Neutral Citation Number: [2019] EWCA Crim 710

Case No: 2011804678/B3

IN THE COURT OF APPEAL
(CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2019

Before :

LORD JUSTICE COULSON
MR JUSTICE SPENCER
and
HER HONOUR JUDGE TAYTON QC
(SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

- -

Between :

REGINA
- and -
CALLUM LEWIS

- -
- -

Mr S Sandford appeared on behalf of the **Crown**
Ms S Forshaw QC appeared on behalf of the **Applicant**

Hearing date: Friday 12th April 2019

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Approved Judgment

Lord Justice Coulson :

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those 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 to their identification as the victim of the offence. The judgment is anonymised accordingly.

2. The applicant is now 22 years old. On 11 September 2018, he was convicted in the Crown Court at Kingston upon Thames (Mr Recorder Atchley and a jury) of one count of anal rape. The jury were unable to reach a verdict on Counts 2 and 3 (vaginal and oral rape). He was sentenced to 4 years imprisonment. His application for permission to appeal against conviction has been referred by the single judge to the full court, because it involves – at least in part – an application to rely on fresh evidence.

3. On the evening on 17 February, the applicant, a soldier, met the complainant EH, in a nightclub in Kingston. It was their third meeting. They both consumed a good deal of alcohol and EH described herself as "quite drunk". They left the nightclub at about 3.30 in the morning and took a taxi to the applicant's mother's house. She was away abroad and the applicant was housesitting. The applicant and EH intended to have what EH said she thought was "normal vaginal sex".

4. EH's evidence was that they went to the applicant's bedroom and engaged in consensual oral and vaginal sex. She dozed off. She was awoken by the alarm on the applicant's phone. She told him she wanted to leave but he wanted to have sex again. She said he pushed her down and engaged in anal intercourse whilst she shouted 'No, no, no, no". Whilst he was anally raping her, she was able to free her arms and called Amy, a friend with whom she had early been in the nightclub. She told Amy she wanted to go home. EH said that, at this time, the applicant forced his penis into her mouth although, in her evidence, Amy said that she did not hear anything during the call that gave her concern about EH's welfare. Thereafter, EH said, the applicant engaged in further non-consensual oral and vaginal intercourse.

5. EH ordered a taxi and went to Amy's house. She told Amy and another friend Olivia, who was also present, what had happened. Amy said that EH told her that the applicant had forced her to do "oral and anal sex" and that EH had not wanted to do anal sex. Olivia said that EH told her that she did not agree to anal sex, saying she was in a lot of pain and asked the applicant to stop.

6. At about the same time, EH sent a text to another friend (AG), which said:

> "So we fucked but he took it too far and wouldn't let me leave his house and I was crying whilst he was fucking me in the arse, and it was so bad."

She also told her mother:

> "I did not expect him to force me to do anal and tell me to shut up because of the neighbours when I was screaming, begging him to stop."

7. In interview, the applicant said that, following consensual sex, he told EH she had to leave and declined to pay for her taxi. He said that EH's allegations were false and may have been partly caused by the fact that EH was unhappy about being told to leave so unceremoniously. He said that EH not only fabricated her story but persuaded Amy and Olivia to lie too.

8. In his oral evidence, he said that he and EH had engaged in an extended period of consensual sexual activity. This included oral sex, vaginal sex and anal sex. He said he had a piercing at the end of his penis and when he found he could not properly insert his penis into EH's anus, he told her it was "not working" and they reverted to vaginal intercourse. He said that at no stage did she tell him to stop. He maintained his stance that EH had fabricated her account and her allegations of rape.

9. There was medical evidence, arising from EH's examination on 19 February by Dr Al-Hadithy. She was found to have a 0.4 cm laceration to the fourchette, a bruise on her thigh and multiple pinprick petechiae in her mouth. An internal vaginal examination and an examination of the perianal and anal margin were not possible because EH complained of tenderness. The doctor's notes, which were made available to the defence, recorded that EH was taking 60mg daily of Roaccutane, a medication prescribed for severe acne.

10. At trial, the medical evidence was treated by both the Crown and the defence as neutral. As is not uncommon in such cases, the injuries were recorded as being consistent with EH's account but also consistent with other causes. Thus, Dr Al-Hadithy was not called, and instead the medical evidence was agreed and read to the jury. The relative unimportance of the medical evidence was a factor relied on by the applicant's then counsel in his closing speech. He observed, correctly, that the Crown had not referred once to that evidence in their own closing speech. He correctly told the jury that the medical evidence was inconclusive.

