IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE Nos 201904157/B3 & 201904171/B3

NCN [2021] EWCA Crim 615

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 21 April 2021

LADY JUSTICE CARR DBE
MR JUSTICE LAVENDER
THE RECORDER OF NEWCASTLE
HIS HONOUR JUDGE SLOAN QC
(Sitting as a Judge of the CACD)

REGINA
V
LORENZO COSTANZO
FERDINANDO ORLANDO

_____

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

_____

MR J BENNATHAN QC AND MR B NEWTON appeared on behalf of the Applicants

MISS A HUNTER QC AND MISS H STANGOE appeared on behalf of the Crown.

_____

J U D G M E N T

LADY JUSTICE CARR: The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

Introduction

1. These are two renewed applications for leave to appeal against convictions brought by the applicant Lorenzo Costanzo ("Costanzo"), now 27 years old, and Ferdinando Orlando ("Orlando"), now 26 years old. Each was convicted by a unanimous jury following trial in October 2019 before His Honour Judge Curtis-Raleigh ("the Judge") sitting in the Crown Court at Isleworth of two counts of rape, contrary to section 1(1) of the Sexual Offences Act 2003.

2. The following month each applicant was sentenced by the Judge to a total of seven years and six months' imprisonment, sentences upheld on 13 February 2020 following an unsuccessful application by Her Majesty's Solicitor General for leave to refer under section 36 of the Criminal Justice Act 1988: see [2020] EWCA Crim 1814.

3. Leave to appeal against conviction was refused by the Single Judge on 13 November 2020. Since that refusal the applicants have changed their legal teams and seek to advance amended grounds of appeal, alongside an application to adduce fresh evidence. They are now represented by Mr Joel Bennathan QC and Mr Benjamin Newton. Formerly they were represented by Miss Bennett-Jenkins QC for Costanzo and Miss Elliott QC for Orlando. The respondent remains represented by Allison Hunter QC and Miss Heather Stangoe. We record our gratitude for counsel's assistance on both sides.

The facts

4. On Saturday 25 February 2017 the complainant, whom we shall call "X", had gone out for a "bottomless brunch" for her friend's birthday. She started drinking prosecco from 11.00 am onwards, consuming around five glasses at that stage. After brunch, she and her friends bought five more bottles of prosecco and went to one of their homes. X continued drinking and fell asleep on her friend's bed for about six hours.

5. When she awoke, the group decided to go clubbing. A friend lent X a dress and some high-heeled shoes which were a size too big for her. The group went to a club in Soho called the Toy Room. Upon its arrival at around 11.30 pm some promoters gave X some vodka and lemonade which she drank. She then had some free shots. X could not remember having more drinks after that but recalled being very drunk and falling over a lot. The club was crowded and she remembered getting pushed around.

6. There was CCTV coverage of the majority of the inside of the club. We have viewed the relevant footage. X can be seen arriving in the club a little unsteady on her feet. Later on, X can be seen encountering the applicants at around 1.50 am the next day in a room known as 'Frank's Lounge'. The applicants had arrived at the club at around 12.30

am. They were Italians living in London, studying English, and had sat their final exams on the Saturday. They had previously been out for dinner with friends.

7. The footage captures X at just after 01.50 am alone at the bar leaning and swaying. Costanzo reaches past her to place his glass on the bar and then places his arm around her and scoops her towards him. She is then held, steadied and prevented from falling by the applicants. She is unsteady on her feet and very disinhibited. They dance and then kiss her in turn. Within a short space of time the three leave Frank's Lounge together, the applicants manoeuvring X between them, with one of them in front and one behind her. They walk through a number of rooms, after a few minutes reaching a corridor off which there was a maintenance room. As they reach the maintenance room, X is still sandwiched between the applicants and stumbling, with the men supporting her. By this stage she is bent at the waist, her arms being held by the man in front and her hips being held by the man behind. They enter the maintenance room. The applicants effectively bundle X into the room. She shows no sign of resistance or struggle.

8. The three are in the maintenance room for some 16 minutes. There was no CCTV coverage inside the maintenance room, but Costanzo filmed what happened on his telephone. That recording was later deleted by him.

9. The prosecution case was that, whilst in that maintenance room, each of the applicants orally and vaginally raped X at a time when she (very obviously) lacked the capacity to consent. The defence case was that, whilst vaginal and oral sex did take place, it was consensual.

