressly said she enjoyed. He further submitted that she knew, or must have known, that he had removed the condom after the first act of sexual intercourse, and that if she had been unhappy about this there was nothing to stop her from saying so.
67. It is important to emphasise that the prosecution case was not that this was rape because the sex was rougher than before. The vitiation of consent turned expressly and only on the absence of a condom.

### **Admissibility of Text Messages (Initial Ground 3)**

68. In support of the proposition that VG engaged in rough sex, and in seeking to establish that VG could not have been cowed by such behaviour as she was intimately familiar with rough sex, the appellant sought leave under Section 41 YJCEA to question VG on a series of Facebook messages. These messages, between VG and another person (EP) pre-dated VG's meeting of the appellant, and contained a discussion of various sexual scenarios, including numerous explicit references to violent sexual behaviour and practices. This, the appellant submitted, was of heightened relevance, given that the complainant denied an enjoyment of rough sex with the appellant.
69. The application was refused by the HHJ Lamb QC on the basis that it offended Section 41(6), as the messages were merely evidence of preference of particular sexual practices, and not specific instances of sexual behaviour. Further, that VG's thoughts in and of themselves prove nothing that was relevant to the case. What may have passed through VG's mind when conversing with EP 18 months before she met the appellant is irrelevant to the issue of belief in consent.
70. In addition to the conversations with EP, it should be noted that the appellant was able to rebut the complainant's claim regarding enjoyment of rough sex with the appellant, by reference to the messages between VG and her friend the morning after the relevant date. These were before the jury. In those messages she said that she enjoyed being hit, and enjoyed rough sex. In our judgment, the messages between VG and EP add little if anything to those later messages. The material concerning EP would not have materially enhanced the jury's ability to accept or reject the proposition that VG was shocked by the level of violence on the relevant night, and did not bear on the critical issue of the use of a condom.
71. As a result, this ground of appeal is dismissed.

### **Cross-Admissibility (Initial Ground 4, Additional Ground 1)**

72. The appellant seeks to advance two inter-related grounds regarding cross-admissibility. The first (initial ground 4) is that the judge erred in directing that the evidence in the cases of NR and VG was cross-admissible at all. The second (additional ground 1) is that the prosecution failed to serve a bad character notice, which was required if cross-admissibility was to be relied upon, and the judge failed to give a ruling on the issue in advance of closing speeches.
73. It is the appellant's case that the allegations of NR and VG are of such a different character that the judge erred in directing the jury that they could use the evidence relating to one complainant to support a finding of guilt on the other.
74. Under Section 101 of the CJA, entitled 'Defendant's bad character', evidence in relation to one count of an indictment is capable of being admitted as bad character evidence in relation to any other count in the indictment if it satisfies any of the criteria in that Section. For present purposes the relevant criteria are:

(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if –

...

(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,

...

(3) The court must not admit evidence under subsection (1)(d) ... 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.

75. Section 103 CJA further makes it clear that:

“(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.

76. Pursuant to Section 101(1)(d), evidence can be cross-admissible on the basis of coincidence or propensity. In coincidence cases, where one allegation strengthens the cogency of the evidence in relation to another allegation, the jury should be instructed that the evidence on each count may be relied on to preclude coincidence and thus to support another count. In such cases, the important matter in issue is “whether circumstantial evidence linking [the defendant] to [the offences], when viewed as a whole, pointed to his participation in and guilt of each offence”: *Wallace* [2007] EWCA Crim 1760.

77. Alternatively, where there is insufficient similarity in the facts relating to the various counts, the application under Section 101(1)(d) is likely to be a propensity argument,

and as such the jury should be directed to deal with the evidence sequentially. This means, as it was put by Latham LJ in *Freeman and Crawford* [2008] EWCA Crim 1863, the jury should be directed to:

“...first determine whether it is satisfied on the evidence in relation to one of the counts of the defendant’s guilt before it can move on to using the evidence in relation to that count in dealing with any other count in the indictment.”

78. This was further particularised by the court in *R v Hanson* [2005] EWCA Crim 824, at [7]:

“Where propensity to commit the offence is relied upon there are thus essentially three questions to be considered: 1. Does the history of conviction(s) establish a propensity to commit offences of the kind charged? 2. Does that propensity make it more likely that the defendant committed the offence? 3. Is it unjust to rely on the conviction(s) of the same description or category; and in any event, will the proceedings be unfair if they are admitted?”

79. In *N(H)* [2011] EWCA Crim 730 at [31] the Court of Appeal noted that it will be a rare that the jury might be directed to consider evidence on the basis of coincidence, and on the basis of propensity. In any event, in propensity cases the direction must relate to a specific issue, and not to a broad similarity. In *R v Jan Nicholas Ross* [2017] EWCA Crim 1125 at [28], for example, the issue was explained thus:

“Taking that notion of propensity, the question that arose here was: were the features of one or more of these offences likely to indicate that the appellant had a propensity – a tendency, an inclination, a disposition – to breach sexual boundaries in the context in which these matters arose?”

80. At the trial, in addressing cross-admissibility, HHJ Lamb QC directed the jury in the following way:

“65D. [T]here are two ways in which the evidence of one count might support the prosecution’s case on the other. You should consider these ways in the following order.

First, consider count 4 where the prosecution rely not only on the evidence from NR, but on VG’s phone video. If, having considered the evidence on count 4, you are sure that the defendant is guilty of count 4, you should go on to consider whether that shows that he has a tendency to commit offence of the kind charged in count 2. As Mr Russell-Flint [counsel for the prosecution] put it, losing control in the moment and/or exploiting his physical, dominant role in the sexual activity, playing little or no regard to the wishes of his sexual partner.