11. A week after the applicant's conviction on the count of anal rape, he changed his legal representation, which meant that, by the time of the sentencing hearing on 19 October, he was represented by new counsel, Ms Forshaw QC. The subsequent application for permission to appeal against conviction was made 34 days out of time. An extension of time is therefore required. In our view, given the various events which have occurred, to which we refer below, we allow the extension of time.

12. There are a total of 5 grounds of appeal. It is said:

    i) That the jury's verdicts were so inconsistent as to be "logically inexplicable" (Ground 1).

    ii) That the learned Recorder "effectively withdrew" the issue of consent from the jury (Ground 2).

    iii) That the learned Recorder wrongly referred to his own "Steps to verdict" document as being "a guide" rather than something that the jury was forced to follow. It is now said that they should have been forced to follow the Steps document. We note that this complaint was not in the original grounds but was advanced by way of a supplemental skeleton argument prepared by Ms Forshaw dated 8 April 2019.

iv) That, although some entries from EH's the correct phone were downloaded originally, an error meant that the wrong phone was the subject of a further check, which in turn meant that what is said to be important evidence related to EH's prescription of Roaccutane was not available to the jury (Ground 3).

v) That new medical evidence should be admitted because it was relevant both as to the nature of EH's injuries and the effect of Roaccutane (Ground 4).

13. We deal with the merits, or otherwise, of each of these five points. For reasons which will become clear, we deal with Ground 4 before Ground 3.

Ground 1: Inconsistent Verdicts

14. In *R v Formhals* [2013] EWCA Crim 2624; [2014] 1 WLR 2219, this court provided the following guidance:

> "28 It will be a rare case indeed where a failure to reach a verdict can be said to be logically inexplicable when contrasted with or set against a verdict or verdicts which have been reached. If such an argument is to be run, it will have to be run in cases which will call for the closest scrutiny by the court. Moreover, such an argument has to be run in circumstances where the principles applicable to inconsistent verdicts (in the true sense of the words) are - as has long been established - themselves very tightly prescribed: see, amongst other cases, *R v Dhillon* [2011] 2 Cr AppR 112, where the main relevant principles are helpfully summarised by Elias LJ at para 33 of the judgment of the court, and as further amplified by the judgment of the court delivered by Jackson LJ in *R v Dobson (Stuart*) The Times, 26 October 2011. The bar is thus set high for the application of the principle of inconsistent verdicts. It can be set no less high, and perhaps is set higher, where the attempt is to compare and contrast a verdict of guilt with a failure by the jury to agree."

15. In *R v Fanning* [2016] EWCA Crim 550; [2016] 1 WLR 4175, this court held that where inconsistency between verdicts was advanced as a ground of appeal against conviction, the burden was upon the defendant to satisfy the court that the two verdicts could not stand together, meaning thereby that no reasonable jury who had applied their minds properly to the facts in the case could have arrived at the conclusion. Lord Thomas CJ stressed that the test did not require the verdicts of a jury to be treated as inconsistent simply because the jury had been sure about some parts of the evidence given by a witness, but unable to be sure to the requisite standard about others. He also confirmed that "multiple counts arising from… a single sexual encounter where the complainant alleged different forms of sexual acts closely related in time" – in other words, a case such as the present – was precisely the situation where the standard test should be applied. All of the appeals in that composite case were refused.

16. The authorities are also clear that where the charges all relate to the evidence of one witness, a conviction on one count but not on others will not be automatically

rendered unsafe: see *R v G* [1998] Crim LR 483, and that is so even if the credibility of that witness is in issue: see *R v Cilgram* [1994] Crim LR 861 and *R v C* [2008] 1 WLR 966.

17. In our view, for the reasons outlined below, the applicant has failed to discharge the heavy burden of demonstrating that his conviction on the count of anal rape was "logically inexplicable" when contrasted with the jury's failure to reach a verdict on the counts of oral and vaginal rape.

18. First, as we have already summarised, there was always a clear difference in EH's account, and her subsequent evidence, about the anal sex on the one hand, and the oral and vaginal sex, on the other. In all her accounts, it was the anal sex which featured predominately as the act to which she did not consent. That can also be seen in the evidence of Amy and Olivia, who both focused on the anal sex as the source of EH's complaint, together with the text message to AG and what she said to her mother.