10. X said that she had no recollection of entering or being in the maintenance room at all. She did not recall meeting the applicants and recollected no kind of sexual intercourse with anyone in the club.

11. The CCTV footage shows the three exiting the maintenance room. The applicants guide or manoeuvre X along the corridor with one of them pulling down her dress to cover her groin. They take her to the nearby ladies' lavatories and usher her inside, whereupon they run away. They can be seen later laughing and high-fiving each other. They watch the footage of what had happened inside the maintenance room on their telephone and at one point also share that footage with another man at the club. They can be seen laughing and at one point one of them gyrates, thrusting his pelvis forward and opening his mouth. At one point they return to the ladies' lavatories and look inside before returning to Frank's Lounge, where they remained for some hours.

12. X's next memory was of being in the ladies' lavatories, which were not far from the maintenance room, and being in a lot of pain. There she remained until she was found some time later, around 3.20 am, by a security guard who escorted her from the club. She was later found by some tourists in Piccadilly Circus. They took her home where she arrived at around 04.30 am in pain. Her friend, Mr Mendoza, a man with whom she said she was in a casual sexual relationship, was there. He carried her up to bed. He started undressing her ready for bed. It was at this stage that X realised that her vagina was bruised and swollen. Mr Mendoza called an ambulance at 06.05 am. The operator

commented, amongst other things, that X could have been the victim of a sexual assault.

13. The police arrived. X stated that there was a large time window between 11.00 pm and 3.00 am about which she could not remember anything. She believed, due to her vaginal pain, that she had been raped in this period. She also then went to hospital and subsequently underwent surgery to drain what was a vulval haematoma.

14. The medical experts agreed on the following findings: to the left side of her neck, what could have been a "love bite": this could have been sustained consensually or non-consensually; on her right shoulder, a red bruise and on her left buttock a brown bruise: these were relatively uncommon sites of accidental injuries that could have been caused by, for example, falls onto her back or side; on her left knee a red bruise: this was a common site of accidental injury and, for example, could have been sustained by a fall forwards; on her lower abdomen in the supra pubic area a red bruise and on her right groin a red bruise: these were uncommon sites of accidental injury sustained during normal daily activities. Examples of injuries at these sites were road traffic accidents, assault and falls from a height; as for the vulval haematoma, this was a rare injury and could have been caused in a number of ways, including accidental injury or either consensual or non-consensual sexual activity. In this case, as it was a non-specific injury it was not possible to determine whether the injury was most likely due to accidental injury such as a straddle injury or associated with consensual or non-consensual sexual activity.

15. X gave her ABE interview on 7 March 2017. As indicated, the prosecution case was that X lacked the capacity to consent and that it was obvious to anyone who saw her that she was incapable of consenting. The CCTV footage was a central part of the evidence for the prosecution.

16. The defence case on behalf of both applicants was that they did not rape X. They believed that X was consenting and did not believe that she lacked the capacity to give consent. Both gave evidence at trial. In summary they stated that X had danced with them in a sensual manner, but seemed stable and not drunk. The dancing became more sensual over time and X began kissing them on the dance floor. They moved to a more private area and, whilst this was not expressly discussed, X was content to go with them. Whilst in the room X masturbated both applicants, performed oral sex on them and had vaginal sex with them. Costanzo had filmed some of what had occurred in the maintenance room. The applicants accepted having looked at this and showed it to a friend after they had left the maintenance room. They also accepted making sexual gestures once in the passage outside the maintenance room. Each applicant, both being of previous good character, called a character witness.

The trial process

17. The trial process was not a smooth one. The prosecution case pre-trial was mounted on the basis that there had been a penetrative assault on X with an object or thing unknown which had caused the haematoma. This, however, was not supported by medical evidence and the counts were then amended to counts of rape. This shift led to an unsuccessful dismissal application before the Judge before trial in November 2018. The

Judge indicated that there was a proper basis for conviction based on the CCTV footage and X's own evidence.

18. The first trial then commenced but the jury had to be discharged at an early stage and the matter had to be adjourned to September 2019. The second trial commenced on 23 September 2019, but again the jury had to be discharged.

19. The third trial commenced on 30 September 2019. X was the only live witness for the prosecution. For reasons which will become apparent, it is relevant to note that her then partner (who was not Mr Mendoza) accompanied her to court and sat in the public gallery for the first day of her evidence.

