Neutral Citation Number: [2020] EWCA Crim 1247

Case No: 201902351 B2

IN THE COURT OF APPEAL CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT KING'S LYNN.
His Honour Judge Shaw
T20187162

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/10/2020

Before :

LORD JUSTICE DAVIS
MR JUSTICE SPENCER
and
HIS HONOUR JUDGE POTTER
(sitting as a Judge of the Court of Appeal (Criminal Division))

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Between :

The Queen	**Respondent**
- and -	
Douglas Joseph Hewitt	**Appellant**

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- -

Tania Griffiths QC (instructed by the Registrar) for the **Appellant**
Edward Renvoize (instructed by Crown Prosecution Service) for the **Crown**

Hearing date: 5 August 2020

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Approved Judgment

Covid-19 protocol: This judgment will be handed down by the Court remotely, by circulation to the parties' representatives by email and, if appropriate, by publishing on www.judiciary.uk and/or release to Bailii. The date and time for hand down will be deemed to be 1 October 2020 at 10.30 am. The Court Order will be provided to Norwich Crown Court for entry onto the record.

Mr Justice Spencer :

Introduction and overview

1. Joseph Douglas Hewitt appeals, by leave of the single judge, against his conviction for an offence of rape committed 37 years ago against a girl who was in his care when he was in charge of a children's home in Norfolk (count 5). He was convicted of the offence on 30th May 2019 after a trial in the Crown Court at King's Lynn. He was acquitted of a multiple incident count of rape against the same girl, alleging at least four further rapes (count 6). He was also acquitted of a single count of rape of another girl at the children's home (count 4). The jury were unable to agree on verdicts in respect of other counts on the indictment alleging sexual assaults at the children's home against three boys. There is to be a retrial on those counts. The appellant has not been sentenced, pending the outcome of the retrial.

2. Although all the complainants are now mature adults in their fifties this is a case to which the anonymity provisions of the Sexual Offences (Amendment) Act 1992 apply. There must be no reporting of the case which is likely to identify the complainants. We shall refer to them by initials only.

3. The appellant is now 80 years of age. As is often the case with historic allegations of sexual abuse in residential establishments, one of the difficulties faced by the appellant and those representing him was the lack of contemporaneous documentation which might shed light on relevant issues. This appeal is principally concerned with the adequacy of the process of disclosure of unused material and the impact of that on the fairness of the trial and the safety of the conviction. It is part of the background to the case, as the jury heard in evidence, that the appellant had previously been convicted in 1995 of sexual offences against five other girls at the same children's home in the period 1977 to 1981, in respect of which he still protests his innocence. The appellant had served a sentence of 14 years' imprisonment for those offences.

4. Ms Tania Griffiths QC has represented the appellant throughout. She submitted to the trial judge, His Honour Judge Shaw, that a fair trial was not possible and would amount to an abuse of process. She applied for a stay of the indictment. Mr Edward Renvoize, who has appeared throughout for the Crown, opposed that application. The judge deferred his ruling until the close of the prosecution case. Following full legal argument he refused the stay and the trial proceeded. He was satisfied that any prejudice arising from the delay and from the consequent absence of potentially relevant documentation could be cured by the trial process, including his directions to the jury in the summing up.

5. The principal ground of appeal is that the judge was wrong not to stay the indictment for abuse of process; it is said that the appellant could not have a fair trial in view of the fundamentally flawed disclosure process and the nature and extent of the missing documentation caused by the long delay. A further new ground of appeal was argued, by leave and without objection from the Crown: that the judge's directions to the jury in the summing up in relation to delay and missing documentation were inadequate, rendering the conviction unsafe.

6. We heard the appeal on 5th August 2020 and reserved judgment. There was a great deal of material to be considered. Ms Griffiths' written submissions alone ran to 160 pages. We are grateful to both counsel for their very full and helpful submissions, written and oral.

JE's allegations

7. JE was born on 17th March 1967. She had a very troubled childhood. She was taken into care and adopted as a baby. She ran away from her adoptive home in London, as a teenager, took an overdose and was made a ward of court. She was placed at Woodlands Children's Home in Norwich, where the appellant was the officer in charge. Her recollection was that she went to Woodlands at the age of 14, but documentation which came to light during the trial established that in fact she went there in September 1982, when she was 15½ years old. The extent to which her stay at Woodlands overlapped with the appellant's time there was an important issue for the jury in evaluating her allegations of rape, and this became the principal focus of the appeal. It was an agreed fact by the end of the trial that the appellant had started a new job elsewhere no later than 1st May 1983. It was also an agreed fact, based on documentation which came to light during the trial, that JE had left Woodlands by 1st August 1983. On the face of it, therefore, they overlapped at Woodlands for a maximum of some 7 months, from September 1982 to April 1983.

8. The appellant contacted the police on 19th September 2014 alleging she had been raped by the appellant during her time at Woodlands. This was soon after she had coincidentally met another former resident of Woodlands at the time, Matthew Steele, who had come to clean her carpets. He told her about the investigation into the appellant's sexual abuse of children at Woodlands. Matthew Steele was not himself a complainant.

9. JE was formally interviewed by the police on 1st October 2014. Her achieving best evidence (ABE) interview lasted an hour. She was by then 47 years old. She had trained as a nurse and had worked as a nurse for a while. She had brought up two sons and was a grandmother. She had suffered from serious mental health problems throughout her adult life and had received extensive treatment of various kinds. The detail of her evidence in the ABE interview is important, and in particular what she said about dates and the timing of the incidents of sexual abuse she described.

10. In the ABE interview she told the police that she went into Woodlands when she was 14 and came out at 16, when she went to a half-way house. She said that when she first met the appellant he made her "feel uncomfortable straightaway, he was quite letchy and not very nice". Everything was fine for a while, for a couple of months, "… I can't be dead on this time, you know". She remembered the first time really clearly, "… because everyone had gone home. I think it was an Easter weekend and nearly everyone had gone home for the holiday… there was only three of us left in the home." She said she thought the first incident was on Easter Sunday. The appellant only seemed to be on overnight duty on Saturdays and Sundays and was always on duty with a man called Jim, whose surname she could not recall, who was "really old school… quite old as well."

11. JE said that on this first occasion she had come out of the bathroom wrapped only in a towel and was making her way back to her room when the appellant came upstairs

and pulled the towel off her, leaving her naked. She picked up the towel and went into her room. He came into her room and started rubbing himself. He shut the door. She was scared. Nothing else happened but he came back about an hour later and told her there was no point in saying anything: "You're a glue sniffer. You're all glue sniffers so no-one's going to believe you." She said she "would've been definitely 14" when this happened. She said this was Easter and she had gone into Woodlands either just before Christmas or just before her birthday (17th March). She enlarged on the detail of this first incident. When he followed her into her room he was "letching round my neck and then … he's started rubbing his thing… and then he sort of went and touched my face… as if to get me to look into his eyes… and then he just got up and went." She said there was no lock on her door. There was never a female member of staff on duty at weekends; the appellant would be on overnight weekend duty every two or three weeks.

12. JE said that after this first occasion there were other incidents "quite regularly" when most children had gone home for the weekend, and there would only be three or four children in residence. She said that the appellant started coming into her room every three or four weeks when she was in bed. He would take his penis out and put his hand under the bed clothes, fondling her. He would put his face close to her, trying to kiss her. She would pretend to be asleep. He would say "I know you're not asleep". She described the first time he raped her. She was lying in bed facing the wall pretending to be asleep. He turned her over. He entered her with his penis and ejaculated. She was a virgin. She remembered that he was wearing "cords" (corduroy trousers), she always remembered cords. He kept his trousers on and just pulled them down. JE said that the first couple of times he raped her in this way, the next morning (which would be Monday, and a school day) she would make an excuse to stay in bed, pretending to be ill. She was bleeding. She didn't really have any good friends at the time. Later in the ABE interview when asked about his ejaculating on the first occasion she was raped, she said when she went to the toilet it "all come out" and although she wasn't on a period "I was spotting as well." She said the appellant was "quite heavy" and "got…quite…frantic as he was ejaculating."

13. She said that this first rape happened about three or four weeks after the initial incident when he pulled her towel off; it was the next time he was on night duty. After that it happened more times – "not even monthly…it certainly got to a point where… I just used to detach myself really…". She was asked by the interviewing officer how many times she thought the appellant had raped her in this way, vaginally: "Are we talking double figures?" JE replied: "I'd say about 10, 12 times ...over the two years" she was at Woodlands.

14. We pause to explain that the first incident of rape she described was charged in count 5, which was expressed to be a "specific incident reflecting the first time the defendant raped JE". This was the count on which the appellant was convicted by the jury. Count 6 (as originally pleaded) alleged rapes on "not less than 9 occasions other than in count 5", and was expressed to be a "multiple incident count to reflect the number of times JE states she was raped by the defendant". At the close of the prosecution case, count 6 was amended (without objection) to allege "not less than 4 other occasions" (rather than 9) in view of the evidence JE had given at trial. It was on Count 6 that the appellant was acquitted by the jury. We also observe that the

bracket of dates in count 5 and count 6 was amended at the close of the prosecution case (without objection). As originally charged, the bracket was 1st January 1981 to 17th March 1983, the former being the year in which JE reached her 14th birthday, the latter being the date of her 16th birthday. The amended counts alleged the bracket 1st January 1982 to 31st December 1983, the former being the year in which JE arrived at Woodlands, the latter being the end of the year in which both she and the appellant left Woodlands.

15. In the ABE interview JE also described other sexual behaviour by the appellant. He would get her to rub the outside of his trousers when she was alone with him. When he sat on her bed and took out his penis he would rub it and "kind of admire it… like he was..., I don't know, proud…". He didn't get her to do anything else to his penis. She was asked if the appellant did anything else to her. Other than raping her, she said he did not touch her anywhere else on her body, but he used to "force my legs open and… used to ejaculate over me as well sometimes". He never entered her in any other part of her body, but sometimes he didn't penetrate her properly and she didn't know whether his penis had slipped but it "really hurt". She didn't even know about anal sex at the time. As for contraception, she said that when she went to Woodlands, like the other girls there she was put on the pill automatically at the age of 15.

16. She said that the very first person she ever told about this sexual abuse by the appellant was the father of her youngest child, her ex-partner, JC. She estimated that this would have been about 12 years earlier. Asked whether she had told anyone at Woodlands at the time it was happening, she said that when she moved to College Road (the half-way house) she had told a girl called Lea (she thought her name was Lea Duval) who was older than her, who said she had gone through the same thing and been physically abused and raped by the appellant. JE said there had been one occasion when another member of staff, called Mike, had caught the appellant coming out of her bedroom, doing his belt up. There had been some sort of conversation between the two men. She thought Mike had asked the appellant whether she was all right, and the appellant had replied she was fine. At the end of the ABE interview JE said she felt bad "…because I kind of just… grew accustomed to it, that's completely the wrong way, I just, I kind of just cut it off, like,… and I got chucked out of school and it all spiralled." She said the appellant was "so big and overbearing… when you're in that situation and you're in care… the things he used to say that he could do, what he would do… I used to get written up for things that I didn't do."

17. There was some support for JE's account from her former partner, JC, who gave evidence at the trial. He confirmed that he had met JE more than 20 years earlier. JE told him she had been in care. She said she was raped by a man who ran the care home, while her head was being held underneath a pillow. That was the only detail she gave him. He understood her to mean that it had happened only on one occasion. We observe that this may provide part of the explanation for the acquittal on count 6, if the jury could not be sure it happened more than once.

18. The police traced Lea Duval. She made a witness statement in 2016. She gave evidence at the trial. She confirmed that she had been at Woodlands for a few months when she was 13 and again when she was 16. She did recall a friend whose first name was an abbreviation of the "J" of "JE", but she could not say for sure

whether it was this JE. She wasn't aware of anyone else at Woodlands called Lea. She had no recollection of being with JE at College Road, the half-way house. Lea Duval said she had never been raped by the appellant and had never told anyone she had been raped by him.

19. The "Mike" referred to by JE in her ABE interview was never reliably identified. There was a staff member called Mike Bridgeman, who had died in 2018. There was another staff member called Mike Shearing who was apparently not traced.

20. The jury heard evidence from Helen Hall, who had worked at Woodlands for about 18 months leaving in July 1980 (well before JE's arrival). She had made a witness statement in 1993 and (we infer) gave evidence at the previous trial in 1995. She recalled that one night, when she was sleeping over at Woodlands, she was woken by the sound of the fire door opening which led into the girls' living area. She got dressed quickly, went to investigate and found the appellant in the girls' living area. He said he had heard a noise. She found that explanation for his presence there strange and concerning. He was wearing a black tracksuit with a white stripe down the leg, and but for the white stripe she might not have seen him. She agreed in cross- examination that checking noises was part of the appellant's job.

The other complainants in the trial

21. In order to understand the issues in the appeal it is necessary to refer briefly to the allegations by the other complainants in the trial. There were four other complainants: three males and one female.

22. WM, a boy born in April 1968, went to Woodlands in 1981, aged 13, following the commission of criminal offences. He alleged that the appellant had raped him anally on a number of occasions. The offence would then have been classed as buggery. The abuse ended in 1983 when WM tried to stab the appellant with a pair of scissors. WM has subsequently spent several periods in custody over many years. In 2011 he responded to an advertisement he saw in a prison newspaper suggesting that compensation might be available for people subjected to abuse. WM was seen by the police in April 2013. Count 7 charged the appellant with the first incident of buggery. Count 8 was a multiple incident count alleging at least 6 other offences of buggery.

23. DL, a boy born in February 1969, was at Woodlands between 1979 and 1983. He alleged that he had been forced by the appellant to give him oral sex. He also alleged that he and other boys at the home had been subjected to sexual abuse by a number of individuals in a motorcycle club, although this formed no part of the indictment and was background only. DL was seen by the police in May 2013. Count 1 charged the appellant with a single offence of indecent assault on DL by forced oral sex.