19. Secondly, although there was originally a difference between EH's account and the applicant's account as to whether or not there was a period when EH dozed before sexual activity was restarted, that difference narrowed in the cross-examination of the applicant, when he appeared to accept a break between the two periods. At all events, we consider that, on all the evidence, the jury were entitled to consider the anal sex as a separate event within the overall sexual activity. The Recorder emphasised (at 614F-G) that the allegation in count 1 was confined to "post-consensual anal sex", and he was "not on a charge" for "anal sex that he says that he had consensually".

20. Thirdly, the evidence in support of the anal rape count was based on the evidence of EH, Amy and Olivia. It was not based on the medical evidence, which (as we have said) was entirely neutral: it was consistent with EH's account but it did not go further than that. Thus, contrary to Ms Forshaw's submissions on the application for permission to appeal, we consider that the medical evidence had no bearing on the conviction for anal rape, or the failure to agree on the other two counts.

21. Fourthly, the jury were directed by the Recorder to consider each count separately. They were told that their verdicts might not be the same on each count. There was no dissent from that from counsel then appearing for the applicant; nor would we expect there to be. Those are perfectly standard directions. Indeed, at 615G-H the Recorder told them that "you look at them [the three counts] individually and you return individual and different verdicts on them if that is how you feel." It can hardly be a surprise when, in a case where such directions are given, an applicant is convicted on one count but not on another.

22. Fifthly, we reject Ms Forshaw's surprising submission that, in contrast to *Formhals*, the jury in the present case reached "a hasty or illogical compromise". Her additional oral submission was that the jury were "in and out repeatedly" and this may have led to the alleged inconsistency. In our view, these contentions are misconceived. The sequence was:

    a) Monday 10 September

    10.16 Jury retire

2.33 Majority direction given

4.18 Jury say they think they will reach verdicts

b) Tuesday 11 September

10.10 Jury retire

11.05-11.42 Jury questions and answers

12.57 Jury again say they think they will reach verdicts

2.24 Jury return verdict on count 1 and say there is no prospect of verdicts on counts 2 and 3

23. There is nothing remotely unusual about such a sequence. It shows how careful this jury was. On the two occasions when they were asked whether, if they were given more time, they would reach a verdict on which at least 10 of them would agree, they replied in the affirmative. No fair criticism can be made either of the jury or the Recorder about the time taken to consider their verdicts or the process adopted; indeed, we regret that this point was ever raised.

24. Finally, we cannot help but note that the different evidence in relation to the different counts was a matter on which the applicant's then counsel relied heavily at the trial. His closing submissions are full of references to those differences. Simply by way of example, we note that, perhaps unsurprisingly, he stressed that EH had made no initial complaint to Amy or Olivia about vaginal rape. That was a point that he was quite entitled to make. But it is one of many potential explanations as to why the jury was able to reach a verdict on the charge of anal rape, but not on the other two counts.

25. Accordingly, there is no 'logical inexplicability' about the verdicts in this case. They seem to us to be an entirely reasonable reflection of the different evidence on the different counts. The fact that the allegation of oral rape was perhaps weaker because it was alleged to have happened during the phone call to Amy (a point made in the summing-up at 614A and 626E), and the allegation of vaginal rape was perhaps weaker because it was not included in the original complaint (a point made in the summing-up at 619B and 625F), has no effect on the strength of the evidence on the count of anal rape (which suffered from neither difficulty).

26. Ground 1 of the application for permission to appeal is therefore refused.

Ground 2: Withdrawal of Consent from the Jury

27. The applicant's case is that the issue of consent was "effectively withdrawn" from the jury during the summing-up process, and that this was an error of law. Again, for the reasons outlined below, we reject that submission. The issue of consent was manifestly *not* withdrawn from the jury at any time.

28. First, there was the Recorder's written 'Steps to verdict' document. It is not suggested by Ms Forshaw that there was any deficiency or error in that document (indeed she has a separate point that the jury should have been forced to follow it). Question 3 indicated to the jury that they had to be sure that EH did not consent to the penetration

and Question 4 asked if they were sure that the applicant did not have a reasonable belief in her consent. So the issue of consent was plain and obvious from that document which the jury had throughout, and which was never amended or modified in any way.

29. Secondly, in the main body of his summing-up, given on Friday 7 September and starting at page 617B, the Recorder made it plain that the key issue was one of consent. As he put it:

> "Did the complainant consent, or may she have done so?"