20. In cross-examination for Orlando on 1 October 2019, X accepted that she had fallen over because the club was crowded and people were pushing and her shoes were too big. Her answers as to what had happened were based essentially on what she could see on the CCTV and her lack of recollection. She accepted she could be seen kissing the applicants as shown. She could not remember having stroked Orlando's genitals and allowed him to reciprocate. She said that that "did not sound like [her] at all". She accepted, because she could not remember, that she could not disagree that she had participated in the maintenance room as alleged, nor that she had appeared willing and enthusiastic. She could not remember giving consent, but she answered "Yes" to the question that she might well have done so by the way she behaved and by being an active participant.

21. As X left the witness box overnight the Judge said this to her:

> "Can I remind you it is very, very important that you do not speak to anyone, Mr Mendoza or anyone like that who is going to be a witness in the case, about anything that has been said, any question you have been asked, any answer that you have given. And also, very regrettable that we cannot finish you in one day because also what it means is in the morning, other than maybe, 'Good Morning', neither Miss Hunter or Miss Stangoe nor the officers in the case can discuss things with you in any way... So, you must not as it were approach them and ask for any information, but as I say also tremendously important you do not discuss anything with Mr Mendoza. All right?"

22. On the next day, in cross-examination for Costanzo, the effect of X's evidence remained that she could not remember. From her recollection she was not able to say one way or the other. When she reached the alleged events in the maintenance room, counsel for Costanzo stated that she adopted all the matters that had been put on behalf of Orlando. When that was explained to X, X answered:

> "Can I just clarify?"

23. The Judge indicated he would wait for the next question (which did not follow up the request by X to clarify). X was therefore not allowed to provide any clarification at that

stage. However, in re-examination, Miss Hunter asked X what it was that she had wanted to clarify, and X responded:

> "A. That there was no proof that that actually happened, because I know for a fact that I wouldn't have gone through with that.
>
> Q. You wouldn't have gone through with what?
>
> A. With everything that they have said that happened in that room.
>
> Q. Can I just ask you to explain what you mean by that?
>
> A. I've never been in a threesome before. I've, I've never had sex in a club before, I've never been with two guys before, that's just not something I — that I do.
>
> Q. So that's what you wanted to clarify?
>
> A. That's, that's the picture that they're painting but that's not true. That couldn't have happened..."

24. For the applicants it is said that this was a "profound change" of position on X's part. Whether or not this was the case does not in our view necessarily assist resolution of the issues which we have to decide. But because of the emphasis which has been placed on it by Mr Bennathan, we would comment that this seems to us not to be an entirely fair or accurate statement, at least not without some contextualisation.

25. There was in one sense a change in X's position in the first day of her evidence (when she accepted that it was possible that she had appeared willing to engage in the sexual activity alleged) and her position on the second day of her evidence (when she said that she would not have agreed to act as alleged). But there was nothing necessarily sinister in X's subsequent clarification on the second day. Whatever view counsel or anyone else might have thought of the strength of the prosecution case at the end of day one of X's evidence is immaterial.

26. X's evidence on the first and second days of her evidence has to be seen in light of the fact that the defence case as to precisely what had happened in the maintenance room had been put to her for the first time in cross-examination. X described her thought processes in her victim impact statement as follows:

> "[After the first day of X's evidence] I didn't sleep that night knowing that I had just let them walk all over me and was now questioning myself as a person. I knew what they had suggested was not the woman that I am and I would have never willingly let any of that happen to me. The second day of cross-examination came and although I knew better what to expect it was still very overwhelming. I became upset and broke down halfway as I wanted my voice to be heard and was not being given a fair chance to tell my truth.

I was not that person they suggested I was. I did not give consent to those two men and I am not that kind of person."

27. Further, her answers in re-examination had been foreshadowed by her earlier answer on day 1 to the effect that the activity alleged did not "sound like [her] at all". Her previous statements that she could not disagree with suggestions as to what had happened during the key period also have to be read at all times in the context that she had no relevant memory. She was looking at the CCTV footage. She (reasonably) agreed on the first day and continued to agree on the second day of her evidence with many propositions as to what the CCTV showed. She merely added that she would not have had sex with two men or sex in a club. Rather than being some necessarily unreliable change in her position, this was, more properly characterised, the completion of her evidence at the end of the full cross-examination and re-examination exercise.