If you are not sure that the defendant has such a tendency, then your conclusion that he committed the offence in count 4 does not support the prosecution case on count 2, but if you are sure that the defendant does have such a tendency, then you may take this into account when you are deciding whether the defendant is guilty of count 2.

Bear in mind, however, that even if a person has been a tendency to commit a particular kind, it does not follow that he is bound to do so, so if you are sure that D has a tendency to commit offence of the kind charged in count 2 or 4, this is only part of the evidence against him on that count and you must not convict him wholly or mainly on the strength of it.

The second way in which the evidence on one count might support the prosecution's case on the other is this. The prosecution also rely on similarities between the allegations made by VG and NR. What have they both told you, say the prosecution? That D was posing as a caring and considerate sexual partner. He adopted the physically dominant role, he abused that position to sate his own desire.

66G. If you decide that this has or may have happened, the similarities between that complainant's evidence and the evidence of the other complainant, would not take the prosecution's case any further and you would have to take any influence of that kind into account when deciding how far you accepted the complainant's evidence. However, if you are sure that there had been no such concoction or inference, you should consider how likely it is that two people independently of each other, would make allegations that were similar but untrue. If you decide that this is unlikely, then you could, if you think it right, use VG's evidence as support for the evidence of NR or the other way around."

81. It is significant to focus on the different issues arising in the cases of VG and NR. VG's allegation was based on the removal of a condom during otherwise consensual sex, whilst VG was in a relationship with the appellant, and had previously engaged in rough consensual unprotected sex. NR's allegation was of extreme violence and forced penetration by the appellant – who was a complete stranger. In this way the two instances are entirely dissimilar. In our view, whether viewed through the prism of coincidence or propensity, VG's allegation could not logically assist the jury with whether NR had consented to rough sex (or anal penetration), just as NR's allegation could not assist the jury with the issue of whether VG had, on the relevant occasion, consented to sex without a condom.
82. In our judgment, the jury was not entitled to find the counts mutually reinforcing. The similarity advanced was on the very limited basis that during rough sex the appellant went further than the complainant wanted. The suggested propensity was, as the prosecution had put it, 'losing control in the moment and/or exploiting his physical, dominant role in the sexual activity, paying little or no regard to the wishes

of his sexual partner.’ Each case turns upon its facts and the facts here were too widely distinct for cross-admissibility be left to the jury.

83. The already difficult question of jury directions on cross-admissibility was compounded in this case by the neglect of an important procedural step. As the appellant noted in their submissions on additional ground 1, under Section 101(1) CJA 2003, cross-admissibility requires a bad character notice. In the absence of a bad character notice a defendant is entitled to have the case decided on the basis that the evidence for one count will not be used as evidence for another count. Moreover, the requirement for a notice is not merely technical. The Crown Court Compendium is clear that in such cases the direction must be discussed before closing speeches. The same issue arose in the recent decision in *R v Adams* [2019] EWCA Crim 1363, where it was held that:

“...unless the procedure for admitting evidence of bad character is to be treated as a complete dead letter, that meant that the evidence was inadmissible and the appellant was entitled to have the case decided on the basis that evidence on each count was inadmissible in relation to other counts. That in turn made it necessary for the judge so to direct the jury.”

84. In the present instance there was no explicit or decisive discussion of cross-admissibility in advance of speeches. The issue of cross-admissibility was finally addressed late. As Mr Russell Flint makes clear, the broad issue of cross-admissibility lay behind applications made earlier in the trial on joinder and severance. The Crown’s stance that the material was cross-admissible, save where collusion might have been possible, was tolerably clear. The thrust of this approach, as the Crown’s skeleton argument makes clear (paragraph 59), was that the defence involved the proposition that “two unconnected individuals, neither of whom had any knowledge of the other had either instigated, or at least been willing to indulge in, the idea of submissive or rough sex”: that is to say, coincidence.
85. The position of the Crown was not contained in a notice, making it clear what they sought, in a manner to precipitate a conclusive argument on the point, in advance of closing speeches. There was no discussion with the judge at that point. This Court was informed that the fact the judge proposed to leave cross-admissibility to the jury only emerged during the first day of the summing-up, 4 April. The Crown emailed submissions to leading counsel for the appellant that evening, with a reply later that evening from Ms Forshaw. The judge provided both counsel with his direction or ruling on the point by email early in the morning of 5 April, and the summing-up addressed the point later that day.
86. In our view, this was not a helpful way to proceed. The service of a bad character notice should and would have the effect of ensuring this issue is approached in a coherent and timely way.
87. On the facts of this case, the prejudicial effect of cross-admissibility was likely to be high. The complexity of the summing up and the risks attendant on the cross-admissibility were compounded by the case in relation to the third complainant, HM. Owing to a fear of contamination, since HM was cognisant of the allegations of NR and VG prior to making her own complaint, HM’s evidence was deemed not to be

cross-admissible, and the direction to the jury was necessarily therefore more complex.

88. We conclude that this evidence should not have been ruled cross-admissible.

### **The Safety of the Convictions**

89. We have addressed the safety of these convictions, bearing in mind all the aspects of this trial which went awry. Taking them together, we have had no hesitation in concluding that these convictions were unsafe.

### **Conclusion**

90. For those reasons, the appeal is allowed. The convictions have been quashed. We will consider any applications concerning re-trial. This judgment must not be reported until that matter has been decided.
91. This was a most difficult and demanding case for all concerned. The evidence presented unusual problems. We are very grateful to both counsel for the care with which they approached this appeal. Our particular thanks are due to Mr Russell Flint, who responded so swiftly to the grant of leave to appeal, allowing the matter to be disposed of in an expeditious appeal.