24. SB, a girl born in September 1968, went to Woodlands in 1979, aged 11. She stayed there for two years. She had first complained to the police and made a witness statement as long ago as October 1995, at the time of the appellant's previous trial. She alleged that after a review meeting at Woodlands when she was aged 11, the appellant called her into his office, invited her to sit on his knee and touched her vagina. She stayed out of his way after that, making sure she was never alone with him. She made a further witness statement to the police in March 2016. Count 4

charged the appellant with a single offence of indecent assault on a girl under 13, by touching her vagina. The jury acquitted on count 4.

25. JM, a boy born in May 1967, spent a few months at Woodlands during 1978 and again in 1979 for a longer period. He alleged that when he was 12 or 13 the appellant started touching him in a way which progressed to mutual masturbation. It would end with the appellant ejaculating. JM did not even view this as sexual abuse at the time. Many years later JM met WM in prison and they talked about their experience of the appellant at Woodlands. JM was seen by the police in April 2017. Count 2 charged the appellant with the first incident of gross indecency with a child, by mutual masturbation. Count 3 was a multiple incident count alleging at least five other such incidents of gross indecency with a child.

26. We observe that although there was undoubtedly evidence of contact between the three male complainants discussing their respective allegations, there was no suggestion of any such contact between JE and any of the other four complainants in the trial.

The disclosure history and the course of the trial

27. The appeal centres on the adequacy and fairness of the disclosure process and its impact on the fairness of the trial. It is therefore necessary to consider the disclosure history and the course of the trial in some detail. Ms Griffiths submits that the whole disclosure process was fundamentally flawed, not least because the disclosure officer did not understand and/or neglected her duties, and the civilian disclosure officer who was later recruited to assist her was untrained and incompetent. Mr Renvoize, for the Crown, accepts there were serious shortcomings in the disclosure process but submits that the errors had been identified and remedied by the conclusion of the evidence, and consequently there was in the end no unfairness and there is no reason to doubt the safety of the conviction.

Initial disclosure is made

28. The initial schedule of unused material (MG6C) was served on 12th August 2018. It was prepared by the disclosure officer, Detective Sergeant Alex Logue. It listed only 30 items, only seven of which related to the complaint by JE.

The defence statement is served

29. The appellant's solicitors served a very detailed defence statement, dated 3rd October 2018. It complained about the paucity of the disclosure to date and identified, in respect of each complainant, further material which ought to be disclosed. Specifically in relation to JE, it called for disclosure of all her medical and social services records including medical and psychological assessments, staff rotas at Woodlands, and all records of any prior allegations by JE of physical or sexual abuse, made either to the police or to medical/welfare authorities. In relation to the issue of possible motive to make false allegations, the defence statement requested disclosure of any criminal injuries compensation claims by the complainants and any evidence of debts.

30. The defence statement included the question: "What items are recorded on the sensitive schedule? Do these include social care files and medical notes (noted as 'hefty' in the case of [JE]). The defence require disclosure of all relevant items on the sensitive schedule."

An expanded schedule MG6C is served

31. On 18th October 2018 an expanded version of the same schedule of unused material was served, now listing 51 items in total. Most of the additions consisted of PNC records of the previous convictions of witnesses. The schedule did not address the disclosure requests made in the defence statement.

The prosecution serve the Disclosure Management Document

32. Those requests were, however, addressed in the prosecution's Disclosure Management Document ("DMD") and lengthy accompanying letter dated 4th December 2018. By now a deputy disclosure officer, Susan Vinson, had been appointed to assist DS Logue. The DMD explained that the local authority responsible for Woodlands had been unable to locate any further documentation, which was assumed to have been destroyed, apparently even before the previous investigation in the 1990s which had resulted in the appellant's earlier trial and conviction. Nor had it been possible to locate the paper file comprising JE's children's services records. It was said that there were no other recorded sexual allegations by JE. The DMD contained a mental health summary for JE, limited to only three entries. It disclosed that JE had received rape counselling in the past.

33. It seems that there was an abortive mention hearing on 7th December 2018 to raise the issue of disclosure, but the hearing was ineffective because Ms Griffiths' video link from Liverpool failed.

The defence serve the Disclosure Request Schedule

34. In response to the DMD, the appellant's solicitors served a very lengthy Disclosure Request Schedule on 7th January 2019, drafted by Ms Griffiths. It ran to 60 pages. It set out the gaps in disclosure and the documentation still required (78 areas in total) with a final column for the prosecution to complete. By way of example, the schedule requested disclosure of the complete social care files of the complainants, details of their debts, details of any prior allegations of physical or sexual abuse, JE's mental health records and her therapy/counselling records.

35. Of particular relevance, the material which had already been disclosed referred to an allegation by JE of sexual assault, noted by a psychiatrist (Dr Schneider) on 23rd December 2010, that she had been raped at the age of 15. The disclosure request schedule (items 64 and 67) asked for further details of this allegation. The prosecution's reply was to the effect that this must be a reference to the allegation of rape by the appellant in 1982, when she would have been 15 and that she had not made any other complaint of rape to the police. This turned out to be an inaccurate

assertion, because it later emerged that there had been another incident of sexual assault, other than at Woodlands, the circumstances of which JE described in her evidence at trial.

The abuse of process application is lodged

36. In view of the alleged prejudice and unfairness arising from the long delay since these alleged offences, and the lack of disclosure, Ms Griffiths drafted an abuse of process application dated 15th January 2019 uploaded to DCS on 4th February 2019. The prosecution response was served on 18th March 2019. On 5th March 2019 the prosecution had served their responses to the disclosure request schedule.

The abuse of process application is part heard

37. The trial was due to start on 24th April 2019. On 21st March 2019 the abuse of process application was listed before the trial judge, Judge Shaw. There was insufficient time for the application to be fully argued that day. It was agreed that Ms Griffiths would provide any further submissions in writing, which she did on 3rd April 2019. The nub of the complaint, so far as JE's allegations were concerned, was that there had been no disclosure of documentation relating to her time in care and no records such as staff rotas for Woodlands. It was impossible to say with confidence precisely when she had been at Woodlands. There had been inadequate disclosure in relation to her mental health issues, only partially remedied by the further disclosure in response to the Disclosure Request Schedule. There had been no disclosure of counselling records. More generally, all records relating to Woodlands had apparently been destroyed. The absence of such material was all the more prejudicial as the jury would hear about the appellant's previous trial and conviction for similar offences and that would be the prism through which the jury would view the present case.

38. The prosecution's written response to the abuse application, dated 19th March 2019, asserted that the defence did not suggest there was any key material either missing or destroyed which would advance their case. The delay in reporting the abuse could be explored fully with each complainant and went to their credibility and reliability. The appellant undoubtedly had significant opportunity to commit the abuse alleged. The issue was whether he did so. There were no missing pieces of evidence which were capable of bearing upon the central issues in the case.

The trial commences

39. That was how matters stood when the trial commenced on 24th April 2019. The judge indicated that he had considered the oral and written submissions, and that if pressed to rule in advance of any evidence being called his ruling would be that Ms Griffiths had not established that this was one of those rare and exceptional cases where a stay was justified. However, as the appellant's main complaint was the prejudice caused by the loss or non-disclosure of potentially relevant material, the judge expressed the view that he could not properly assess the impact of the absence of that material until the close of the prosecution case. He would therefore revisit the matter at that stage and consider any further submissions. Ms Griffiths agreed that this was the appropriate course.

40. The trial proceeded. After the prosecution opened the case, Ms Griffiths was permitted to address the jury in opening as well. We have the draft of what she proposed to say. We have no doubt that she made her points clearly and forcefully, alerting the jury very properly to the danger of jumping to the conclusion that because the appellant had been convicted of similar offences previously, he must be guilty of these offences too. Specifically in relation to JE, Ms Griffiths alluded to the absence of documentation to test her evidence and alluded to her serious mental health issues. She alerted the jury more generally to the issues relating to disclosure and the absence of relevant documentation.

41. Despite the deficiencies in disclosure, Ms Griffiths had a substantial quantity of material with which to cross-examine the complainants. Ms Griffiths has helpfully provided us with a bundle of the relevant documentation in relation to JE disclosed before trial (Bundle A) which runs to 53 pages. In respect of each complainant the defence had prepared a bundle of documents for the witness to refer to when cross-examined. The jury did not have these bundles but later, as part of the defence case, the jury were supplied with a defence jury bundle containing relevant key documents.

JE is called to give evidence

42. JE was the second complainant to give evidence. She was called on Monday 29th April. We have a full transcript of her evidence, which was completed that day. Her ABE interview was played to the jury. She was skilfully cross-examined by Ms Griffiths, who was able to contradict parts of her evidence from the disclosed material. For example, although JE suggested that it was the police who had first contacted her, the record showed that it was JE who had phoned the police on 19th September 2014. Importantly, Ms Griffiths was able to establish that, contrary to JE's account in her ABE interview, she was not 14 when she went to Woodlands, but 15½, arriving there on 22nd September 1982. Ms Griffiths was able to demonstrate that JE had a history of stealing and telling lies before she went to Woodlands, that she had long-standing mental health problems, and had abused drugs and alcohol. She elicited that JE had been in many therapy groups and had undergone counselling. She had recently had five courses of electric shock therapy (ECT). She had undergone hypnotherapy, cognitive behavioural therapy (CBT), and psychotherapy. Ms Griffiths probed the reliability of JE's memory by reference to the medical records which spoke of her periods of forgetfulness. Ms Griffiths probed JE's account of being put on the pill by reference to a medical record dated 27th July 1982, before she went to Woodlands. JE insisted that this was not because she was already sexually active but because of menstrual problems.

43. In relation to JE's account of weekends at Woodlands, when the sexual abuse was alleged to have occurred, Ms Griffiths suggested there were never as few as only three or four children left in residence. JE disagreed. We observe that the jury were eventually provided with information in the agreed facts about the number of children present at weekends which contradicted JE's evidence, albeit based on records subsequently discovered by the local authority (supplied on 30th April 2019) which were only for 1980 and 1981, long before JE's period at Woodlands. Ms Griffiths established that JE was alleging that when the appellant abused her, the other member of staff on duty with him was "Jim", and that there were no female

members of staff on duty at weekends. We observe that there were no records available to confirm or contradict this evidence of JE.

44. Turning to JE's account of the first incident when the appellant removed her towel, and the important issue of the timing of that incident, Ms Griffiths reminded JE that she had said she thought it was the Easter weekend, and in fact Easter Sunday. JE replied: "I can't say exactly the date, but yes." Pressed on this, and the fact that by Easter 1983 JE would not have been 14 but would already have had her 16th birthday, JE replied: "I said I think it was Easter." Ms Griffiths suggested that the appellant had started his new job elsewhere on 1st May 1983, and would have had holidays to take before he started, "… so April 1983 is actually the time Mr Hewitt left?" JE replied: "I disagree with that completely". Ms Griffiths challenged JE's account altogether, suggesting the rapes had never happened. JE was adamant they had.

45. Later in her cross-examination, Ms Griffiths queried why JE had not mentioned at the outset of the ABE interview that the appellant had gone on to rape her multiple times. Ms Griffiths suggested that JE had said this only in response to prompting by the interviewing officer. JE replied that it came out of the blue when the police came to see her; telling things in great detail to a police officer was difficult; even though she had not forgotten, there were going to be mistakes and she might have said things that weren't right. She was reminded that she had said in the ABE interview that there were about 10 to 12 rapes in total. JE replied: "I didn't say they were rapes every time." The judge intervened to press JE for an answer to Ms Griffiths as to why she had not said at the outset of the ABE interview that the appellant had raped her all these times. She replied that the policeman had just turned up; she was unsure about the situation; it was difficult talking to a male police officer when she had "sort of put it away for so long, I'd never really told anyone." Ms Griffiths pressed JE on the detail of the rapes. JE said she had never reported the bleeding to anybody, even though the other staff were nice and some were women, and she had her own key worker. JE said that the figure of 10 to 12 times "might be slightly over". On reflection she thought the minimum was probably about 7 or 8 times adding, "you should just get the file when he was working, and then you'd know".

46. Significantly, Ms Griffiths asked JE about her description of the clothes the appellant would wear on these occasions. JE said she remembered very clearly that he was wearing cords, so much so that "…I haven't been able to go anywhere near cord since. I remember the smell, I remember the colours… mustard and, like forest green, and grey." Ms Griffiths immediately challenged JE about this, suggesting that the appellant never wore cords. A few minutes later, however, after a break in which she presumably took further instructions, Ms Griffiths corrected her earlier suggestion and now accepted that the appellant did have some cords in similar colours to those JE had described, but he did not wear them ordinarily to work. JE agreed that he did not wear them during the week, only at weekends.

47. In relation to the possibility of anal penetration, JE explained that she thought "he probably slipped" on one occasion. She didn't know anything about anal sex at the time and couldn't say whether he was trying to penetrate her anus deliberately.

48. In relation to the complaint she had made to her former partner, JC, and the circumstances in which he came to speak to the police, JE agreed that she had

spoken to him before the police contacted him. She said she had spoken to his parents and had given them her phone number and asked them to get him to call her, which he did. She had asked him whether it would be all right for the police to talk to him. She had said to him that he was the first person she had told, and that was "a couple of years before the whole Jimmy Savile situation", wanting to make the point that she had not jumped on any bandwagon.

49. In relation to Lea Duval, JE insisted that she had made a complaint to her when there were at the half-way house together, College Road, and Lee Duvall had told her that she had also been raped by the appellant.

50. In relation to Matthew Steele, JE said she had called him because she needed a carpet cleaner. She didn't realise it was Matthew Steele from Woodlands. She hadn't seen him for 35 or 40 years. He had asked whether anyone had been in touch with her about an investigation into the appellant, because someone had been in touch with him. It came completely out of the blue. She had not told Matthew Steele in any detail that she'd been abused by the appellant, but it was after this conversation that she had contacted the police.

51. Significantly, JE was asked whether she was going to make a compensation claim. She replied: "I didn't, but the police put one through." The police had done the paperwork for it on a laptop when she was sitting with them. This was on 8th January 2019. At that stage Ms Griffiths was aware that a criminal injuries compensation claim form had been completed but she had not seen the document.

52. JE had to be recalled later in the trial, when further unused material had been disclosed. One of Ms Griffiths' complaints is that this subsequent late disclosure prevented her from cross-examining JE to full effect in a single session and thereby put the defence at a distinct disadvantage. We shall return to this submission. First, however, it is necessary to explain how that further disclosure came about in order to assess its impact on the fairness of the trial.