28. We must return below to the course of X's evidence again in the context of the second ground of appeal.

Ruling on section 41 applications

29. Multiple defence applications under section 41 of the Youth Justice and Criminal Evidence Act 1999 ("section 41"), ("the Act") were made before, during and after X's evidence. Written applications of 20 November 2018 were not addressed until the beginning of the third trial in 2019.

30. These applications sought to admit three pieces of evidence that were outlined in X's medical records. First, X's relationship with Mr Mendoza - more specifically that X had had oral and vaginal sex with Mr Mendoza on 22 and 25 February 2017. The defence submitted that this was admissible under section 41(3)(a); secondly, X's sexual relationships with another man (whom we will call "the third man") on 18 February 2017. The defence submitted that this was admissible under section 41(3(c)(ii) and/or section 41(5); thirdly, evidence that these sexual encounters were without contraception or protection. The defence submitted that this was admissible under section 41(3)(c)(ii) and/or section 41(5).

31. Prior to the oral hearing on 1 October 2019 it was agreed between the parties that the evidence of X's sexual relationship with Mr Mendoza could be adduced into evidence in order to explore the suggestion that the impetus for her remarks to the police that she believed she had been raped was because she needed to give an explanation for sexual activity to Mr Mendoza.

32. The disputed issues centred on X's sexual relations with the third man and were argued primarily on the basis of section 41(3)(b) (contemporaneity) and (c) (similarity), although section 41(5) was also raised. The jury, it was said for the applicants, had heard X's ABE interview in which she had said she had a history of kissing randomers when in drink. The concern was that, if X were asked whether Mr Mendoza was a sexual partner and nothing more, the jury could come to the incorrect view that he was an exclusive sexual partner. In fact, X had indicated to the doctors that she had had vaginal sex with another male partner, the third man, and without a condom.

33. On 2 October 2019 the Judge ruled that there was no connotation that X was in an exclusive sexual relationship with Mr Mendoza. The circumstances of the encounter with the third man were neither similar nor close in time. In relation to section 41(5) he stated:

> "It does nothing to explain or rebut X's remarks about having a history of kissing randomers, but on the other hand, the introduction of this evidence would run the real risk of a juror thinking that, because a person consented to sex on a particular occasion with a particular person in a particular set of circumstances, they are therefore more likely to consent to having sex with another person or persons on a different occasion in different circumstances."

34. Section 41 applications were then renewed on 7 October 2019 following the cross-examination of Orlando. The applicants sought to admit two pieces of evidence: first, that X had told medical staff that her last three sexual encounters had not involved either the use of a condom or contraception. This evidence was to be adduced to deal with the prosecution questioning of Orlando as to whether he used a condom or spoke to X about using a condom. This was to invite the jury, submitted the applicants, to find support for X's lack of consent because no contraception or protection was used. In fact, it was argued, when placed in its proper context it provided no such support at all because it was the practice of X not to use contraception or barrier protection; secondly, X's sexual activity with the third man. This was said to combat the suggestion put to Orlando in cross-examination that, as a school teacher, X was less likely than someone else to have consented to being filmed in the course of sexual activity in the maintenance room of a nightclub. The implication that the jury was being invited to draw from that, said the applicants, was that X was a modest and respectful woman in her sexual preferences.
35. The applicants submitted that the evidence should be adduced under section 41(3)(b) or 41(3)(c)(ii) or section 41(5).

36. As to the evidence regarding the use of a condom, the Judge accepted that the question of the use of a condom arose only out of Orlando's assertion that he was a kind and considerate person. However, it now having been raised as a point, the Judge was concerned that the jury might think that the fact that a condom was not used was a very significant feature of the case. He indicated that there should be a neutral indication that X was not in the habit of using a condom at the relevant time during consensual sex.

37. As to the evidence regarding the third man, the Judge noted that the suggestion by reference to X's position as a teacher was only gently put and then only in relation to a very specific issue about consent to being videoed, not more widely that she would not engage in oral as well as vaginal sex. Beyond that, the Judge said this:

> " ... the fact that a young woman may have sex with a young man who is a friend of hers and also a previous sexual partner at his house one week and a week later have sex with a different male friend at her house can have no

conceivable bearing or evidential value in explaining or rebutting an assertion by her that she is not in the habit of engaging in threesomes with two young men previously unknown to her in a nightclub and if that is excluded there is no chance of a jury being led to any unsafe conclusion."