Furthermore, at 618D, he again stressed:

> "The Crown have to make you sure that she did not consent."

There are numerous similar references to consent scattered throughout the summing-up. It is unnecessary to set them all out here.

30. Finally, when on the following Monday morning (10 September), the Recorder was about to send the jury out to begin their deliberations, he reiterated the "very important" ingredient as to whether or not EH consented, repeating it again at 634F:

> "At the end of the day you must be sure that it happened and that it happened without her consent. That is it in a nutshell."

31. In our view, therefore, it is idle to suggest that the learned Recorder "effectively withdrew" the issue of consent from the jury. On the contrary, the Recorder properly made it the central issue.

32. It is right that, in some of the other passages in the summing-up to which Ms Forshaw took us, he indicated that what was important was whether the jury accepted EH's account. All he was doing was putting the issue of consent into the factual context. The jury knew that, even on EH's account, the pre-doze sex was entirely consensual. What mattered was what happened thereafter. EH had given a graphic account of violent sex, particularly the anal sex, during which she was screaming "no, no, no, no". The Recorder was therefore right to say that, if the jury were sure that EH's account was true then, certainly in respect of the anal rape, the charge had been made out. That was because, on that account, there could have been no question of consent or reasonable belief in consent.

33. The Recorder was quire entitled to get the jury to focus on that critical element of EH's evidence and to ask themselves whether they were sure that that was what had happened. That was no more than common sense: after all, the applicant admitted that anal sex had taken place, so this was a case that was all about consent, which itself turned on the reliability or otherwise of EH's account. But there was no question that the *issue* of consent – which was critical and which the Recorder told the jury was critical – was ever withdrawn from them, whether "effectively" or otherwise.

34. Accordingly, ground 2 of the application for permission to appeal is refused.

New Ground: The Steps to Verdict

35. As previously noted, the complaint about the Recorder's treatment of the 'Steps to verdict' document was not in the original grounds of appeal. It is advanced by reference to a supplemental note submitted by Ms Forshaw on 8 April 2019.

36. The complaint is that at on the morning of 10 September, when they were about to be sent out to consider their verdicts, the jury were told by the Recorder:

> "This [the Steps document] is a guide; you are not forced to follow it."

It is said that this was a serious misdirection of law and that the jury "were or should have been forced to follow the 'Steps to verdict' document".

37. With respect to Ms Forshaw, we regard this belated argument as semantic rather than real. For one thing, in contrast to the Recorder's legal directions, which are of course mandatory, the jury was not obliged to use the Steps document. Such documents are routinely provided to assist the jury. They are not obliged to use them and there is no authority which makes them mandatory.

38. More importantly, the complaint about the Recorder's language is unfair because it takes the words out of context. The Recorder's reference needs to be set out in full. He said:

> "This is a guide; you are not forced to follow it, but it is a working guide to take you through the steps that you need to go through."

39. It is clear to us that, even as a matter of semantics, the reference to the document as containing the steps that the jury *needed* to go through made it quite clear that, to the extent that it repeated the separate legal directions, this was a series of questions the jury had to ask themselves. Moreover this reference to the Steps document came immediately after a reminder (at 633D-E) of the indictment itself containing "the ingredients that you need to be sure of", and a reminder that the indictment was "the key to your deliberations".

40. It is also necessary to stand back and see this passage in its wider context. As we have said, this reference occurred on the Monday morning. However, that was not the first reference to it. The "Steps to Verdict" document was referred to early on at the start of the summing-up the previous Friday. There is a first reference to it at page 611, and between pages 616 and 618 the Recorder goes through it in considerable detail. Each element of the 'Steps to verdict' document is fully explained. There could have been no doubt in the mind of the jury that this was a document they needed to use when they came to consider their verdicts.

41. Accordingly, having considered the summing-up as a whole, we are in no doubt that the jury 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. There is therefore nothing in this new ground of appeal, and we refuse it.

Ground 4: New Medical Evidence

42. The applicant wishes to adduce medical evidence from two new experts. One is Dr Payne-James who gives evidence about EH's injuries. The other is Dr Cohen, who deals – in entirely generic terms – with the Roaccutane that she was prescribed. It is said that this evidence goes to – and in some way undermines - two of the strands of evidence which supported EH's account, namely her injuries, and the distress she says she exhibited when she arrived at Amy's house.

43. In our view, on a careful examination of these reports, they do no such thing. We do not consider that they add anything. In addition, we consider that this part of the application for permission to appeal against conviction is based on a number of false premises.

44. We deal first with EH's injuries and the new medical report of Dr Payne-James. We reiterate that Ms Forshaw is wrong to say that the Crown were relying on the nature of EH's injuries in support of their case. They were not, as Ms Forshaw's predecessor, Mr Cohen, made plain to the jury in his closing speech. Accordingly, for it to have any relevance, the fresh medical evidence would have to undermine EH's evidence in some way; to indicate that, for example, the injuries were somehow consistent with consensual sex but not with non-consensual sex.

45. The medical evidence does not do that. Dr Payne-James does not dispute that the evidence of the injuries is neutral (the very point made on behalf of the applicant at the trial). He says that the injuries are consistent with EH's account and also consistent with the applicant's account. On that basis, we do not consider that the report of Dr Payne-James adds anything to the statement which was read at the trial from Dr Al-Hadithy. At most, it provides further reasons for the neutral or inconclusive nature of the injuries. It provides no basis for saying that any part of the evidence admitted at trial was wrong or significantly misleading.

46. Whilst dealing with the injuries, it is appropriate at this point to deal with the suggestion that, in some way, Roaccutane might increase or exacerbate bruising. The evidence in relation to that is extremely thin. But even if it were stronger, it would have no relevance in the present case. Here, on the agreed injuries, EH only had one bruise, and the Recorder expressly told the jury that was "not relevant" to the issues they had to decide: see 611E.

47. The other report is from Dr Stuart Cohen, a consultant dermatologist. This deals briefly (the report itself is just 6 pages) with the possible side effects of Roaccutane.

48. The first point to make about this evidence is that, as Ms Forshaw impliedly accepted, it does not pass the test in s.23(2)(d) Criminal Appeal Act 1968 that there is a reasonable explanation for the failure to adduce the evidence at trial. This was evidence which, with one exception, could have been adduced at the trial. It is about Roaccutane in the abstract, and it is clear that Dr Cohen's evidence is largely based on other documents. The applicant has always known that EH was taking this prescription drug so, if it had been thought relevant, this evidence could have been adduced at trial. But it was not. Accordingly, it seems to us that any application to admit this evidence now falls at the first hurdle.

49. The exception to that is the short passage in which Dr Cohen deals with some of the earlier text messages from EH which were not before the jury, and to which we refer

under Ground 3 below. It is here that he addresses the possible side-effects of Roaccutane on EH. But we find the evidence unpersuasive and immaterial; it would not have made any possible difference to the outcome of the trial. Indeed, it may not even have been admissible.

50. On the question of its side-effects generally, Dr Cohen is clear that Roaccutane "has rarely been associated with mood changes such as depression and suicidal thoughts". He says that database studies "failed to prove a causative link" between the drug and any adverse effect on mental health. He also confirms that he was aware of no evidence of any pharmacological interaction between alcohol and Roaccutane which might lead to effects on mood or behaviour.

51. Even taking into account the text messages, the highest that Dr Cohen can put it is as follows:

> "10.2. I would not expect the drug to have interacted directly with alcohol to influence her judgement, behaviour or level of intoxication.
>
> 10.3. It cannot be ruled out though that if, as her telephone messages suggest, she was suffering from psychological or behavioural effects of Roaccutane, the additional of alcohol may have enhanced these."

52. We do not consider that this evidence is anything other than speculative. Dr Cohen did not examine EH, so he cannot say whether it did or might have had any effect on her on the night in question. In our view, it is likely that, had it been available at the trial, the judge would have ruled that Dr Cohen's report was inadmissible.

53. Ms Forshaw also endeavoured to argue that Dr Cohen's evidence was in some way relevant to the distress from which EH was suffering when she arrived at Amy's house. Ms Forshaw said that, if the jury had known about this evidence, they might have had regard to it as an additional factor to explain that distress. But, even assuming that Dr Cohen's evidence was more than merely speculative, the argument immediately runs up against the difficulty that, on the applicant's case, EH was not distressed at all. He said that she had fabricated the allegation and that the distress was part of this falsehood. So evidence that she may have been rendered over-emotional by Roaccutane was completely at odds with the calculating liar the applicant said she was.

54. Accordingly, in the light of that, it is impossible to see where the speculative and generic evidence of Dr Cohen could have led. It seems to us to have no bearing on the real issues in the case.