Late disclosure during the trial

53. In understanding the chronology of the trial we have been assisted by reference to the court log on the digital case system (DCS). We note that during the course of JE's evidence on the afternoon of 29th April the jury sent a note with the following question: "What date did Mr Hewitt's employment end on at Woodlands, when did he leave his employment?" The log indicates that the note was read into the record and that the judge answered the jury's question next day. We have no transcript of what the judge said (he would doubtless have discussed the matter with counsel first) but the jury's question indicates that the issue of dates was very much in the jury's mind from this early stage. The position was eventually clarified, to an extent at least, in the agreed facts. It was agreed that the appellant took up his new post in Gloucestershire on 1st May 1983. The issue which was never resolved on the evidence, because of an absence of documentation, was whether he continued to work at Woodlands in April (i.e. after Easter) in the weeks leading up to starting his new job, there being a possibility that he may have had accrued holiday entitlement which enabled him to finish work at Woodlands sooner.

54. The relevance of this timing is that JE had given evidence that she thought the initial incident (with the towel) took place over Easter weekend (Easter Sunday was 3rd April 1983), and that the first rape, charged in count 5, would have been 3 or 4 weeks after that. Ms Griffiths submits that on these timings the appellant may have had a complete alibi in that he may no longer even have been working at Woodlands when JE says he first raped her. She also submits that in view of the acquittal on count 6, the jury must have been satisfied that the later series of rapes she alleged cannot have taken place as she described, over a subsequent period of weeks or months, because the appellant had by then left Woodlands.

55. The prosecution case continued for the rest of the week and was nearing its conclusion the following Tuesday, 7th May 2019, when the officer in the case (and disclosure officer) DS Alex Logue was called to give evidence. After evidence in chief, her cross-examination was postponed to the following day. It then emerged that there was a further and fuller version of the unused schedule (MG6C), undated and unsigned, which had never been reviewed by the CPS lawyer. The explanation provided by the Crown, in response to a wasted costs application, was that this schedule had been sent by the police to the CPS on 17th April, but it had not been appreciated that it contained new material and expanded entries. Worse was to come. It was then discovered that a new schedule of sensitive unused material (MG6D), also sent to the CPS on 17th April, had never been reviewed by the CPS lawyer at all. This schedule listed far more extensive medical records for the complainants, including JE.

<u>The two-day adjournment for prosecuting counsel to review disclosure</u>

56. These developments were reported to the judge next morning, Thursday, 9th May. The defence team plainly needed time to consider the new material and the implications of its late disclosure. The jury were initially sent away until the afternoon, and then for the rest of the day. Prosecuting counsel, Mr Renvoize and his junior, Ms Ascherson, took control of the disclosure exercise and undertook to review all the material themselves. This necessitated a further adjournment. Next morning, Friday 10th May, the jury were sent away until Monday 13th May.

57. Following prosecuting counsel's review of the unused material, a further expanded version of the unused material schedule (MG6C) was served, dated 12th May. Among the documents reviewed by counsel was JE's application for criminal injuries compensation, dated 8th January 2019. The existence of this document, and a very brief summary of its content, had been included in the MG6C schedule forwarded by the police on 17th April 2019: see item 64. The summary stated that in the application JE "… describes the sexual abuse suffered whilst at Woodlands between 1981 and 1983…". What the summary failed to mention was that in the application JE described not only vaginal rape but also anal and oral rape. The final revised MG6C schedule included this detail, and prosecuting counsel ensured that Ms Griffiths had a full copy of the application.

58. In the final revised MG6C schedule the additions made by prosecuting counsel were highlighted, and the schedule now ran to 44 pages rather than 39 pages. In relation to JE, the other expansions in the final revised schedule related to her medical records from various sources: see items 74 to 78. Among the information now disclosed in those medical records was a reference in March 2014 to debts JE owed, including

bills for previous respite care. This was potentially relevant to the issue of possible financial motive for making false allegations.

59. Ms Griffiths has helpfully provided us with a bundle containing the material relating specifically to JE which was disclosed to the defence during the course of the trial as a result of the further disclosure exercise (Bundle B) running to 88 pages.

60. The schedule, even in its final revised form after review by counsel, failed in its narrative to disclose one important documentary entry in a social work assessment dated 17th April 2014 (item78) which was picked up only by Ms Griffiths herself when she was supplied with the actual document. The schedule stated, after a brief description, that the record in question contained "further details of being in care and systematically sexually abused". This did not reveal that in fact the relevant entry recorded: "There is a report on file indicating that [JE] was raped at the age of 15. [JE] herself told us that her abuser had put £10 in her pocket and she had been blamed for this by her parents."

61. Although not directly relevant to JE's allegations, Ms Griffiths also emphasises that the two-day review of disclosure revealed that there had been glaring omissions in disclosure relating to the three male complainants as well. In relation to WM, it emerged that in order to advance his civil claim for damages against the local authority his solicitors had written to him (in letters that had not been disclosed) advising that he needed the support of other former residents. The involvement of the other two male complainants post-dated this advice, strengthening the inference of collusion. In relation to DL, it emerged that, contrary to his account that the appellant had broken his nose in the course of a violent sexual assault when he was aged 13, there was a medical record (not previously disclosed) of DL reporting a history of having first broken his nose aged 17. In relation to JM, it emerged that, contrary to his insistence in cross-examination that his complaint was not motivated by money, he had told others (recorded in documents not previously disclosed) that he was waiting for a "pay out" and was looking to purchase a plot of land with his anticipated award of compensation.

The trial resumes

62. When the trial resumed on Monday 13th May, prosecuting counsel gave an assurance that there had now been full disclosure. Ms Griffiths indicated that there would be a wasted costs application against the Crown as a result of the loss of two days' court time, the appellant being a privately paying client. She also indicated that it would be necessary to recall four of the complainants in order to cross-examine them further in the light of the new disclosure.

63. DS Alex Logue was cross-examined closely about the disclosure failures. She agreed that the reference to vaginal, anal and oral rape in the criminal injuries application form should have been flagged up for the defence in the original schedule. The deputy disclosure officer, Susan Vinson had failed to do so. DS Logue denied the suggestion by Ms Griffiths that her approach to disclosure had been very casual. The deputy disclosure officer, Susan Vinson, was also called and cross-examined, as was the original supervising officer, Detective Sergeant Alison McCulloch.

64. A witness from Norfolk County Council, Philip Watson, Deputy Director of Children's Services, gave evidence about the loss of records from Woodlands. He had not made a witness statement, but under threat of a witness summons for third party disclosure he had set out the position in writing. In short, his evidence was that he had been assured by his staff that every effort had been made to find the files requested. There had been extensive searches on two occasions of 16 separate premises across the county. Some items had recently been found in unmarked cardboard boxes in the basement of County Hall. It was a real challenge to monitor and track old files. He knew there had been fires and floods at premises belonging to the County Council. He could not say what if anything had been lost from the records, or when.

JE is recalled

65. JE was the last of the complainants to be recalled. She gave evidence again on Thursday 16th May, as the last witness before the close of the prosecution case. Ms Griffiths explained to us the forensic challenge she faced in cross-examining JE for a second time, and in particular the risk of losing the jury's sympathy by extended cross-examination on the newly disclosed documents. When JE appeared in the witness box one or both of her arms were bandaged, which Ms Griffiths suggests may have led the jury to think she had been self-harming again and added to counsel's problems in cross-examining her robustly.

66. We have a full transcript of JE's further evidence. Ms Griffiths first asked her about the reference in a social work assessment to her being raped at the age of 15 when her abuser put £10 in her pocket, for which she had been blamed by her parents. This was one of the records in the new disclosure. JE agreed that this was a reference to sexual abuse by someone else, not the appellant. It was not the incident she had mentioned to JC. She denied that it was possible she was confusing this incident with what she said the appellant had done to her. She said that this incident was not in fact a full rape, but an indecent assault. One Christmas she and a school friend had gone to clean a man's flat. He had indecently assaulted her (a vibrator was involved) and put £10 in her pocket for the cleaning. When her foster mother found the £10 in her pocket she got into trouble because it was thought she had stolen the money. JE went on to give more detail of the incident.

67. Ms Griffiths asked JE about an entry in her medical records (17th March 2014) to the effect that JE found the festive period and Easter very difficult as she recalled abuse from her adoptive parents at those times of year. This was based on the previously undisclosed material. JE agreed that she hated bank holidays and Christmas: "… they're family days and it just takes me back… that was why…". She said she had never been subjected to any kind of *sexual* abuse by her adoptive parents and had no idea where that came from. Ms Griffiths put it directly to JE that the reason she was saying that Easter 1983 was the time the appellant had abused her was because Easter was very difficult for her recalling abuse from her adoptive parents at that time. JE again denied that her adoptive parents had ever abused her sexually.

68. Ms Griffiths asked JE about the criminal injuries application form. It was pointed out that on the bottom of the form she had signed a declaration that she had read and agreed with its contents. She denied that she had actually signed the form; it was still on her phone. She agreed that the form said that the abuse was between 1st January 1981 and 17th March 1983 (the bracket of dates in counts 5 and 6, before amendment). It was pointed out that she had said in the form: "…he would vaginally, anally and orally rape me. It was weekends and bank holidays…" She agreed that she had told the police this when the form was being completed. The judge intervened specifically to clarify that point. Ms Griffiths asked why she had said in the form that she had been orally raped, something she had not mentioned to the jury. JE replied: "You didn't ask me". Ms Griffiths pointed out that she hadn't mentioned oral rape in her ABE interview either. JE replied: "Yes, I did."

69. Ms Griffiths asked JE about a note of her call to the police on 19th September 2014 in which he had suggested that the appellant had raped her on average once a week for two years. Ms Griffiths suggested JE was aware that the more abuse she alleged the more money she would receive. JE insisted that money was totally irrelevant. Ms Griffiths put to her the reference in the newly disclosed material that on 17th March 2014 she was having problems with debt. JE agreed that she had incurred charges for two periods of respite accommodation totalling £8,000 which she was still paying off at £20 a week. She thought she still owed £7,000. She denied the suggestion that she had been "pretty desperate for money" in early 2014.

70. Ms Griffiths asked JE about an entry in her medical records from February 2011 which said her memory was not good and she could not remember whether previous ECT (electro-convulsive therapy) impaired her memory. JE replied: "Well that's quite standard, isn't it, really?" She denied that she had a drink problem or drug problem although she had used drugs in the past.

71. In re-examination JE said that she wanted to make the point to the jury, to be fair, that she was the head of her little family: "I've done it myself, they're brilliant kids. I've got brilliant, gorgeous grandchildren."

The judge rules on the abuse of process application

72. As agreed at the start of the trial, the judge heard further submissions on the abuse of process application at the end of the prosecution case. In fact, by agreement and presumably for reasons of convenience and witness availability, the judge heard those submissions on Wednesday 15th May, the day before JE was recalled. We note from the court log that Ms Griffiths indicated her agreement to the abuse of process application being dealt with then, but she emphasised that it remained a live issue throughout the trial and there might be further evidence later which added to the argument. Ms Griffiths' oral submissions lasted 40 minutes. The prosecution's reply lasted 18 minutes. We do not have transcripts of the oral submissions, but we are not disadvantaged in view of the thoroughness of the written and oral arguments we have in the appeal. Submissions concluded shortly before the luncheon adjournment. The judge gave his ruling later that afternoon. Helpfully, the judge set out his ruling in writing, in a document running to 16 pages. It is convenient to summarise the ruling at this stage, although we shall return to it again later.

73. In his ruling the judge first set out the general background of the case and the history of the proceedings. He summarised the relevant law and the test to be applied in deciding whether to grant a stay of proceedings. No issue is taken with that analysis. He referred to the relevant authorities, to which we shall return.

74. The judge recorded that in her oral submissions Ms Griffiths relied not only on prejudice arising from delay and from lost and/or non-disclosed evidence which made a fair trial impossible, but also invited the judge to stay the proceedings to protect the integrity of the criminal justice system. The judge identified the broad categories or topics of information and evidence said to be lost or undisclosed in relation to the complainants as a whole. We need enumerate only those relating specifically to JE: (i) contemporaneous information from her social services records (ii) information concerning any counselling or therapeutic treatment she might have had (iii) information from other third parties, including medical records.

75. The judge set out the disclosure history in detail and identified the material which had eventually been made available and deployed. He described the "root and branch" attack Ms Griffiths had made on the integrity of the disclosure process, and her questioning of the competence and good faith of DS Alex Logue. He acknowledged that DS Logue's conduct of the investigation of the disclosure process had not by any means been perfect, but he rejected the proposition that she had acted in bad faith or had demonstrated a lack of integrity.

76. The judge emphasised that he had observed how each of the five complainants and other prosecution witnesses had been cross-examined by Ms Griffiths "with measured and focused reference" to the unused material in each of the individual bundles prepared for their cross-examination. The challenges to their evidence had been "both robust and thorough". Ms Griffiths had "left no stone unturned". The judge noted that until Tuesday 14th May he had not been asked to rule on any defence application pursuant to s.8 of the Criminal Procedure and Investigations Act 1996, nor had there been any request for the issue of a witness summons against any third-party requiring the production of records in their possession. Ultimately, however, Mr Watson from Norfolk County Council had given evidence. Prosecuting counsel had undertaken a thorough review of disclosure. It would be open to Ms Griffiths to make "appropriate and measured submissions" to the jury concerning the failure by the police to obtain the more recent medical records sooner. The judge said that he was satisfied so as to be sure that the Crown had now disclosed to the defence everything in their possession that met the test for disclosure.

77. The judge said that although Ms Griffiths had articulated, in terms of categories, the sort of material she might have wished to be disclosed, in his judgment she had failed to do more than speculate about what that material might have shown. For example, there was no evidential foundation to enable him to conclude that any complainant had ever engaged in any meaningful counselling or therapy, let alone to conclude that there might somewhere be disclosable records that had not been found. The judge said that Ms Griffiths had been unable "to identify a single document that has actually been lost, a single missing witness who could have given material evidence, or a single document in the possession of the Crown that should been disclosed to her that has not been." She had identified much that she might have liked to see, but those submissions were akin to "keys to the warehouse" submissions. The judge said that although the proposed agreed facts were still to be

finalised, he was confident from what counsel had told him that the Crown would make appropriate admissions.