Grounds of appeal on behalf of both applicants

38. The original grounds of appeal that were refused by the Single Judge related to the granting of permission to amend the indictment, the refusal of the applications to dismiss and the submissions of no case to answer. Only the fourth ground of appeal was based on the Judge's refusal to admit evidence under section 41.
39. The Single Judge rejected all four grounds as being unarguable, in relation to the fourth saying this:

> "The Judge's refusal to admit evidence of the complainant's previous sexual behaviour, beyond that which he allowed, was plainly correct."

Fresh grounds not considered by the Single Judge

40. Mr Bennathan submits that the court should grant leave and allow this appeal on the grounds that events before, during and after trial cast such doubt on X's alleged absence of consent and the applicant's alleged lack of reasonable belief in that consent that their convictions are unsafe.

41. He points to the fact that on the question of capacity and consent there were, on the evidence, arguments both ways. He outlines the narrative of the incident themselves and of the events as they evolved at trial. Against that backround, he advances three specific grounds:

> Ground 1. Once X and the prosecution had deployed her sexual history to argue that she had not consented, the Judge should have admitted evidence and allowed her to be cross-examined on the topic under section 41(5). This is not a new but a refined version of the previous grounds of appeal. No reliance is placed on section 41(3) although, as we have noted, that was very much the focus at trial. Mr Bennathan refers to the twin myths underlying the "rape shield provisions" in the Act: see R v A (No.2) [2002] 1 AC 45. He submits that section 41 sets the law firmly against using the past sexual habits and tendencies of complainants to correct the "long history of prejudice and misogyny that had infected rape trials". The Act however, he submits, allows the prosecution to deploy sexual history at will. He submits that once it does so, fairness, Article 6 and section 41(5) must permit the defence to explore the same theme with far more freedom than the Act otherwise allows. He points to the fact that section 41(5) goes beyond mere rebuttal evidence but also extends to explanation. Thus it is submitted that the events at trial show that the line that normally keeps the complainant's sexual history from a jury was crossed. Section 41(5) imposes a far lower and less stringent exclusionary rule once, as in this case he submits, the prosecution relies on a complainant's previous sexual history. Here, the evidence in question was deployed repeatedly both in response to the submission of no case to answer, for example, in speeches to the jury and in the judge's summing-up itself. It is said that in this case X's lack of memory, together with her visible conduct on the CCTV

is such that, absent the repeated and partial deployment of her sexual history by the prosecution, the evidence of any lack of consent or evidence to disprove the applicants' belief in her consent was scant. Rhetorically, Mr Bennathan asks, if the prosecution can go there, how can it be fair that the defence are not allowed to do so? The defence was prevented either from adducing the evidence or asking questions and section 41(5) should be read down so as to ensure a fair trial;

Ground 2. On this ground it is said that a major change in X's stance on consent is now undermined by information that the defence only received after the verdicts, namely that her partner (who had been in the public gallery at the time) had been profoundly upset after her testimony on the first day. The applicants rely on X's subsequent victim impact statement. There it can be seen that the reaction of her partner overnight to what she had accepted in cross-examination on day one of her evidence was to be "deeply affected" and "very upset" such that she "found [herself] trying to support him through this". We note at this stage that X went on in her statement to say:

> "As I was not finished giving evidence I was not able to discuss the particulars of the trial."
>
> This is a new ground. As indicated, it is said that X's allegedly "profound change" in her position overnight is material. The "likely" reason for it is said to be the impact of her boyfriend's upset and reaction to her evidence the day before. The trial system, it is said, depends on juries being trusted to assess and weigh clashing accounts and contradictory evidence, but that cannot happen where, as in R v Shaw [2002] EWCA Crim 3004, a witness changes his or her account for reasons that are concealed. The jury should have been told of a plausible reason for X's change in stance;

Ground 3. It is said there was a failure to list a DNA report of Ruth Bartram dated 9 August 2018 ("the DNA report") on the schedule of unused material. This is said to have been another "profound" error. That report states that DNA from at least two, possibly more males was detected in intimate swabs taken from X and concludes that it could be explicable by the sexual activity with Mr Mendoza and the applicants. The report also states that DNA detected in the inside of the gusset of X's knickers showed the presence of DNA of at least four, possibly more, males. It is submitted that this report has the potential to cast doubt on X's admitted but excluded sexual history which ought, further to Ground 1, to have been before the jury. For example, an obvious explanation for the findings from the gusset would be that X had had sexual contact with four or more males, thus suggesting sexual activity beyond that admitted by X. A further report from a James Clery dated 5 February 2021 is produced and said to illustrate the sort of evidence that "could have been mustered by the defence at trial had the prosecution complied with its disclosure obligations." If the underlying records for the findings from the DNA swabs were provided, it might be possible to eliminate the applicants and to ascribe a number that might take the number of "possibly more" above three. The applicants seek to adduce both reports as fresh evidence. This is again a new ground.