55. For those reasons, Ground 4 of the grounds of appeal is refused.

Ground 3: Disclosure

56. This concerns EH's mobile phone. This was not a case in which text messages and the like were of any real significance. EH's phone was provided to the police and those few messages which related to the events in question were identified. However when,

at a later date, a further check was carried out, the phone that was checked was EH's current mobile phone, not the one she had at the time of the incident. The Crown say that this was a mistake, and Ms Forshaw accepts that.

57. On the applicant's behalf, it is noted that, now that his advisers have had access to the correct phone, there were text messages which EH sent to others (not the applicant) some months before the events in question, in which she said that she was over-emotional, and crying for no reason, and also a suggestion that she was liable to bruising. She made a connection between these matters and her prescription of Roaccutane. Ms Forshaw now submits that these earlier messages also went to the same two issues in the case to which we have already referred: namely EH's injuries and her state of upset and distress.

58. In our view, these submissions have not been made out. As we have already said, the evidence as to the injuries was neutral. Thus, even assuming that it is correct to say that, in some way, the Roaccutane made EH think that she was more likely to bruise than before, that could have had no effect on the issue before the jury. The only bruise she did have was said by the Recorder to be irrelevant.

59. As to EH's distress on arrival at Amy's, we accept that that was a part (albeit a small part) of the Crown's case. The Recorder gave the jury a proper direction about that distress.

60. In our view, the fact that EH had described herself as being more over-emotional some two months before that night was of peripheral relevance. In any event, EH herself said she was not distressed when she left the applicant's mother's house, and referred to joking with the taxi driver. The distress came when she told her friends what had happened. So the more important element of that part of the story was what EH actually said to Amy and Olivia. She was remarkably consistent in what she said both to them, and to AG, and to her mother, about what the applicant had done to her. Furthermore, again as we have said, the applicant said that any distress was part of EH's fabrication of the allegations against him.

61. In consequence, we do not consider that the text messages from two months before are of any real relevance to the issue (such as it was) of distress.

62. Finally, there is a suggestion that the text messages somehow adversely affect EH's credibility or reliability. This is principally put on the basis of the potential combination of Roaccutane and alcohol. We reject that submission. The medical evidence on which the applicant now relies from Dr Cohen eschews any general link between alcohol and Roaccutane, and says in terms that it does not affect memory. There is no evidence (whether from the texts or the new medical reports) that Roaccutane made EH more likely to be untruthful. In our view, therefore, this wider point goes nowhere.

63. We accept that, unlike the evidence of Dr Cohen, the text messages (if found in time) would probably have been admissible. But for the reasons we have given, on a proper analysis, they do not affect the safety of the applicant's conviction.

64. For all these reasons, Ground 3 of the grounds of appeal is refused.

Other Matters and Conclusion

65. During her oral submissions in reply, Ms Forshaw raised a new complaint that Mr Sandford was wrong to say, in his Respondent's Notice, that the Recorder directed the jury that they must acquit if what the applicant said was or might be true. We have therefore checked that point and the Recorder did indeed give that direction: see 626H. That again demonstrates that this case was, at root, a question of who the jury believed, an issue which was fully and fairly summed up to them by the Recorder.

66. Finally, Ms Forshaw submitted that, regardless of the strengths or weaknesses of the five individual points raised by the application, this Court should have regard to their cumulative effect. The submission was that, taken together, these five points meant that there was sufficient doubt about the safety of the applicant's conviction.

67. We have carefully considered that submission. However, we are unable to accept it. The first three points that we have addressed above are all without substance, for the reasons we have given. The applicant cannot be in a better position because he has run three bad arguments rather than one.

68. As to the last two points, when taken at their highest, they arise because different lawyers might have explored different potential avenues in a different way (the Roaccutane) and the discovery of some old text messages which shed no relevant light on the events in question. Again for the reasons we have given, none of this leads us to doubt the safety of the applicant's conviction.

69. Like so many allegations based on sexual offending, this case boiled down to a dispute on the facts between EH and the applicant. Were the jury sure that EH was telling the truth? On count 1, the anal rape count, they were. There were good reasons for that. On counts 2 and 3, they were not sure. There were good reasons for that too, identified in the defence closing speech and summed up by the Recorder. None of that is remarkable and none of the points raised by this application (either taken individually or together) requires this court to interfere with the jury's conclusion.

70. The extension of time sought is granted. But this referred application for permission to appeal against his conviction is refused.