78. The judge concluded that the defence had failed to satisfy him on the balance of probabilities that this was one of those rare and exceptional cases where the proceeding should be stayed because no fair trial was possible or to protect the integrity of the criminal justice system. The judge said that, on the contrary, in his judgment he had been presiding over a trial that had been scrupulously fair to both sides. Ms Griffiths had been afforded considerable leeway in her cross-examination of the witnesses, and in other respects. No restrictions had been placed on her cross-examination when perhaps they might have been. The judge elaborated on these observations with examples. He recorded that Ms Griffiths had submitted to him that she had made the tactical decision not to cross-examine complainants about material that she would have asked about had it been available to her from the outset, for fear of incurring tacit rebuke from the jury. (We observe that, despite this indication, Ms Griffiths did in fact cross-examine JE the following day on the newly disclosed material, as already outlined). The judge said that he agreed with the Crown's submission that the new material which had been disclosed could fairly be described as "more of the same", and nothing that was disclosed late gave rise to any new cross-examination of any real substance. Again, we observe that the judge was giving this ruling before JE had been recalled, and in the expectation that she would not be recalled. The judge said that the matters he described were "…all examples of how our criminal trial process has yet again demonstrated itself capable of coping with non-recent allegations and adapting to ensure fairness to both sides, and I am satisfied so that I am sure that this trial has been fair to both sides."

79. The judge said that the allegations in the present case were typical of cases of this kind, where the alleged abuse was not witnessed by any third party. The judge said there was now ample evidence at least that the defendant had the opportunity to commit the offences: "…in truth, records from Woodlands are very unlikely to have assisted at all." The judge described the "quest for forensic perfection" as admirable, but one rarely achieved. He was sure that a fair trial was possible and was well underway. It would be for the jury in due course to decide whether the prosecution had proved its case or not. In reaching those conclusions the jury would be able to take account of Ms Griffiths' extensive cross-examination of the complainants and other witnesses, any defence evidence she called, and any submissions she made in her closing speech. It would be for the jury to assess what they made of her several complaints about the police investigation and the disclosure process and how, if at all, those complaints influenced their deliberations and conclusions about the case. We shall return to Ms Griffiths' criticisms of the judge's ruling.

80. We need summarise the remaining chronology of the trial only very briefly, before turning to the final chapter of the disclosure history, which post-dated the trial.

Counts 5 and 6 are amended

81. Counts 5 and 6 of the indictment were amended, without objection, to take account of the evidence of JE's age when she arrived at Woodlands, as already explained. The Crown closed their case on Thursday 16th May after JE had been recalled and after the amendments to the indictment had been explained to the jury. There was no

half-time submission in relation to any of the counts on the indictment that there was no case to answer, even count 6 (the multiple incident count of rapes of JE).

The appellant gives evidence

82. The appellant was then called to give evidence. The jury were supplied with a defence bundle of documents. The appellant's evidence-in-chief occupied the rest of the day and went into the following morning, Friday 17th May. He denied all the allegations. He gave a detailed account of his background and work history. He explained that in 1983 his father-in-law became ill and he and his wife decided they should try to move closer to her parents in Somerset. He applied for a job in Gloucestershire. He produced for the jury a letter dated 23rd March 1983 appointing him to the new role, to commence on 1st May 1983. He said he would have been expected to give one month's notice to Norfolk County Council but he did not recall if he worked out his notice as he could not remember whether he might have had holiday entitlement. It was quite likely he had some days left to take and he would have used up any holiday allowance he had left. He therefore did not know the date of his last working day at Woodlands, but that information would have been available in the records held at the time.

83. He described the documentation which would have existed at Woodlands in respect of each child. In relation to JE, the appellant said that he did not generally work on Saturday nights but mostly because there weren't as many children. Surviving registers from 1980 and 1981 showed that on one Saturday in September 1980 there were 6 out of 15 children present at Woodlands; on a Saturday in October 1980, 8 out of 19 children were present. The appellant confirmed that the children who were able to go home to their parents at weekends did so. All this information was subsequently provided to the jury in the agreed facts. It came from the records discovered by the local authority during the trial.

84. The appellant was cross-examined for almost a full day. The allegations of each of the complainants were explored. In relation to JE, one of the matters put to the appellant was the similarity between JE's evidence of threats he made to silence her and the evidence of one of the girls he had been convicted of sexually abusing in the previous trial, to the effect that the appellant had threatened to send each girl somewhere and there was no point in complaining to anyone. The appellant agreed they must either have told the same lie or made the same mistake. He suggested that JE may have read in a newspaper what the other girl had said in the trial 20 years earlier.

85. The appellant was asked about the evidence of Helen Hall, who had come across him one night in the girls' living area, which had struck her as strange. The appellant said he was probably checking a noise he had heard when he was on night duty. It would have been his responsibility to double-check that everyone was where they were supposed to be. A number of defence witnesses were called, including the appellant's wife and former members of staff. The defence case closed on the afternoon of Monday 20th May.

The judge gives the directions of law

86. Over the weekend the judge had provided counsel with a draft of his directions of law, in advance of the first part of his split summing up. Ms Griffiths had suggested some amendments, to which we shall return. The judge gave the jury his directions of law both orally and in writing that afternoon.

87. Next day, Tuesday 21st May, time was taken in producing the final version of the agreed facts for the jury. As we have already explained, the document included the fact that the appellant took up his new post in Gloucestershire on 1st May 1983 and left Woodlands in April 1983. It was an agreed fact that Easter Sunday in 1983 fell on 3rd April. It was an agreed fact that JE had left Woodlands by 1st August 1983. The agreed facts were read into the record and the document was provided to the jury.

The closing speeches

88. On the afternoon Mr Renvoize made his closing speech for the prosecution, lasting 1 hour 19 minutes. In the course of his speech he made it clear to the jury that they were not tied to the Easter weekend as the timeframe for the start of the sexual abuse. After a break, Ms Griffiths embarked on her closing speech for the defence. She spoke for 38 minutes that afternoon, and completed her speech next morning, Wednesday 22nd May, speaking for a further 1 hour 39 minutes.

The judge sums up the facts and the jury deliberates

89. The judge began the second part of his summing up that afternoon and completed his summing up next day, Thursday 23rd May. When the jury retired to consider their verdicts, Ms Griffiths raised the question of wasted costs. In the end that application was postponed to the conclusion of the trial and ultimately to the conclusion of the retrial. The jury deliberated for the rest of that day and the whole of Friday 24th May. They sent a number of notes during the course of their retirement which the judge dealt with. Monday 27th May was a bank holiday. The jury resumed their deliberations on Tuesday 28th May. The judge gave the majority direction that afternoon. The following day, Wednesday 29th May, it was discovered that the jury foreman had been taken ill at home with a suspected heart attack and he had to be discharged.

90. On the afternoon of Wednesday 29th May the jury returned a verdict of not guilty on count 4, which was the single allegation of indecent assault on the girl SB. No other verdicts were returned that day. Next day, Thursday 30th May, the jury returned a verdict of guilty on count 5, the first allegation of rape of JE, by a majority of 10 to 1. By then they had been deliberating for 22 hours and 35 minutes. Later that afternoon they returned a verdict of not guilty on count 6, the multiple incident counts of rape of JE. They returned no other verdicts that afternoon.

91. The court could not sit next day, Friday 31st May, but the jury resumed their deliberations on Monday 3rd June. That afternoon it became apparent that the jury would not be able to reach any further verdicts. A note from the jury read:

> "I believe that a sexual assault can occur between a heterosexual male and a child of either sex as a way of putting them in their place or degrading them, and not as a purely sexual

> motive. Are you able to clarify this, as several jurors seem stuck
> on that… i.e. if you did it to girls, he couldn't switch to boys."

The judge answered the note appropriately, urging the jury to focus on the routes to verdict. However, after further retirement it became clear that there was no prospect of further verdicts and, having now deliberated for over 27 hours, the jury were discharged.

Further late disclosure is made before the retrial

92. The appellant's retrial in relation to the three remaining complainants (all male) was listed to commence on 18th November 2019 at Norwich Crown Court, again before Judge Shaw. On 7th November 2019 Ms Griffiths served a further written application to stay the proceedings as an abuse of process, relying partly on the previous grounds and partly on the Crown's continuing shortcomings in relation to disclosure. On 15th November, the last working day before the retrial, the CPS wrote to the appellant's solicitors and Ms Griffiths enclosing an addendum disclosure schedule (MG6C), items 125 to 145. They also enclosed a report from DS Alex Logue relating to new material recently found by Norfolk County Council. This material had been located by Norfolk Children's Services and delivered to DS Logue on 13th November. None of that material related specifically to JE (who was, of course, not a complainant in the pending retrial) but Ms Griffiths submits that this further late disclosure vindicates the appellant's concerns all along about the fairness of the trial and the disclosure officers' continuing basic lack of understanding of the disclosure process.

93. The judge heard this fresh application to stay the indictment for abuse of process and gave a further comprehensive written ruling dated 18th November 2019. He rejected the application in robust terms. As that ruling does not form part of the trial which resulted in the appellant's conviction, we do not propose to rehearse the ruling, save insofar as it relates to newly disclosed material which may potentially have a bearing on the issues in the original trial, the subject of this appeal.

94. The judge rejected Ms Griffiths' submission that the prosecution had always fundamentally misunderstood their disclosure obligations. In relation to the material recently found by Norfolk County Council, the judge said he doubted very much that it met the statutory test for disclosure. It neither undermined the prosecution's case nor was it reasonably capable of assisting the defence case. We observe that the judge was speaking here only in relation to the allegations by the complainants in the retrial. The judge also referred to further material obtained by the prosecution since the original trial at King's Lynn. The judge said he had read the material itself in its entirety, and there was nothing that undermined the prosecution's case. Again, this was in the context of the retrial.

95. Ms Griffiths has again helpfully provided us with a bundle containing the material disclosed after the conclusion of the original trial (Bundle C), which runs to 160 pages. We have examined the material carefully. It appears that the only documents which could conceivably have assisted the appellant at the original trial in meeting JE's allegations are records relating to his employment with Norfolk County Council from its inception in 1973, and his application for the post he took up with Gloucestershire County Council from 1st May 1983.These records apparently came

from his personnel file. They include a letter from the appellant to Norfolk Social Services dated 5th March 1983 tendering his resignation from his post at Woodlands with effect from 30th April 1983. There is an internal social services document setting out the appellant's salary increases year by year, which records "voluntary resignation 30/4/83", and a somewhat cryptic manuscript note which appears to read "Term from 17/03/83". Ms Griffiths submits that this may be an indication that the appellant actually ceased working at Woodlands on that date, i.e. some two weeks before Easter 1983 which was the key date referred to by JE. There is another social services staff record which indicates that the appellant's annual leave entitlement on appointment in March 1974 was 25 days.

96. Ms Griffiths points out one of the documents newly disclosed was a disclosure schedule from the appellant's original trial in 1995 (URN 36 NC 2913 93) listing the appellant's "personnel file whilst employed with Norfolk County Council" as being located "on file", and submitted to the CPS on 19th August 1984. Ms Griffiths also points out that prior to the trial the prosecution had disclosed documentation relating to the original investigation in the 1990s which included a photocopy of the spine of a lever arch file labelled "working copy", bearing the same URN reference, the inference being that the newly disclosed personnel file may well have been in the possession of the police all along. There was a memorandum from Norfolk's Director of Legal Services to Norfolk's Director of Social Services, dated 13th September 1995, enclosing a copy of the appellant's "personal (sic) file as received from the Crown Prosecution Service".

97. For completeness, we should explain that although the retrial proceeded, the jury were discharged after the first witness had given evidence. Judge Shaw subsequently recused himself. The retrial is scheduled to commence again in January 2021.

The legal framework

98. The principles governing an application for a stay of proceedings for abuse of process arising from delay are well established and uncontroversial. They were set out by this court by Lord Lane CJ in *Attorney-General's Reference (No. 1 of 1990)* (1992) 95 Cr. App. R. 296. No stay should be imposed unless the defendant showed, on the balance of probabilities, that due to the delay he would suffer serious prejudice to the extent that no fair trial could be held. The principles were confirmed in *R v S (SP)* [2006] EWCA Crim 756; [2006] 2 Cr. App. R. 23, where it was said by Rose LJ (Vice President), giving the judgment of the court, at [21]:

> "In the light of the authorities, the correct approach for a judge to whom an application for a stay for abuse of process on the ground of delay is made, is to bear in mind the following principles:
>
> (i) Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule;
>
> (ii) where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted;

> (iii) no stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held;
>
> (iv) when assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate direction from the judge;
>
> (v) if, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted."

99. These principles were reinforced in *R v F(S)* [2011] EWCA Crim 1844; [2011] 2 Cr. App. R. 28, where it was also said that an application to stay for abuse of process should ordinarily be heard and determined at the outset of the case, and before the evidence is heard, unless there is a specific reason to defer it because the question of prejudice and fair trial can better be determined at a later stage. There is no dispute that the present case undoubtedly fell within that exception. Giving the judgment of the court, Lord Judge CJ said, at [45]:

> "… most important of all, as all the authorities underline, it is only in the exceptional cases where a fair trial is not possible that these applications are justified on the grounds of delay, even when the pre-condition to a successful application, serious prejudice, may have occurred. The best safeguard against unfairness to either side in such cases is the trial process itself, and an evaluation by the jury of the evidence."