Grounds of opposition

42. Miss Hunter submits that there is no merit in the amended grounds of appeal advanced. This was a case which largely turned on CCTV evidence and the jury's perception of what it revealed and what inferences they drew from it with regard to X, her capacity or lack thereof and the conduct of the applicants. As for Ground 1, to compare X's previous sexual encounters with two friends days apart after one glass of wine with what happened in the maintenance room was wholly unmeritorious. The issue in the case was X's capacity to consent, not her capacity on previous occasions with other men who were in any event friends. There was a wealth of evidence here that X lacked capacity on the day or night in question. The Judge had heard every conceivable defence application in this case and all the evidence. He was in the best position to control the fairness of the proceedings. He gave reasoned rulings on the section 41 applications after considering the relevant legislation.

43. As for Ground 2, Miss Hunter submits that counsel for both applicants were aware that X's partner had been in the public gallery during the first part of X's evidence. It was open to counsel to ask X whether the alleged change in her account was in any way related to her boyfriend being in court the previous day and leaving distressed.

44. As for Ground 3, Miss Hunter rightly accepts that the DNA report does not appear in the prosecution disclosure and that that was a regrettable oversight. But she says that the respondent is satisfied that the applicants were at the very least aware of the existence of the DNA report. In any event, if they were not so aware this cannot and does not render the convictions unsafe. The traces of DNA from the three potential male contributors were present from the cellular fraction of X's low vagina swabs, but it was not possible, due to the trace amounts found, to determine from whom this male DNA originated. Given that X had had consensual intercourse with Mr Mendoza within 18 hours of the incident, it was reasonably assumed that that would account for one source. Given that each of the applicants admitted intercourse with X it was reasonably assumed that they would account for the further two sources. X's underwear was seized by the police who attended hospital. The inside and outside of the gusset area was tested for the presence of semen. Semen was found on the inside gusset. From the seminal fraction a mixed DNA profile was obtained indicating the presence of DNA from at least two people. The report concluded that the DNA could have originated from X and Mr Mendoza in equal amounts. Traces of DNA, not semen, from areas above the gusset were too complex for any meaningful comparisons to four possible reference Y-STR DNA profiles. Miss Hunter submits that it is not unusual to find extraneous amounts of DNA on the surface of garments. None of these additional inconclusive findings could have had any bearing on any relevant issue in the case. She notes that the applicants carried out no further work on the semen findings that were disclosed in reports that were disclosed. To suggest that there would have been further analysis, she submits, is both speculative and far-fetched.

45. The Amended Respondent's Notice has led to a flurry of late papers and exchanges between the parties. The applicants complain that the respondent's presentation of the facts there presents an unbalanced and unfair account. Issue is taken as to the factual assertion that trial defence counsel were aware of X's partner's presence in court and

departure from the public gallery before X had finished her evidence. Reliance is placed for the applicants on two statements produced under the procedure identified in R v McCook [2014] EWCA Crim 734 ("*McCook"*) from Miss Bennett-Jenkins and Miss Elliott. They say that they do not recall being aware of X's partner's presence and departure as Miss Hunter and Miss Stangoe recollect. Mr Bennathan suggests at this stage, in the face of conflicting evidence, that the applicants should be given the benefit of the doubt and if necessary the position tested in evidence at a full hearing on appeal. As indicated, Miss Bennett-Jenkins says she does not recall having any information on day one of X's evidence, although she remembers asking junior counsel about the presence of a male at some point. She states that the layout of the court and the position of defence counsel made it impossible to see who was present in the gallery unless walking past the gallery. She says that she was not aware of anyone leaving in distress. Miss Elliott says that she does not think that she was the one who brought the respondent's attention to the fact that a male in the public gallery had left in a state of distress. She does not think that she knew about this before re-examination; she only found out later during the trial. The applicants question whether X was spoken to by counsel before her evidence and why the prosecution refused to allow the jury to know that X's boyfriend had been present during her evidence as an agreed fact.

46. As to the response to Ground 3, the applicants submit that it is the prosecution's job to disclose and list documents, rather than a task for the defence to investigate and police that process.

47. In further rebuttal, the respondent submits in broad terms that the further written submissions from the applicants merely demonstrate the handicap under which the applicants' new representatives labour. They do not have first-hand knowledge of the relevant matters. Miss Hunter submits that she can demonstrate that Miss Bennett-Jenkins' recall about the evidence of a staff member at the nightclub was wrong. As for Ground 2, X's boyfriend, who had not been in court until X gave evidence, sat next to the applicants' parents (who were extremely active in their engagement with defence counsel) in court, and sat immediately behind Miss Bennett-Jenkins' instructing solicitor. Miss Hunter and Miss Stangoe maintain that X withdrew from the court in distress and that Miss Elliott then alerted Miss Stangoe to an upset male who had exited the courtroom and asked who he was. They say that Miss Bennett-Jenkins asked if it was the pupil about whom she had previously inquired and her instructing solicitor asked if it was the de-warned witness, Mr Mendoza. Miss Hunter and Miss Stangoe say that enquiries were made of DS Woodsford who relayed that it was X's then partner. Inevitable disquiet was then expressed that he had been in court. Miss Stangoe indicated that there was no power to prevent a non-witness from observing proceedings and if the defence wanted him excluded they should raise it with the Judge.

Discussion and analysis

48. As is evident, the applicants seek to advance two fresh grounds of appeal post-dismissal of their applications by the Single Judge. There has been no application to vary the Notice of Appeal or any meaningful attempt on the part of the applicants to comply with

the principles identified in R v James and others [2018] EWCA Crim 285, [2018] 1 WLR 2749 ("*James"*) (at [38]), although it has been confirmed that fresh counsel have complied with a duty of due diligence as explained in *McCook* and *James* was referred to in a footnote in the amended grounds. In oral submissions, Mr Bennathan emphasises the fact that Ground 3 arose out of what was only a recent concession by the prosecution that the DNA report had not been disclosed and that the events the subject of Ground 2 were at least referred to as part of the narrative in original grounds of appeal.

49. We would wish to repeat that, as a general rule, all the grounds of appeal upon which an applicant wishes to rely should be lodged with the Notice of Appeal or application, subject to being perfected on receipt of transcripts. The filter mechanism provided by section 31 of the Criminal Appeal Act 1968 is an important stage in the process. Fresh grounds must be cogent and accompanied by an application to vary. The advocate should address the relevant factors in writing, namely the extent of the delay, the reason for delay, whether the issues or facts were known at the time of the original advice on appeal, the overriding objective and the interests of justice. The hurdle for an applicant to overcome is high.

Ground 1

50. Section 41 provides materially as follows:

> "41 Restriction on evidence or questions about complainant's sexual history
>
> (1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—
>
> (a) no evidence may be adduced, and
>
> (b) no question may be asked in cross-examination."

51. By section 41(2) the court can give leave in relation to any evidence or question only if satisfied that subsection (3) or subsection (5) applies and that a refusal of leave might have the result of rendering unsafe a conclusion of the court or jury on any relevant issue in the case. Section 41(3) applies, amongst other things, if the evidence or question relates to a relevant issue in the case and:

> "... it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar —
>
> to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or
>
> to any other sexual behaviour of the complainant which (according to

such evidence) took place at or about the same time as that event

that the similarity cannot reasonably be explained as a coincidence."

52. Section 41(4) provides:

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

53. Section 41(5) provides:

> "(5) This subsection applies if the evidence or question—
>
> (a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and
>
> (b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused."

54. For the purpose of section 41(3) and (5) the evidence or question must relate to a specific instance or instances of alleged sexual behaviour on the part of the complainant. Once the criteria in section 41 for admissibility are met, it is not open to a judge to exclude the evidence (see Re: T [2012] EWCA Crim 2358, [2013] Crim LR 596).