100. The issue of missing documents frequently arises in applications for a stay on the grounds of delay in cases of historic sexual allegations. Helpful guidance was given by this court in *R v RD* [2013] EWCA Crim 1592, where there were allegations by four complainants of sexual abuse between 39 and 63 years earlier. The court emphasised that the length of the period of itself proves nothing beyond that historical fact. What is of crucial importance is the effect of such delay on the fairness of the trial and the safety of any resultant convictions. Giving the judgment of the court, Treacy LJ said, at [15]:

> "In considering the question of prejudice to the defence, it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of the missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether

judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to a defendant." (emphasis supplied)

101. In explaining why the trial judge had been correct to refuse a stay, Treacy LJ said at [20]:

> "… This case, although unusual in relation to the length of time which has elapsed, presents difficulties of a sort which frequently occur in cases involving lesser delay. There also underlay the submissions made on behalf of the appellant the assumption that the missing evidence would necessarily have supported the appellant's case, which we are unable to accept. Moreover, the complaints of J, G and S were not date specific but were couched in general terms of sexual abuse occurring on very many occasions during visits during school holidays within wide periods identified in the indictment. Accordingly, an alibi in its true sense was not the issue before the jury. The issue was in reality whether or not the jury could be sure that the abuse had taken place…".

102 Similar issues were considered again more recently by this court in *R v PR* [2019] EWCA Crim 1225; [2019] 4 W.L.R. 98, where the trial judge's refusal to stay the proceedings was upheld. Evidence gathered by the police in 2002, relevant to the appellant's defence, was destroyed by water damage and was unavailable for the trial in 2018. Giving the judgment of the court, Fulford LJ said, at [65]-[66]:

> "65. It is important to have in mind the wide variations in the evidence relied on in support of prosecutions: no two trials are the same, and the type, quantity and quality of the evidence differs greatly between cases… Some cases involve consideration of a vast amount of documentation or expert/forensic evidence whilst in others the jury is essentially asked to decide between oral testimony of two or more witnesses, often simply the complainant and the accused. Furthermore, there is no rule that if material has become unavailable, that of itself means the trial is unfair because, for instance, a relevant avenue of enquiry can no longer be explored with the benefit of the missing documents or records. It follows that there is no presumption that extraneous material must be available to enable the defendant to test the reliability of the oral testimony of one or more of the prosecution's witnesses. In some instances, this opportunity exists; in others it does not. It is to be regretted if relevant records become unavailable, but when this happens the effect may be to put the defendant closer to the position of many accused whose trial turns on a decision by the jury as to whether they are sure of the oral evidence of the prosecution witness or witnesses, absent other substantive information by which their testimony can be tested.

> 66. In a case such as the present, the question of whether the defendant can receive a fair trial when relevant material has been accidentally destroyed will depend on the particular circumstances of the case, the focus being on the nature and extent of the prejudice to the defendant. A careful judicial direction, in many instances, will operate to ensure the integrity of the proceedings. This general statement is not meant to preclude the possibility that a fair trial may sometimes be unachievable when relevant material cannot be deployed…But we stress that the strength and the utility of the judge's direction is that it focuses the jury's attention on the critical issues that they need to have in mind."

103. We shall return later to the adequacy of the judge's directions in the present case, but we observe that in *R v PR*, Fulford LJ went on to say, at [73]:

> " The judge's directions to the jury should include the need for them to be aware that the lost material, as identified, may have put the defendant at a serious disadvantage, in that documents and other materials he would have wished to deploy had been destroyed. Critically, the jury should be directed to take this prejudice to the defendant into account when considering whether the prosecution had been able to prove, so that they are sure, that he or she is guilty. The judge gave an impeccable direction to this effect, of which there is no criticism by [counsel for the appellant]."

104. Ms Griffiths drew our attention to a case which, she submitted, bore similarities to the present case, where this court held that the trial judge had been wrong to refuse a stay: *R v Burke* [2005] EWCA Crim 29. There the defendant was charged with historic sexual offences against several boys in a children's home where he had worked, 30 years earlier. The trial judge's refusal to stay the proceedings was upheld in relation to all but one of the complainants, KS. His allegation differed from those of the other complainants in that it related to one single occasion when, on night duty, the defendant was said to have assaulted KS sexually after he was returned to the home by the police at about midnight following an absconding. Available records confirmed that KS had absconded on more than one occasion during the relevant period. If the defendant was on night duty when KS was returned by the police on the occasion in question that would be powerful evidence in support of KS's allegation. If, on the other hand, the defendant was not on duty that night, then sensibly no jury could properly convict. Absent contemporaneous records from the home or elsewhere, it was not possible to tie down the exact date of the absconding and return. The crucial documents which would have existed and would have shown whether the defendant was on duty (i.e. the duty rota and/or form which would have been signed by whoever was on duty to acknowledge receipt of the boy) were missing. It was partly for this reason that this court concluded that the defendant had been prevented from having a fair trial, but there was another unconnected reason as well, arising from some fresh evidence which had come to light. Accordingly, the authority is of limited assistance and, in any event, is merely an example of a case which turned on its own facts.

105 We have also been referred to authorities in relation to the crucial importance of proper disclosure in cases of this kind, and generally. For example, in *R v S(D) and S(T)* [2015] EWCA Crim 662; [2015] 2 Cr.App.R.27, Lord Thomas CJ, giving the judgment of the court, made trenchant observations on the serious shortcomings in disclosure in a case of multiple rapes by two defendants. The trial judge had eventually stayed the proceedings as an abuse of process. This court reversed that decision on the facts, but emphasised, at [50]:

> "It has always been apparent in cases of historic sexual abuse that disclosure will be important and proper steps [should] be taken to ensure that it is dealt with in an orderly manner."

At [53], Lord Thomas highlighted:

> "…the importance of proper procedures being put in place for an intelligent approach to disclosure and the necessity for disclosure officers to receive proper training…"

referring to similar observations he had made in *R v Malook (Practice Note)*[2011] EWCA Crim 254; [2012] 1 WLR 633, albeit in the context of disclosure in a drugs conspiracy case where the disclosure issue went (unusually) to sentence following a *Newton* hearing rather than to conviction.

106 In *Malook*, Thomas LJ (as he then was) identified, at [35], a number of serious failings in the disclosure process in that case, observing that:

> "….Proper record keeping in an investigation is essential to the integrity of an investigation, to public confidence in police investigations and the proper administration of justice…In this case, as we have observed, the position was that the records were deficient and the disclosure officer plainly had no proper understanding of the obligations of disclosure. He did not have the training and competence to exercise the necessary judgement required of a disclosure officer. This was the fault of those much more senior to him who were responsible for the system…"

107 More generally, Ms Griffiths has referred us to the very comprehensive analysis of principles and good practice in relation to disclosure in the judgment of this court in *R v R (Practice Note)* [2015] EWCA Crim 1941; [2016] 1 Cr. App. R. 20. The guidance was concerned particularly with cases where the unused material comprises vast quantities of electronic files, but it also identified principles of general application. Giving the judgment of the court, Sir Brian Leveson P emphasised the importance of the prosecution "taking a grip" on the case and its disclosure requirements from the outset. The court also emphasised the importance of the judicial task of active and robust case management if required. The court referred in detail to the relevant statutory provisions in the Criminal Procedure and Investigations Act 1986, the Code of Practice made under s.23(1) of that Act, the Attorney-General's Guidelines on the Disclosure of Unused Material in Criminal Proceedings, and the relevant provisions of the Criminal Procedure Rules.

108 The requirements of the Code of Practice (CP) and Attorney-General's Guidelines (AG) which are particularly relevant to Ms Griffiths' submissions include the following:

> (i) Material which may be relevant to an investigation, which has been retained in accordance with the Code, and which the disclosure officer believes will not form part of the prosecution case, must be listed on a schedule: CP, para.6.2.
>
> (ii) The disclosure officer should ensure that each item of material is listed separately on the schedule and is numbered consecutively. The description of each item should make clear the nature of the item and should contain sufficient detail to enable the prosecutor to decide whether he needs to inspect the material before deciding whether or not it should be disclosed: CP, para.6.11.
>
> (iii) Disclosure officers, or their deputies, must inspect, view or listen to all relevant material that has been retained by the investigator, and the disclosure officer must provide a personal declaration to the effect that this task has been undertaken. Generally this will mean that such material must be examined in detail by the disclosure officer or the deputy: AG, paras. 26 and 27.

109 Finally, Ms Griffiths submitted to the judge that a stay should be granted not only because a fair trial was not possible, but also on the ground that a stay was necessary in the light of the prosecution's disclosure failures in order to protect the integrity of the criminal justice system. The principles governing this ground for a stay were considered by this court in *R v S(D) and S(T)* (supra), where the failure was in disclosure, in the light of the court's earlier decision in *R v Boardman* [2015] EWCA Crim 175; [2015] 1 Cr. App. R. 33, where the failure was gross disregard of the Criminal Procedure Rules and the directions of the court. Lord Thomas CJ said, at [42]-[43]:

> " 42…Nor is it right to make a distinction in principle between a failure by the prosecution to serve evidence on time and the failure to make proper disclosure. Both have the potential to affect the fairness and orderly conduct of a trial and to undermine public confidence in the integrity of the criminal justice system. As we shall explain, one of the critical factors is the effect of the prosecution failure on the ability of the judge to hold a trial that is fair to the prosecution, to the complainant (or victim) and to the defendant.
>
> 43. Thus, although the way in which the judge proceeded in *Boardman* was by refusing to admit the evidence under s.78 of the 1984 Act, and the present case involved a stay for abuse of process, the court should approach both types of application on the same basis, namely by balancing the material considerations and determining whether it was in the interests of justice,

> including the interest in the integrity of the criminal justice system, that the proceedings should be allowed to continue. It is where continuation would offend the court's sense of justice and propriety or would undermine public confidence in the criminal justice system and bring it into disrepute that a court should make an order which would have that effect."

Counsel's submissions at the appeal: abuse of process and disclosure

110 We shall deal first with the parties' submissions in relation to the principal grounds of appeal, abuse of process and disclosure, and give our decision on those grounds. We shall then address separately the additional ground of appeal relating to the adequacy of the judge's directions in the summing up.

The appellant's submissions

111 We shall not attempt to summarise the full detail of Ms Griffiths' written and oral submissions. The grounds of appeal ran to 27 pages and her skeleton argument 104 pages, with a further 69 pages of appendices. We have already highlighted some of Ms Griffiths' submissions on particular issues in the course of our narrative of the disclosure history and the trial.

112 In short, Ms Griffiths submits overall that the indictment should have been stayed as an abuse of process because the disclosure process was fundamentally flawed, and because the appellant could not have a fair trial in view of the nature and extent of the missing documentation, the delay of 36 years, and the biased nature of the police investigation.

113 As to disclosure, Ms Griffiths submits that the conduct of the investigation must be viewed against the backdrop of the previous investigation and trial in the 1990s resulting in the appellant's conviction and 14 year sentence for similar offences against 5 girls at Woodlands, offences which he continues strenuously to deny. That investigation was flawed in resulting from an inappropriate "trawl" for complaints of abuse, of a kind criticised subsequently by the Home Affairs Select Committee of the House of Commons. The present investigation was similarly tainted.

114 Ms Griffiths submits, in effect, that the issue of disclosure was dealt with in a haphazard and casual way. The disclosure officer, DS Logue, failed properly to schedule the unused material which was gathered, and the police failed to obtain a great deal of other potentially relevant material. Ms Griffiths submits that, at its most charitable, DS Logue failed to appreciate the relevance of significant material, resulting in very late disclosure during the trial itself, after the complainants had given evidence, which necessitated their being recalled, to the prejudice of the appellant's case forensically. The civilian deputy disclosure officer, Susan Vinson, who was appointed in November 2018 to assist DS Logue, was inadequately trained; it was admitted in the Crown's response to the wasted costs application that "limited police resources [caused] the need to use civilian staff not fully trained in RASSO [rape and serious sexual offences] cases and what needs to be looked for." Ms Vinson had failed to appreciate the significance of crucial parts of the content of various records and other documents; her approach to the test for disclosure was

more expansive than that of DS Logue, and possibly inappropriately so, but Ms Vinson did not know how to assess and deal with the material properly.

115 Ms Griffiths points out that the defence went to great lengths to alert the prosecution to the areas of outstanding disclosure, both in the defence statement and in the Disclosure Request Schedule. Despite this, the disclosure was woefully inadequate. Particularly serious examples included:

> (i) non-disclosure of the other allegation of rape (the £10 episode) which was never referred to on the unused schedule, even after review, and was only picked up by Ms Griffiths herself when the relevant record was eventually disclosed on 9th May (see [60] above).
>
> (ii) non-disclosure of the crucial content of the criminal injuries application form, referring to oral and anal rape, as well as vaginal rape, which provided pwerful cross-examination material on credibility but could only be deployed when JE was recalled; this vital information was only spotted and disclosed when prosecuting counsel conducted the wholesale review of unused material during the two-day adjournment on 8th May (see [57] above).
>
> (iii) non-disclosure of JE's extensive debts, recorded in a NHS risk assessment review only six months before her complaint to the police, which afforded a potential motive for making a false allegation; this was disclosed only following the review by prosecuting counsel during the two-day adjournment (see [58] above).
>
> (iv) non-disclosure of JE's reference to abuse by her adoptive parents at Easter and Christmas, disclosed only following prosecuting counsel's review during the two-day adjournment; this was potentially an explanation for JE's identification of Easter as the time of the alleged abuse by the appellant (see [67] above).
>
> (v) non-disclosure of the full extent of JE's mental health issues and memory problems, and the treatments and therapies she had undergone including "rape counselling", during which she may well have given other accounts of the alleged abuse by the appellant, or sexual abuse by others which she was confusing with it; this was the disclosure eventually made during the two-day adjournment, when it was realised that relevant material on the sensitive unused schedule (MG6D) had never been reviewed by the CPS lawyer (see [55] and [70] above).

116. In her oral submissions, Ms Griffiths explained that although there had been some pre-trial disclosure of JE's mental health problems, the defence had been deprived of the full range of relevant material from which to select the best examples for cross examination. As with the other material disclosed late (referred to above), this put

Ms Griffiths in the invidious position of having to cross-examine JE for a second time, providing the witness with a further opportunity to impress the jury and elicit their sympathy (not least by her reappearance in the witness box with one or both arms bandaged).

117. Ms Griffiths highlighted the examples of equally serious non-disclosure of crucial material potentially undermining the allegations by the three male complainants (see [61] above). Although this had no direct bearing on JE's allegations, it was a further demonstration of the total failure of the disclosure officers to understand what was relevant and disclosable. Ms Griffiths asks, rhetorically, what other similar oversights there may have been which still remain uncovered.

118. As to missing documentation, Ms Griffiths points to the complete absence of any contemporaneous documentation from Woodlands. Such material undoubtedly existed and would have shed light on the all-important timing of the appellant's actual departure from Woodlands in March or April 1983 before he took up his new post in Gloucestershire on 1st May 1983. It was only by good fortune that the appellant had himself retained and was able to produce a document confirming the date of his change of employment. Had he not been able to do so, there would have been nothing to contradict JE's evidence that the rapes continued for a period of many months after the initial incident at Easter 1983. Immediately prior to the retrial in November 2019 the appellant's personnel file had belatedly come to light in circumstances never satisfactorily explained. The reference in one of the documents to "Term from 17/03/83" raised the possibility that the appellant had left Woodlands even before Easter 1983.

119. Equally serious was the absence of any social services file for JE herself, documentation which effectively contained her life story as an adopted child brought up in care, and which, at least under current requirements, has to be retained for 100 years. These records would undoubtedly have contained information as to the date of JE's residence at Woodlands, and her move on to her next placement. Such records may even have revealed that JE had left Woodlands soon after her 16th birthday in March 1983 because the only surviving record referred to her moving to further accommodation "at the age of 16", and there was another record indicating that by 1st August 1983 she was living elsewhere (as set out in the agreed facts). Ms Griffiths questioned whether, even now, there had been sufficient enquiry to locate such records. She acknowledged that the police had pressed the local authority several times for full disclosure, but that should have been done much earlier and more regularly; it was well known that the police have to press local authorities repeatedly to obtain such information. Ms Griffiths submits that there was a "significant and demonstrable chance" that the missing evidence could have amounted to "decisive or strongly supportive" evidence on the issue of alibi or opportunity, and the judge failed to appreciate or acknowledge this fact.

120. Turning to the judge's ruling, Ms Griffiths submits that the judge was wrong to characterise the material disclosed during the trial as "more of the same". There was new material which opened up important lines of cross-examination. She submits the judge was wrong to say that she had "failed to identify a single document that has actually been lost". For example, records from Woodlands such as staff rotas must have existed and would have shown when the appellant was on weekend duty, and whether (as JE alleged) the appellant was on duty with "Jim" and never with any

female member of staff. Ms Griffiths submits that it was wrong and unfair for the judge implicitly to criticise the defence for not making any application for further disclosure under s.8 of the1986 Act, or not applying for the issue of a third party witness summons to produce documents, when in reality the defence had been assiduously pursuing focused disclosure for many months in what was, effectively, one long section 8 application. The judge was wrong to equate the approach of the defence to a request for the “keys to the warehouse”.

121. Ms Griffiths submits that the judge was wrong to say that there was no evidential foundation to conclude that any complainant “ever engaged in meaningful counselling or therapy”, when the material disclosed late showed that JE had undergone extensive counselling and therapy over the years. She submits that the police failed to make any enquiry as to the availability of JE’s counselling records. Ms Griffiths referred us to the guidance issued jointly by the Home Office, the Department of Health and the Solicitor-General (in 2001 or thereabouts) on the Provision of Therapy for Vulnerable or Intimidated Adult Witnesses, and the risk that particular kinds of therapy (including hypnotherapy and psychotherapy) may affect and undermine the reliability of a complainant’s evidence. Ms Griffiths acknowledged that the guidance was directed principally at therapy undergone by witness when a trial is already imminent, but she points out that here there was a delay of nearly 5 years between JE’s ABE interview and the trial, during which time she may well have undergone relevant therapy to which the guideline applied. Ms Griffiths also submitted, rather more faintly, that if there had been proper disclosure of JE’s extensive mental health issues and therapy well before the trial, the defence would have had to consider whether to instruct an appropriate expert (presumably a psychologist) to review the impact of all this. Finally on this topic, Ms Griffiths submitted in her skeleton argument that, had the defence been aware before trial of the full extent of these issues, consideration might have been given to an application to exclude JE’s evidence altogether under s.78 of the Police and Criminal Evidence Act 1984, particularly as there had been a breach by the police of the relevant codes of practice in failing to make a proper record of the initial conversation between the officer who first saw JE (DC Peter Sayer) several weeks before her ABE interview.

The Crown’s submissions

122. On behalf of the Crown, Mr Renvoize accepted in oral argument that the disclosure exercise in this case had been “thoroughly imperfect”. He submits, however, that the situation was redeemed during the course of the trial, and that in the event Ms Griffiths had all the material she needed in order to cross-examine JE forcefully and effectively, exposing weaknesses and inconsistencies. It was then solely a matter for the jury to assess her credibility and the reliability of her account. The jury were made fully aware of the shortcomings in disclosure. The disclosure officer, DS Logue, her predecessor, DS Sayer, and the deputy, Ms Vinson, were all robustly cross-examined. This was a demonstration that the trial process was capable of remedying any prejudice caused by the delay.

123. Mr Renvoize submits that as soon as it was discovered that the sensitive unused schedule had not been reviewed by the CPS lawyer, an extremely thorough review of the unused material was undertaken by prosecuting counsel themselves over a period of 2½ days, which resulted in the disclosure of additional material deployed in further cross-examination. The prosecution offered to deal with the additional

points by making appropriate formal admissions and did so as requested, but Ms Griffiths chose to have the complainants recalled. Had there been any real prejudice arising from this, such as to endanger the fairness of the trial, it was open to Ms Griffiths to apply to discharge the jury, but she made no such application.

124. As for missing documentation, it was almost inevitable that local authority documentation would be unavailable after such a long delay. The police had repeatedly requested such material from Norfolk County Council. What remained of the registers, for 1980 and 1981, was disclosed as soon as the local authority found it on 30th April 2019. The jury heard from a witness from Norfolk County Council about the loss or destruction of records.

125. Mr Renvoize explained in his oral submissions that although the prosecution had opened the case to the jury on the basis that the initial incident with JE had taken place at Easter, it was made clear in the prosecution's closing speech that the jury were not tied to that timeframe; Ms Griffiths had not taken issue with this stance. Mr Renvoize submits that on the evidence the jury heard, there was ample opportunity for the appellant to have committed the offences. The agreed facts made it clear that the appellant had left Woodlands sometime in April 1983. But it was clear that the appellant and JE had both been at Woodlands at the same time over the previous six months or so. The appellant had been able to produce a letter confirming the start date of his new employment on 1st May 1983. Mr Renvoize submits that the absence of other contemporaneous documentation did not impact on the fairness of the trial. The issue was not the precise date on which the alleged rapes had taken place, but whether the jury accepted JE's evidence that she had been raped at all.

126. Mr Renvoize submits that although the defence did not have, at the outset of the trial, full details of JE's therapy and counselling, Ms Griffiths had the relevant material by the time JE was recalled. He submits that the joint CPS and Department of Health Guidance on therapy for witnesses did not apply. Ms Griffiths had been able to explore the witness in cross-examination the issues of her mental health, her therapy, and possible memory loss.

127. As to the judge's ruling, Mr Renvoize submits that in substance the material disclosed during the trial after the two-day adjournment was, in reality, "more of the same". He submits that the judge was best placed to assess whether a fair trial was possible, having heard the complainants cross-examined. He submits that the judge's ruling was reasoned and cogent. It cannot be said that the judge's decision to refuse a stay was unreasonable or plainly wrong, which is the threshold the appellant would have to demonstrate.

Discussion and conclusion: abuse of process and disclosure

128. We have given all counsel's submissions, written and oral, the most careful consideration. There were undoubtedly regrettable errors and shortcomings in the process of disclosure. This compounded the inevitable difficulties faced by the appellant and his legal team in challenging the evidence of the complainants and presenting his defence 36 years or more after the alleged offences. In order to justify the grant of a stay it was for the appellant to show on the balance of probabilities that, by reason of the prosecution's disclosure failings, the absence of documentation and all the other circumstances resulting from the delay, he would suffer serious

prejudice to the extent that a fair trial could not be held. The question for us is whether the judge's conclusion that the appellant had failed to discharge this burden of proof was unreasonable and/or plainly wrong.

129. For the reasons which follow, we are satisfied that the judge was fully entitled to reach the conclusion he did. We are satisfied that there was no serious prejudice such as to make a fair trial impossible.

130. The judge wisely deferred ruling upon the abuse of process application for a stay until the conclusion of the prosecution case. He did so with the agreement of both counsel. This meant that the judge had the advantage of seeing, in practice rather than in theory, the extent to which the defence were hampered in making an effective challenge to the evidence of the respective complainants. It is plain from the transcript of JE's evidence, and from the judge's very full summary of the evidence of JE and the other four complainants in the summing-up, that Ms Griffiths was able to cross-examine each of the complainants, and JE in particular, robustly and to powerful effect.

131. By agreement the judge heard and ruled upon the application for a stay before JE was recalled. In her further cross-examination of JE next day, Ms Griffiths had the opportunity to deploy the additional material which had been disclosed so late in the case. She did so to good effect. She cross-examined JE about (i) the other rape allegation involving the £10; (ii) the abuse she had suffered at the hands of her adoptive parents at the festive periods of Christmas and Easter; (iii) the assertion in her personal injuries compensation claim form that the appellant had raped her orally and anally, as well as vaginally; (iv) her serious problems with debt at the time she made her complaint to the police in 2014; (v) mental health issues and the therapy she had undergone which may have impaired her memory.

132. We do not overlook the forensic disadvantage Ms Griffiths suffered in not being able to put all these matters to JE when she gave evidence initially. Nor do we overlook the inhibition Ms Griffiths felt in cross-examining JE again at length for fear of antagonising the jury, not least when JE had returned to the witness box with one or both arms bandaged. Nevertheless, Ms Griffiths was able to drive home the points raised in the new material, and there was potentially a positive advantage to the defence in highlighting these points clearly and distinctly at the very end of the prosecution case. Had Ms Griffiths considered that the recalling of JE was irremediably unfair, she would no doubt have considered applying to discharge the jury, although again we accept that this would have been a big step to take, particularly as the appellant was a privately paying defendant.

133. We also take into account the disadvantage Ms Griffiths faced, forensically, in having a limited quantity of material from which to choose in cross-examining JE about her mental health difficulties, treatment and therapies. That said, Ms Griffiths did not highlight or draw to our attention any particular document which the late disclosure had deprived her of using in her initial cross-examination. Had there been any such key document we have no doubt that Ms Griffiths would have deployed it to powerful effect in cross-examining JE when she was recalled.

134. We have considered with particular care the suggestion that there was missing contemporaneous documentation from Woodlands which might fairly fall within the

category identified by Treacy LJ in *R v RD* (see [100] above) namely: "…missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case…". The possible timing and timeframe for the rapes JE alleged was certainly an issue in the case, but the timeframe was established by the undoubted fact that the appellant must have left Woodlands no later than 30th April 1983, and this was part of the agreed facts and supported by the letter the appellant himself produced in evidence, a copy of which was provided for the jury.

135. We accept that rotas or other contemporaneous documentation might have narrowed down the window of opportunity still further in relation to JE's belief that the rapes began three or four weeks after Easter. But JE made it clear in her ABE interview and in cross-examination that although she thought the initial incident (with the towel) happened over the Easter weekend, she was not tying herself to that as a date. Mr Renvoize made this same point clear to the jury in his closing speech, apparently without objection from Ms Griffiths. We also accept that rotas or other contemporaneous documentation might have proved or disproved that the appellant was on overnight duty at weekends with "Jim", and never with any female member of staff, or shown whether as few as three children were ever in residence over any given weekend. But these were not, in our judgment, central issues in the context of JE's allegations as a whole. There was no suggestion, for example, that "Jim" or anyone else, staff member or child, would have been aware of the abuse taking place in the privacy of JE's single room.

136. Unlike the factual situation in *R v Burke* (see [104] above), which was held on appeal to justify a stay, this was not an allegation of a single occasion of sexual abuse which occurred on a specific occasion capable of being identified by date if contemporaneous documentation had survived (in *Burke*, the rota and the document signed when the boy was returned by the police). The situation in the present case is far more akin to that described by Treacy LJ in *R v RD* itself (see [101] above), where the complaints: "…were not date specific but were couched in general terms of sexual abuse occurring on very many occasions during visits during school holidays within wide periods identified in the indictment. Accordingly, an alibi in its true sense was not the issue before the jury. The issue was in reality whether or not the jury could be sure that the abuse had taken place…".

137. In his ruling the judge correctly identified and applied the relevant legal principles. Because we do not have a transcript of Ms Griffiths' oral submissions, it is unclear whether she specifically identified as crucial missing documents the staff rotas or other documentation of the kind to which we have referred. We note that in her written "abuse of process application – addendum following disclosure", dated 3rd April 2019, such documents are not identified although others are. If Ms Griffiths did specifically identify such documents in her oral submissions, we find it strange that the judge should have made the observation in his ruling that Ms Griffiths "has not been able to identify a single document that has actually been lost…" that would have been material, adopting the prosecution's submission. We appreciate that in her oral submissions Ms Griffiths would have been addressing the issue of serious prejudice in relation to all five complainants and not merely JE, but we remain puzzled that the judge should have made this observation if Ms Griffiths had put this

point at the forefront of her submissions, as she does now. Indeed, the judge made the same observation in the summing up, without Ms Griffiths correcting him.

138. In characterising the further disclosure during the trial as "more of the same", with nothing that "gave rise to any new cross-examination of any real substance", the judge was speaking before JE was recalled, and in the light of Ms Griffiths' oral submission to him that: "…she made the tactical decision not to cross-examine complainants about material that she would have asked them about had it been available to her from the outset for fear of incurring tacit rebuke from the jury." It is likely that he had in mind, in particular, the additional medical records for the complainants which had been overlooked on the sensitive unused schedule.

139. Similarly, in saying that there was no evidential foundation to enable him to conclude that any complainant in the case: "… ever engaged in any meaningful counselling or therapy, let alone that there might somewhere be disclosable records that have not been found", we think the judge was speaking in general terms, the emphasis being on "meaningful". The jury had heard DS Logue cross-examined on the topic; she had said there was no evidence of any witness having had therapy of the kind mentioned in the joint CPS and Department of Health Guidance on the provision of therapy for vulnerable witnesses. It is plain that the guidance is really concerned with therapy in the lead up to the trial once the complaint has been made, and the responsibilities of the police and CPS in relation to the complainant as a witness in such circumstances. That was not the situation here. It is true that the guidance identifies psychotherapy, for example, as something which might have a material impact on the evidence of a witness (see para. 4.2 of the guidance), and hypnotherapy (see para.10.3), but the jury were aware from JE's own evidence that she had undergone such therapy, and Ms Griffiths was able to deal with that point in cross-examination of JE and of the police witnesses, and in her closing speech.

140. In likening Ms Griffiths' approach to a "keys to the warehouse" submission, the judge was focusing, quite correctly, on the need for a proportionate approach to disclosure, tailored to the issues in the case applying the statutory test for disclosure, rather than a general request for anything that might conceivably have a bearing on the case. That said, we accept that Ms Griffiths and her solicitors had commendably gone to great lengths, in the spirit of co-operation required by the overriding objective in the Criminal Procedure Rules, to identify for the prosecution the material that should be obtained and disclosed.

141. The judge was ideally placed to assess whether the trial had been and could continue to be fair. He expressly found that there had been no bad faith on the part of DS Logue, or the police generally. The judge was entitled and correct to conclude that the trial process itself was capable of compensating for any prejudice arising from the delay and ensuring that the trial was fair.

142. The judge was also entitled and correct to reject the second limb of Ms Griffiths' abuse application, that a stay was necessary to protect the integrity of the criminal justice system having regard to the failings in disclosure. Those failings were fully explored in evidence, and in counsel's written and oral submissions to the judge. Importantly again, the judge was satisfied that there had been no bad faith on the part of the police or the prosecution. This was not a case, in our judgment, where the continuation of the proceedings would offend the court's sense of justice and

propriety or would undermine public confidence in the criminal justice system and bring it into disrepute (see *R v S(D) and S(T),* at [109] above).

143. For all these reasons we reject the first two grounds of appeal, in relation to abuse of process and disclosure. We turn to the new ground argued by Ms Griffiths, that the judge's directions to the jury in the summing up in relation to delay and consequent prejudice to the appellant were inadequate.

The adequacy of the judge's directions in the summing up

144. The judge's directions of law were given before counsel's closing speeches. The judge circulated a draft. Ms Griffiths suggested various amendments, some of which the judge incorporated in substance if not in the precise terms she suggested. The directions of law were provided to the jury in writing as well as given orally. The judge touched on prejudice arising from delay in a set-piece direction, but also in his initial direction on the approach the jury should take to their deliberations, inferences, and speculation.

145. That initial direction included the following passage:

> "…You are entitled to draw inferences, which means come to common sense conclusions based on the evidence that you have heard, but you are not allowed to speculate or guess about evidence you don't have. In this case an example of something about which you should not speculate is this: complaint has been made by the defence about material that they submit is absent, for example complainants' medical records, records for any counselling they may have had in the past, records from social media accounts and/or other digital sources. You should, of course, give to Miss Griffiths' submissions concerning that absent material the weight that you think they merit, but what you must not do is speculate about what any such records might have shown had they featured in this trial. I shall say more about this during my legal direction on delay."

146. Pausing there, Ms Griffiths submits that it was wrong to characterise her submission merely as a "complaint", when the absence of the documentation in question was a fact. She submits that the direction gave the jury no assistance as to how they should approach the question of missing records, if they were forbidden to speculate about their possible content. She says she suggested no amendments to this draft direction because she was expecting the judge to develop the point in the second part of the summing up when he dealt with the facts.

The routes to verdict

147. It is important to record the way in which the judge directed the jury on the ingredients of the offence on each count, and the route to verdict on each count. In relation to counts 5 and 6, after explaining the ingredients of the offence of rape, the judge said:

> " In this case, in reality, the only issue for you to decide is whether the prosecution has made you sure that Mr Hewitt penetrated [JE's] vagina with his penis or not, however, you must also be sure that she did not consent to that penetration and that Mr Hewitt knew that she did not consent or was reckless as to whether she consented, in relation to 5, that this happened on a first occasion and in relation to count 6, that it happened on not less than 4 occasions other than that in count 5."

148. In the routes to verdict, incorporated in the written directions, the judge identified the first issue for the jury to decide in count 5 was:

> "Has the prosecution made you sure of an initial occasion when Mr Hewitt penetrated [JE's] vagina with his penis? If the answer is 'yes', go to question 6; if the answer is 'no', your verdict must be NOT GUILTY to both counts 5 and 6."

We observe that the judge, by his directions, made it clear to the jury that they were not required to be sure that the "initial occasion" was on a date within any particular period, such as between Easter and the end of April 1983.

In the route to verdict for count 6 the judge identified the first issue for the jury to decide:

> "Has the prosecution made you sure of at least 4 more subsequent occasions, all distinct from that in count 5, when Mr Hewitt penetrated [JE's] vagina with his penis? If the answer is 'yes', go to question 9. If the answer is 'no', your verdict must be NOT GUILTY…"

Again, we observe that the judge, by this direction, made it clear to the jury that they were not required to be sure that these 4 subsequent occasions were within any particular period of time.

149. The judge had directed the jury a little earlier as to the difference between "specific" and "multiple" counts:

> "Where, as here, the prosecution are not able to say exactly when or how often offences were committed they may bring a charge which covers more than one incident. Counts 3, 6 and 8 allege that Mr Hewitt sexually abused the 3 complainants named in those counts on at least 5, 4 and 6 occasions respectively. If you are sure that Mr Hewitt did those things, your verdict (on the count you're considering) will be GUILTY. If you are not sure that Mr Hewitt did those things on at least the number of occasions specified in the count you're considering, your verdict on that count must be NOT GUILTY, even if you are sure that Mr Hewitt did those things, but on fewer than the number of occasions specified in those counts…"

We observe that, applying that direction, if the jury concluded that the appellant had raped JE on subsequent occasions but were not sure it was on as many as 4 more occasions, they would have been obliged to acquit altogether on count 6.

The direction on delay

150. In his direction on delay, the judge said this:

> "When you come to consider why these allegations were not made any earlier, you must avoid making an assumption that because they were delayed they must be untrue.
>
> Mr Hewitt's case is that all these allegations are untrue. Owing to the 1995 convictions (which I remind you he disputes) he regards himself as a 'soft target' for new complainants cynically to 'jump on the bandwagon' in order to seek damages from Norfolk County Council or compensation from the Criminal Injuries Compensation Authority to which they are not entitled.
>
> As part of your evaluation of each complainant's evidence you should consider whether any complainant has a motive to make up a false allegation, remembering it is not for the defence to prove that such a motive exists, but rather for the prosecution to prove that each complaint is true.
>
> Ms Griffiths reminds you that the incidents complained of happened a long time ago and Mr Hewitt's memory, as indeed the memory of all witnesses, is likely to have faded. The passage of time also means that the opportunity for witnesses to be certain about, for example, dates has been lost and the opportunity to collect other evidence that may have assisted Mr Hewitt in the presentation of his case has been lost. Your task is to decide whether memories that witnesses claim to have are reliable or not and whether you are sure that the prosecution has proved its case or not.
>
> Complaint is made that Mike Bridgeman has died; Jim Tuddenham and Phyllis Hill (the bursar) are believed to have died; and the doctor who regularly visited Woodlands, Dr Knight, and [DL's] social worker, Liz Miles, cannot be traced. Further complaint is made that records that might have been of assistance to Mr Hewitt in the preparation and conduct of his defence may have been lost or destroyed. The prosecution contend that all available material that should have been disclosed has been disclosed.
>
> [We note in passing that this last sentence is as recorded in the written directions, apparently read out by the judge verbatim; there appears to be an error in the transcript, at page 11A, which reads *'The prosecution contend that in fact more available*

> *material that should have been disclosed has been disclosed* (sic).”]
>
> They say that no one can ever know with any certainty what has been lost and they say that the defence has failed with any certainty to identify a single document or record that has in fact been lost.
>
> You should consider how, if at all, the passage of time has impacted on Mr Hewitt’s ability to respond to [this case]. His first knowledge of any complaint in this case was not until 2013 and he did not know the final shape of the case he had to meet until 2018. Had these allegations be made at the time when the complainants say they occurred, Mr Hewitt may have been able to give a detailed response to them, but this has now been lost to him; for example, perhaps, an alibi, but I remind you that you must not speculate about any evidence that you do not have. Please also bear in mind that Mr Hewitt is now 79, and the longer ago an incident is said to have occurred, the harder it may be for him to respond to it.
>
> A lengthy delay between the time when an incident is said to have occurred and the time when the complaint is made and the matter comes to trial, is something that you should bear in mind when considering whether the Crown has proved its case or not. Necessarily, the longer the delay the harder it may be for someone to defend themselves because, as I have already said, memories will have faded and material that might have been of assistance may have been lost or destroyed. If you find that the delay in the case [has placed] Mr Hewitt at a material disadvantage in meeting the case against him, that is something that you should bear in mind in his favour.”

151. Ms Griffiths’ principal criticism is that the judge failed to identify for the jury the particular aspects of prejudice in relation to JE’s allegations arising from missing documentation. She expected the judge to deal with this in the second part of the summing up in his review and summary of the evidence.

Part Two of the summing up

152. The structure of the second part of the summing up is important. The judge first summarised the appellant’s background and career, and the history of his employment at Woodlands. This included reference to his appointment to the new post in Gloucestershire as from 1st May 1983:

> “…He told you he would have been expected to give one month’s notice to Norfolk County Council but he doesn’t [recall] if he worked his notice. Asked if he might have had any holidays… he said he can’t remember. It’s quite likely that he had some days left to take and he would have used up any holiday allowance left… So he said he does not actually know

> the date of his last working day at Woodlands but that would have been available in records held at the time…"

The judge reminded the jury of the appellant's evidence, in cross-examination:

> "Sadly there are no records to prove definitively when anyone was there."

153. The judge reminded the jury in detail of the evidence given by former members of staff and the appellant himself in relation to the routine at Woodlands, and what information was missing. For example, a former member of staff, Nicholas Loone, said a lot of records were kept at Woodlands:

> "Social services records were important [for] the children to look at when they were adults. To lose those records… would be quite a serious matter. The records were relied on and accurate and everything that was important in a child's life went on those records."

154. The judge next reminded the jury, very briefly, of the complaints made by each of the five girls which had resulted in the appellant's conviction at the previous trial in 1995. The judge had already given the jury a direction of law about the potential relevance of this evidence, as to which Ms Griffiths makes no criticism. The judge also reminded the jury of the appellant's evidence in relation to those allegations and the fact that he maintained his innocence in respect of those matters although he accepted that in law he was guilty of the offences.

155. The judge then summarised, in turn, the evidence in relation to the allegations of each of the five complainants in the present trial. The summaries rehearsed the evidence in considerable detail. Helpfully the judge set out the appellant's evidence and his case in respect of each set of allegations alongside the evidence of the complainant and other relevant evidence. The jury therefore had the factual issues presented for them very clearly.

156. The judge's summary of the evidence in relation to JE's allegations, counts 5 and 6, ran to some 16 pages of transcript. It included a detailed reminder of the cross-examination of DC Sayer, who had conducted the ABE interview, and the criticisms properly made by Ms Griffiths of aspects of his interview technique. It included a thorough summary of JE's cross-examination and the points Ms Griffiths had made in relation to JE's general credibility as well as the detail of her account.

157. In dealing with the timing of the initial towel incident the judge reminded the jury that the appellant had said in evidence that child numbers never went down as low as three (as JE had suggested) although on Christmas day they might have gone down to just a handful of children, and JE was right that children were allowed home during holidays and at weekends where possible, adding:

> "It may be important to note as a matter for you that JE is describing an Easter bank holiday weekend rather than just any old weekend. And in that context, you will have to decide to what extent the limited registers you have actually assist."

158. The judge reminded the jury of the further cross-examination when JE was recalled, including the criminal injuries claim and the suggestion in the application form that she had been raped orally, which she had failed to mention in her evidence. The judge reminded the jury of her improbable explanation for this: "I wasn't asked", and of her assertion in evidence that she had mentioned it in her ABE interview, commenting: "I'm pretty sure she didn't". The judge reminded the jury of this point again, at the end of his review of the evidence on counts 5 and 6, pointing out that previously JE: "…did not mention her mouth at all". In the course of his directions of law on previous complaint to her ex-partner, the judge had reminded the jury earlier that: "… the detail recalled by JC that the man who raped JE held her head underneath a pillow is not the same as JE's account to the police or to you".

159. During the course of the summing up an issue arose in relation to count 4, the allegation of indecent assault on the other female resident, and whether it was necessary for the prosecution to prove, as averred in the particulars of offence, that she was under 13 at the time. The directions of law and route to verdict required the jury to be sure of this and it was a live issue on the facts. The judge acceded to Ms Griffiths' submission that, although as a matter of law proof of age under 13 was not required for a conviction (as opposed to affecting the maximum penalty on sentence), it was too late to change the directions he had already given. It is clear from the transcript (page 76 F) that Ms Griffiths had focused on this point in her closing speech. In the event the jury acquitted on count 4. Whether this was because they were unsure of her age at the time of the offence, or because they were not sure the offence had been committed at all, we shall never know.

160. After reviewing the evidence in relation to each complainant, the judge dealt with the police evidence and the shortcomings in disclosure as a separate topic. He reviewed the evidence, and Ms Griffith's cross-examination, at length. However, Ms Griffiths submits that the judge played down the significance of missing documentation, and in certain respects misstated the position. For example, he reminded the jury of DS Logue's evidence that social services records for each child were provided to the CPS in their entirety and disclosed to the defence; that was plainly not in fact the position in relation to JE, yet the judge failed to correct the error.

161. Ms Griffiths submits, in particular, that the following passage in the summary of DS Logue's evidence (at page 89H-90A) gave an incorrect impression:

> "She said no direct counselling records have been disclosed. She said no direct counselling had been organised for any witness through the CPS for any complainant or for any witness. She said although there are guidelines concerned with witnesses receiving pre-trial therapy, in this case there's no evidence of any witness having had any therapy of the kind mentioned in those guidelines…"

162. Finally, the judge reminded the jury of the rival submissions in relation to the relevance of the previous convictions in 1995. The defence invited the jury to step back and say that their only relevance was to give a platform from which further false allegations were now being made. There had almost certainly been collusion between these complainants; these were false complaints financially driven, to

obtain compensation or damages. The prosecution's case, in answer to this, was that the jury should keep their feet on the ground. What were the chances of 10 unrelated people making similar false accusations against the appellant?

Counsel's submissions: adequacy of the summing up

163. We shall consider the adequacy of the summing up, and the impact of any deficiency on the fairness of the trial and the safety of the conviction.

The appellant's submissions

164. Ms Griffiths acknowledges that the grounds of appeal did not make any complaint about the adequacy of the summing up in relation to prejudice arising from delay and missing documents. She explained in her oral submissions that only when she reflected later on the case as a whole did it strike her that the summing up was deficient.

165. She submits that the legal directions were not sufficient to compensate for the prejudice of missing documents. The case needed a particularly powerful direction on delay and prejudice bearing in mind the disclosure failings and bearing in mind the inevitable prejudice from the 1995 convictions. She submits that the judge failed in his directions of law to identify the relevant lost material. He wrongly referred to documents which "may have been lost", whereas records from Woodlands such as staff rotas had undoubtedly been lost, as had JE's social services records. The judge wrongly appeared to endorse, and certainly did not correct, the prosecution's erroneous suggestion (at page 11B) that "the defence has failed with any certainty to identify a single document or record that has in fact been lost." On the contrary, it was plain that relevant records from Woodlands had been lost.

166. Ms Griffiths relies on the guidance in the judgment of this court given by Fulford LJ in *R v PR* (see [102] –[103] above):

> "The judge's directions to the jury should include the need for them to be aware that the lost material, as identified, may have put the defendant at a serious disadvantage, in that documents he would have wished to deploy had been destroyed. Critically, the jury should be directed to take this prejudice to the defendant into account when considering whether the prosecution had been able to prove, so that they are sure, that he or she is guilty."

Ms Griffiths submits that the judge failed to say this in his directions, or at least to bring the point home to the jury in sufficiently strong and clear terms. He gave the jury no real assistance as to how they should take into account such prejudice, and diluted the force of the general direction on delay by warning them not to speculate about the content of missing documentation, if it had existed at all.

167. Specifically, Ms Griffiths submits that the judge should have directed the jury that the absence of records from Woodlands meant that the jury could not be sure the appellant was even still working at Woodlands at Easter 1983 and for the remainder

of April 1983, which was when JE said the first incident of rape (count 5) took place.

168. Ms Griffiths submits that, even if the directions of law in part 1 of the summing up were adequate in general terms, the judge failed in summing up the facts, in part 2, to focus the jury's attention on the specific prejudice resulting from the delay and consequent loss of relevant documentation. We have already drawn attention to some of her other criticisms of part 2 in setting out the relevant structure of the summing up (see [151] to [162] above). In relation to the absence of counselling records, Ms Griffiths points out that JE had undoubtedly undergone hypnotherapy and psychotherapy, which are specifically identified in the joint CPS and Department of Health guideline as potentially affecting the reliability of a complainant's evidence (see para.10.3).

169. Overall Ms Griffiths submits that in relation to missing documents and failings in disclosure the jury were left with the impression, from the summing up, that the defence were complaining about nothing. Although she had necessarily addressed these matters fully in her closing speech, what was needed in the summing up on these issues, in order to ensure fairness, was the imprimatur of the judge.

170. Ms Griffiths therefore submits that the trial process, and what should have been the important safeguard of the judge's directions on delay and prejudice, failed to ensure a fair trial and the conviction cannot be regarded as safe.

The Crown's submissions

171. Mr Renvoize acknowledged in his oral submissions that the question was whether the summing up was sufficient to remove the prejudice arising from delay and missing documentation. He submits that the jury had the issue of such prejudice well in mind. Most of the defence closing speech was given over to the theme of missing and lost documents, delay and prejudice. The judge's directions of law were accurate and sufficient. Mr Renvoize acknowledged that those directions were couched in general terms and the judge could have chosen to illustrate the general by giving examples of the particular in part 2 of the summing up; but there would then have been a danger of his expressing a view of the facts or inviting speculation. Mr Renvoize submits that that the directions of law, and the summing up as whole, were not rendered defective by the omission to give such examples. He submits that the importance or otherwise of the missing documents was ultimately a matter for the jury, and the judge made this abundantly clear.

172. Mr Renvoize submits that the jury's attention was clearly focused on the timings around Easter 1983, but he had made it clear in his closing speech, without criticism or objection, that the jury were not tied to this timescale.

173. Mr Renvoize therefore submits that, despite the failings in disclosure, all relevant material was eventually provided; the jury were properly directed on the impact of delay and missing documentation; the trial process compensated for any residual prejudice; the trial was fair and the conviction is safe.

Discussion and conclusion: adequacy of the summing up

174. We have given all these submissions the most careful consideration. We are not persuaded that the judge's directions of law on delay, given orally and in writing, were inadequate in general terms. We bear in mind that the judge was at that stage addressing historic allegations by five separate complainants, each raising different issues arising from delay. We are satisfied that the judge conveyed sufficiently clearly to the jury the general prejudice which the appellant was likely to have suffered from the delay and any missing documentation. The judge told the jury that as a result of the delay in the complaints the opportunity to give a detailed response to the allegations "has now been lost to him; for example, perhaps an alibi…". The judge told the jury that: "…Necessarily the longer the delay the harder it may be for someone to defend themselves because… memories will have faded and material that might have been of assistance may have been lost or destroyed." The judge directed the jury that the lengthy delay was: "… something that you should bear in mind when considering whether the Crown has proved its case or not", and that: "… If you find that the delay in the case [has placed] Mr Hewitt at a material disadvantage in meeting the case against him that is something that you should bear in mind in his favour."

175. The question which has given us more real concern is whether the judge should have tailored that general direction to the specific prejudice arising in relation to JE's complaints of rape, counts 5 and 6, so as to bring it home sufficiently to the jury that they should bear in mind that prejudice in deciding whether the Crown had discharged the burden and standard of proof.

176. We think the judge could usefully have identified the timing of the alleged rapes in counts 5 and 6 as an example of potential prejudice arising from the delay and consequent missing documentation. However, in the end, for the reasons which follow, we are not persuaded that this omission or any other alleged inadequacy renders the summing up defective, or resulted in an unfair trial rendering the conviction on 5 unsafe.

177. It is particularly important to focus on the real issue for the jury on count 5. The issue was whether the jury could be sure that the appellant had raped JE *at all*, not whether he had raped her on a particular date or between particular dates. JE's own timing of the first alleged rape as taking place 3 to 4 weeks after the initial towel incident over the Easter weekend (Easter Sunday being 3rd April 1983) was in no way conclusive. The accuracy of JE's timing of the alleged incidents was simply one feature, albeit potentially an important feature, of her general credibility and the truthfulness and accuracy of this allegation. JE made it clear that although she thought this was the correct timing, she was not certain of it. In reminding the jury of her evidence in this regard, the judge nevertheless told the jury (at page 70F) that "it may be important to note that JE is describing an Easter bank holiday weekend rather than just any old weekend…". That comment favoured the defence rather than the prosecution.

178. As we have already observed, the route to verdict for count 5 required the jury only to decide whether the prosecution had made them "sure of an initial occasion" of rape; there was no precision of date required. The date of the offence was not a material averment. By the time the judge summed up the facts in part 2, the jury had heard the prosecution's closing speech in which Mr Renvoize had made it clear that the jury were not tied to the Easter timeframe. Ms Griffiths had taken no issue with

this change of stance, nor had she raised any objection to the amendment of the bracket of dates in the indictment for counts 5 and 6, to reflect the evidence as it had emerged in relation to JE's age of 15½ on admission to Woodlands in September 1982, and the appellant's departure from Woodlands by 1st May 1983 at the latest.

179. Nor, we note, had Ms Griffiths made a submission of no case to answer even in relation to count 6, although the subsequent rapes (on at least four other occasions) could not conceivably have taken place by 1st May 1983 if they began only after Easter. This, we think, may well have been a realistic recognition on the part of the defence that the jury were not in any sense tied to the Easter timeframe as JE thought it to be.

180. In this regard, we also note that in relation to the allegation of indecent assault against the other female complainant (count 4) , as to which there was legal argument during the summing up (see [159] above), Ms Griffiths told the judge that "there wasn't much evidence given about dates, presumably because there were very few records and it was very difficult to ascertain the dates." She explained to the judge that she had not made a submission of no case to answer on count 4: "…because the dates were entirely unclear. The dates only crystallised after the formal admissions were before the jury." Thus Ms Griffiths must clearly have been alive to the contrary position in relation to counts 5 and 6, and the parameters of timing based on JE's evidence compared with the available records incorporated into the agreed facts.

181. We have considered the significance of the acquittal on count 6 (the multiple incident count). Although Ms Griffiths suggests that the acquittal demonstrates that jury must have rejected JE's evidence on the timing of these subsequent alleged rapes, we think there may well be other explanations. For example, as we have already observed, the route to verdict and the directions of law required the jury to acquit on count 6 even if they were sure there were *some* further rapes, unless they were sure there were *at least four* more. Furthermore, JE had been inconsistent in her evidence as to the number of further rapes: 10 to 12 according to her ABE interview; a minimum of 7 or 8 in her oral evidence. Perhaps most telling of all, in her first account to her former partner of rape at Woodlands by the appellant, she had said (or given him the impression) that she had been raped only on one single occasion. That may well be a complete explanation for the acquittal. But in the end all the acquittal demonstrates is that the jury were not sure that the appellant had raped JE on at least four more occasions.

182. Having identified the key issue for the jury on count 5, the question for us is whether the judge failed to alert the jury sufficiently to the prejudice flowing from any missing documentation, and specifically (i) the absence of records to prove whether (and if so when) the appellant had actually ceased work at Woodlands in advance of starting his new job in Gloucestershire on 1st May 1983, and (ii) the absence of records to prove whether (and if so when) JE had left Woodlands before Easter 1983, there being evidence that she had moved on to other accommodation "at the age of 16", which could have been any time after her 16th birthday on 17th March 1983.

183. In the context of the case as a whole, we do not think that the judge was required to give any further tailored direction on this issue. The jury were made fully aware of the records that were missing. We have already quoted (at [152] above) the passage from the summing up in which the jury were reminded of the appellant's own evidence that he might well have taken outstanding accrued holiday leave and therefore did not know the date of his last working day at Woodlands which "would have been available in records held at the time". The judge also reminded the jury of his evidence that: "Sadly there are no records to prove definitively when anyone was there." Similarly, the jury were well aware of the absence of JE's social services records; that was the purpose of the questions to Nicholas Loone, establishing that to lose such records was a serious matter, as they contained: "… everything that was important in a child's life".

184. However, the jury had all available relevant dates in the agreed facts. They were well aware of the significance of the dates. Their question early on in the case during JE's cross-examination (see [53] above), asking for the date the appellant's employment ended and when he actually left Woodlands, showed that they were very much alive to the issue. The appellant and JE were, on any view, both at Woodlands together for a period of at least 6 months, from 22nd September 1982 (when she arrived) to 17th March 1983 (her 16th birthday). It was for the jury to decide whether the appellant raped JE at any time during that period (count 5) and, if so, whether they could be sure that he raped her at least 4 more times (count 6). It was not an alibi case.

185. Rotas and other records might have revealed how often the appellant had been on duty with "Jim", whether female staff were on duty with the appellant at weekends, and how few children were ever in residence on any weekend during that 6 month period. But there was no suggestion that "Jim", or any other member of staff or child, had witnessed any inappropriate behaviour by the appellant. These were matters which went to JE's accuracy and credibility, but no such records (if they had been available) could have proved definitively that JE was not raped by the appellant. The impact of the general prejudice caused by the absence of this material was sufficiently covered by the judge's directions of law.

186. Finally, we think it significant that Ms Griffiths did not, at the time, consider that the judge's summing up was so inadequate or defective as to justify such criticism in her grounds of appeal. We accept that mature reflection and analysis may sometimes lead to the discovery of error. But often a reliable indication of the adequacy of a summing up is the overall impression it made on counsel at the time, particularly counsel as careful and experienced as Ms Griffiths.

Safety

187. In the light of all these conclusions we are satisfied that the appellant's trial was fair, and that the sole conviction, on count 5, is safe.

188. The reality is that the defence had an unusual wealth of material on which to cross-examine JE robustly and effectively. We are quite sure that Ms Griffiths did so. The issue for the jury on count 5 was clear and stark. Were they sure JE was telling the truth in saying the appellant had raped her? The inconsistencies in her evidence were fully explored. The jury nevertheless believed her and disbelieved the

appellant. We suspect that her vivid and accurate description of the cord trousers the appellant wore, down to the detail of colours, will have weighed with the jury. It would be an unusual thing for her to remember unless it carried an unforgettable sinister association. The evidence of the complaint to her ex-partner many years ago negated recent fabrication. The incident recalled by Helen Hall supported the general evidence of opportunity, albeit prior to JE's time at Woodlands. The previous similar offences of which the appellant had been convicted in 1995 provided evidence of propensity.

189. The judge summarised the evidence fully and fairly. He identified the issues very clearly. We are quite sure that the jury had all Ms Griffiths' points well in mind. They were plainly a discerning and diligent jury. The judge observed that the jury had sent no fewer than 32 notes during the course of the trial. The mixed verdicts the jury returned in relation to JE and the other female complainant, and their inability to reach verdicts on the counts relating to the male complainants, all demonstrate the care with which they examined and analysed the evidence. As Lord Judge CJ said in *R v FS* (quoted at [99] above):

> "…The best safeguard against unfairness to either side in such cases is the trial process itself, and an evaluation by the jury of the evidence."

We are quite satisfied that the jury faithfully discharged that duty of evaluating the evidence, and that this conviction of rape is safe.

190. For all these reasons, despite Ms Griffiths' powerful and tenacious submissions, the appeal is dismissed.