55. We can take Ground 1 shortly. The overall thrust of X's evidence at its conclusion was that she could not remember what had happened in the maintenance room but that she did not believe that she would have consented to a threesome in the club with two strangers or have given that impression, because she had never done that before. If there was any evidence to the contrary, then section 41(5) might well bite. That would be evidence and there would be a proper basis for questioning necessary to enable X's evidence to be rebutted or explained on behalf of the applicants. But there was no such evidence or basis. The fact that X did or may have had any number of sexual liaisons with different men (who were known to her and one at a time) in completely different circumstances over the preceding days was neither here nor there. Cross-examination about those matters would not rebut or explain the assertion being made by X. Rather, it would offend the objection to one of the twin myths, namely that a woman's previous sexual conduct sheds light on whether she consented on the occasion being litigated.

56. In our judgment, the Judge was unarguably entitled to consider that the evidence that it was sought to admit would go further than was necessary to rebut or explain X's evidence, as the Judge stated in terms in his ruling. We therefore refuse permission to advance Ground 1.

57. Ground 3 is linked to Ground 1. Whilst it is correct that the DNA report was not

disclosed, and we emphasise that it should have been, we are satisfied that the applicants were aware of its existence from the contents of the CRIS report disclosed to the defence on 5 September 2018 and in particular from an entry on 11 August 2018 and the report of Dr Gray. Both documents referred expressly to it and both documents were clearly considered carefully by the defence teams. Neither of the applicants' counsel in their *McCook* responses has said that they were unaware of the existence of the DNA report. The report could, with reasonable diligence, have been called for and adduced at trial. In any event, following the analysis on Ground 1, the fresh evidence goes nowhere for the reasons identified by Miss Hunter.

58. We would therefore not consider that the interests of justice require the fresh evidence to be admitted. But one does not get that far: we do not consider the high hurdle for introduction of a new ground of appeal at this late stage to have been passed. We refuse leave to advance it.

59. Finally, turning to Ground 2, there is again no good reason for this ground not having been advanced from the outset on appeal if it had had any merit. Both applicants have been represented at all times until the arrival of Mr Bennathan by two QCs. They did not advance the matter, presumably because it was not seen at the time as having any merit.

60. As to merit, as we have indicated, there now appears to be some dispute as to what happened and in particular the state of the applicants' counsel's knowledge about the presence and exit of X's partner during the course (or at the conclusion) of X's evidence.

61. For leave to advance this new ground now to be granted, as we have indicated, the applicants need to advance a cogent case. At its highest for the applicants, the evidential position is confused. At its lowest for the applicants, the position of Miss Hunter and Miss Stangoe, with some considerable and positive detail - particularly on the part of Miss Stangoe in particular - is to be preferred. On this basis it would have been open to the applicants to ask X in cross-examination whether the alleged change in her account was in any way related to her partner's presence in court the previous day and his apparent distress.

62. But in any event there is no proper basis on which to contend (and certainly no evidence) that X spoke to her partner impermissibly overnight, rather the contrary. X's victim impact statement reveals that she clearly understood that she could not discuss her evidence with her partner whilst still in the witness box. This is consistent with the Judge's direction to her. Police statements now confirm further that they reminded her during the overnight break in her evidence that she could not discuss her evidence at all and in particular not with her partner and warned again that when she returned to answer questions the next day she was still under oath. Contrary to the submission for the applicants, we do not consider this advice to have been in any way inconsistent with the Judge's warning.

63. As indicated above, given that the defence case as to what had occurred in the maintenance room was put to X for the first time on the first day of her evidence, it would have been quite natural, if not inevitable, that she would reflect overnight on the

suggestions being made to her and indeed her victim impact statement suggests that that is exactly what she did. That is the simple and "likely" reason for any change in – or clarification of - her position the next day.

64. In all the circumstances again we consider that the high hurdle for permitting a new ground of appeal to be put forward at this late stage is not passed and we refuse leave to advance it.

Conclusion

65. In conclusion, the original grounds of appeal have not been renewed, save in revised form so far as section 41 is concerned. We consider them to have been without merit for the reasons given by the Single Judge. Likewise, and for the reasons set out above, we do not consider that the amended grounds now advanced or sought to be advanced warrant the granting of leave. The convictions are in our judgment not arguably unsafe. There was compelling evidence, including the CCTV evidence of events on the night in question, which fully justified the jury reaching the conclusions that they did. It follows that the applications are dismissed.

66. We would not leave our ruling, however, without recording the fact that Mr Bennathan and Mr Newton have advanced every possible argument that could have properly been advanced on the applicants' behalf; there should be no doubt on anybody's part in that regard.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk