Neutral Citation Number: [2022] EWCA Crim 1438

Case No: 202103571B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM NEWCASTLE CROWN COURT
(HHJ Earl)
T20207417

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3rd November 2022

Before:

LORD JUSTICE COULSON
MR JUSTICE CAVANAGH
and
MRS JUSTICE HILL DBE

R
v
Wilson

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Mr J. Hill KC (instructed by **Forrester Solicitors**) for the **Appellant**
Mr D. Comb (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: 21 October 2022
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Approved Judgment

This judgment was handed down at 9.45am on 3 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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LORD JUSTICE COULSON:

1. Introduction

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. 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 the offence. We have anonymised out judgment accordingly.

2. The appellant is now aged 59. On 27 October 2021, in the Crown Court at Newcastle Upon Tyne (HHJ Earl, whom we shall call "the judge"), the appellant was convicted of one count of indecent assault and two counts of rape. The second count of rape was a specimen count. He was acquitted of one count of child cruelty. He was sentenced to 17 years imprisonment. He appeals against his conviction with leave of the single judge. He renews his application for permission to appeal against sentence following refusal by the single judge.

3. We heard the appeal and the renewed application on Friday 21st October. Because there was evidence to be heard at 2pm and submissions thereafter, we did not finish until 4pm. We also needed to check the transcript of that evidence before concluding our judgment. That explains why we reserved this judgment until 3rd November 2022.

2. The Indictment

4. The allegations against the appellant concerned his stepdaughter, whom we shall call W. They covered the period between 29 September 1982 and 28 September 1984, when W was aged 14 and 15. Count 1 alleged indecent assault. Count 2 alleged rape and was said to cover "the first time that W was raped". Count 3 also alleged rape and was said to be a "specimen count" to cover "any further time that W was raped".

5. We consider that this was an inappropriate way of framing the indictment in this case. From the outset, W's evidence was clear and consistent: that she was raped on a regular basis – at least weekly, if not many times a week - by the appellant, throughout this two-year period. It would therefore have been much better if Count 3 of the indictment had been framed to say, "On an occasion other than in Count 2", and that there had been at least two or three other counts in similar form. Or alternatively, a multiple incident count could have been framed (Criminal PDII para 10A.14) which referred to, say, "rape on at least 10 occasions." The potential risk inherent in the indictment as framed was that it might lead to the suggestion that, if convicted on Counts 2 and 3, the appellant could not be sentenced for more than two rapes: see *R v Canavan* [1998] 1 Cr App R 79 and *R v A* [2015] EWCA Crim 177 at [43] onwards.

6. However, we are satisfied that this potential deficiency did not cause any difficulty in this case. The judge made it clear in his directions to the jury that, if they considered that the rape had occurred on only one occasion they would find the appellant guilty

on Count 2 but not on Count 3, but that if they thought it had happened on more than one occasion they would find him guilty on both Counts 2 and 3. Moreover, if the jury considered that there had been more than one rape, they could only have concluded that W had been repeatedly raped during this period, because that was W's evidence. There was no possibility that the jury could have decided on the evidence that she was only raped twice during the two-year period.

7. We discussed this point with Mr Hill during argument. In the measured terms which were the hallmark of his presentation of the appeal and the renewed application, he immediately accepted that this had never been a case where any sort of 'halfway house' was available to the jury; that everyone was aware that, if the jury accepted the Crown's case, it was because they considered, on the evidence, that the appellant had been repeatedly raped. At all times, therefore, the purpose of Count 3 was clear, even though we consider that it was imperfectly drafted.

3. The Evidence At Trial

8. In 1979, W was 11. At that time, the appellant, who was about 17, began a relationship with W's mother, who was 28. The appellant was therefore closer to W's age than to his new wife's age. The appellant married W's mother in 1983. By then, on W's evidence, he had begun to abuse her.

9. W's evidence was set out in the judge's detailed summing up between pages 14 and 32. She said that she was sexually and physically abused by the appellant from the ages of 14 to 16. She described in clear terms that he began to make sexualised comments to her and would slyly touch her, pulling her top or nightie down to expose her breasts and her vagina. She said it was "like a control thing". He did not do anything else when her mother was in the house. However, he was very strict about her being home by 9pm in the evening. Then, between 9pm and 10pm, when her mother was out working, and he had put a hook and eye on the door to lock her younger brothers in their bedroom, the appellant would pin W to the bed and rape her.

10. W gave detailed evidence about the rapes: that she would always be on her back and that the appellant would be on top of her with his hands on her throat or by her hair. He would tell her if he had come or not. He did not use contraception. After he had ejaculated he would tell W to get up and get dressed because they had to go and get her mother to pick her up from work.

11. There were other specific and relevant pieces of W's evidence, such as the appellant making her wear his underpants to school as a result of which she avoided gym; and the repeated threats he made to her that, if she told anybody, the family would spilt up and her brother, who had Down's Syndrome, would have to go into an asylum.

12. Towards the end of the two-year period, W fell pregnant. The appellant took her for a termination. Although he had originally said in his interview that he had simply dropped her off, it became apparent that the appellant had in fact accompanied her to the appointment with Mr Bullough, a gynaecologist. It was W's evidence that the baby was the appellant's because, although she had by that stage started having sex with her boyfriend Martin, they were careful, whilst the appellant was not.

13. Mr Bullough wrote to W's doctor on 21 May 1984 confirming that he had carried out a termination on W, who he said was 15 ½. He went on to say this:

> "You had mentioned that the mother had married for the third time. She was accompanied to the clinic by her stepfather, and it struck me that the two of them had a rather closer relationship then would be expected. Also, W's mother had not been told of the pregnancy and both of them were very anxious that she should not hear. I think you will understand that my suspicions were aroused over an unusual relationship and I have arranged for our social worker, Ms Synnock to see the patient to try and explore things with her."

We return to that letter a little later in our judgment.

14. It appears that, after the termination, the appellant rarely came near W. She said it was because "he knew he had done wrong". Some months later, W fell pregnant again but this time she said that she knew it was Martin's baby and she moved out of the house to live with Martin.

15. Although she was cross-examined by Mr Hill on all of this evidence, it is clear from the summing up that she made no significant modification or alteration to that evidence. On the basis of her evidence, as summarised by the judge, W appeared to be a compelling witness.

16. There was, in addition, a good deal of other evidence in support of W's allegations. Her mother, Pat, confirmed that the appellant had been very strict with W, particularly about her timings when she returned home. She recalled one occasion when she heard W shout from upstairs "get out". Pat went up and the appellant was coming out of her bedroom. W complained that he had gone in whilst she was getting dressed. Pat also confirmed that W had told her that the appellant had kept saying sexual things to her. She said that the appellant told her that he was just joking and that it was "a bit of banter".

17. W had not told her mother about the termination. But afterwards, when her mother was having a row with the appellant, the appellant volunteered that W "wasn't so sweet and innocent and had an abortion at 14" (in fact 15). Her mother said she felt sad and upset about not knowing. She said that, throughout her relationship with the appellant, she felt controlled by him, and gave evidence about his controlling behaviour. When she was cross-examined, she vehemently denied that her version of the appellant was coloured by his leaving in the 1990's after his third affair; she said, "No, I threw him out." She said that the appellant had wanted her to 'get past' the latest of his affairs, as she had done before, but this time she had refused.

18. Martin Henderson gave evidence to confirm how strict the appellant had been with W as to timings, and that W had to be home by 9pm. At the time of the termination, he said he thought the child was his. After W had left home and had her first child by him, she began telling Martin about what the appellant had done. So W told Martin Henderson about the repeated rapes within a year or two of their occurrence.

19. There was evidence from some of W's school friends. Perhaps the most significant of these was Andrea Mallam, who had seen the interaction between W and the appellant

when W was still living at home. During this period, she had seen the defendant with W in South Shields, with their arms linked. When she said 'hello', W looked very embarrassed and was uncomfortable. Whilst she was still living at home, W told Andrea Mallam about the rapes. Andrea confirmed that W had told her a lot of the detail, including the 9pm-10pm pattern, making her wear his underpants to school, and about the termination. Andrea said she told her own mother, Brenda Collier, that the appellant had been "doing things to" W.

20. Andrea recalled taking W home to her mother Brenda, and W going into the kitchen. W phoned her mother from there and Pat had said "come home, it will all be alright". Andrea said that W stayed the night with Andrea and her mother and went home the following day. She agreed in cross-examination she had not heard the conversation with Pat, but she had seen W on the phone and W being upset. Andrea Mallam also said that, after that, she went to W's house a couple of times when the appellant was there "but it wasn't the same because he knew that I knew".

21. Brenda Collier only had limited recollection of these events, but she remembered going into the kitchen with W and hearing W's allegation that her stepfather had been abusing her. She did not recall being given any details of the abuse. Brenda said she had encouraged W to talk to her mother. That was the background to the phone call with Pat.

22. Another school friend of W's who gave evidence was Andrea Mason. She found the appellant creepy and was uneasy around him. She had seen the appellant touching and kissing other women, not Pat. She saw the appellant and W holding hands in South Shields and asked W why she let him. W said she had to, and was required to call him 'Dad'. She recalled that he was very strict with W. Andrea Mason later learned of W's visit to Andrea Mallam's house which, she understood, had happened because the appellant "had made advances".

23. Shortly after she had had her baby by Martin, so after she had left home, W told Andrea Mason about how she had been raped on various occasions by the appellant.

24. Maxine Scott was a neighbour. She received a message from the appellant's solicitors about the trial but she did not respond to that and instead contacted W. She said that W had confided in her in the late 1980's/early 1990's about the rapes, and Maxine Scott had taken W to a rape crisis centre. She said that, when W told her about what had happened, she was very nervous, agitated and said she wanted to unburden herself.

25. The appellant gave evidence. He admitted taking her to the termination but denied that the child was his. He denied the rapes and the other allegations of abuse. He said that the allegations were fabricated, and that not only had he enjoyed a happy home life with Pat and her children, but that, after W left home, they maintained a relationship, and on one occasion they all went on holiday together. The appellant also called a good deal of other evidence - seven other witnesses, in total - concerned with the state of the family life before and after W left home.

26. That is a brief summary of the evidence at the trial. We are bound to observe that, when taken in the round, the evidence amounted to a particularly strong case of

historic sexual abuse against the appellant, supported as it was by so much telling detail and corroborative evidence, particularly of contemporaneous complaint.

4. The Appeal Against Conviction

27. There are three limbs to the appeal against conviction. Ground 1 refers to the judge's refusal to allow in evidence about the appellant's attendance at a police station with W, at a time when she was under suspicion for stealing from her employer. Ground 2 is that the judge should have ruled as inadmissible the letter from Mr Bullough (paragraph 13 above). Ground 3 is an application to rely on fresh evidence from the appellant's cousin, Maxine Wilson. We take Ground 2 first.

5. Ground 2: The Letter From Mr Bullough

28. We have already set out the terms of this letter at paragraph 13 above. At the trial, Mr Comb for the Crown said that the latter should be admitted as hearsay pursuant to s.116(2) of the Criminal Justice Act 2003 ("the 2003 Act"), because Mr Bullough's evidence was admissible and he was now dead. On behalf of the appellant, Mr Hill opposed that application on the basis that the letter itself would not have been admissible without further explanation, and that it should have been excluded pursuant to s.78 of the Police and Criminal Evidence Act 1984 ("PACE") because it "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

29. The judge acceded to the application and allowed in the letter under s.116 and/or s.117 of the 2003 Act (document created in the course of business). Mr Hill's points in opposition to the application are now repeated as Ground 2 of the appeal against conviction. In his oral submissions, Mr Hill said that the letter was also inadmissible because it was opinion evidence.

30. Taking that point first, we do not agree that the letter amounted to opinion evidence. It was instead a description of what Mr Bullough saw and observed on the day in question. It was the interaction of the appellant and W with each other which he saw and caused him to say what he said. It was not an opinion; it was an observation based on what he had seen. In one sense, it was no different to the evidence of the defendant's witnesses about the impression that they had of the family in the 1980's: like Andrew Hudson, for example, who said about Pat and the appellant, "they were like a normal couple". That was evidence he could give because it described what he had seen.

31. We agree that the professional experience that Mr Bullough will have had, dealing with family relationships and unwanted pregnancies, gave his observations a weight they would not otherwise have had, but that was inevitable, given the circumstances of his dealings with W. It was not a reason to deprive the jury of this contemporaneous evidence.

32. Equally, we do not agree that Mr Bullough's letter was inadmissible because it required further explanation. It is quite clear that, based on his observations, Mr Bullough was suspicious that the relationship between the appellant and W was "rather closer…than would be expected" and was "unusual" enough to warrant the intervention of a social worker. It provided support for the proposition that W and the

appellant were in a sexual relationship: it was therefore contrary to the appellant's defence and supportive of W's case. On the evidence, of course, any such sexual relationship would have been non-consensual.

33. At the hearing of the appeal, Mr Hill advanced a new point under Ground 2: that, since the jury had found the appellant not guilty of Count 4 (the charge of cruelty to a person under 16), it showed that they were sensitive to the factual nuances of this case and that, if the evidence (in the form of Mr Bullough's letter) had not been adduced, it might have made a difference to the convictions on the assault and rape charges.

34. We disagree. It seems to us that the obvious reason why the jury acquitted on Count 4 was that it was contrary to the evidence of W's mother and was -unlike all the sexual offences - uncorroborated by any other witness. We do not accept that the acquittal on Count 4 demonstrates that the decision to admit Mr Bullough's letter made any difference. They are unrelated.

35. In addition, there was the issue as to the paternity of the baby. Clearly that was not an issue on which Mr Bullough, even if he had been alive, would have been able to give a definitive answer. However, his observations suggested that the appellant was the father, and again provided support for W's case. W had said, right at the outset (during her ABE interview) that the appellant had accompanied her to the termination because it was his baby. But, as we know, there was also evidence the other way, not least from Martin, who thought the baby was his.

36. Finally, we consider that the letter was also admissible because the appellant had originally denied being present at the abortion appointment (he said in interview he had simply "dropped W off"). The letter made clear that that was untrue. Further, in cross-examination, the appellant said that he could not remember the event, so he would have to defer to Mr Bullough's contemporaneous note. In those circumstances, the appellant would not have been able to provide any instructions to Mr Hill for the purposes of cross-examination of Mr Bullough, even if he had still been alive. Prejudice to the appellant was therefore minimal.

37. Accordingly, in our view, the judge was right to grant the application under s.116 and/or s.117 of the 2003 Act because Mr Bullough was dead and could no longer give oral evidence, and the hearsay evidence in his letter was relevant and admissible.

38. That leaves the second point, by reference to s.78 of PACE. The question for the judge was whether the letter would have such an adverse effect on the fairness of the trial that it should not be admitted (see the comprehensive discussion of this point in *R v Riat* [2012] EWCA Crim 1509). He decided that, if the jury were given suitable warnings, the evidence would not be so unfair that it should not be admitted.

39. We agree with that. Provided that the judge properly directed the jury as to the limitations of this evidence, a prohibition under s.78 of PACE was not made out. The letter was an important element of the evidence against the appellant, but, as we have demonstrated, it was one strand amongst many. In addition, as we have already observed, since the appellant could not recall the appointment, there was no prejudice in the fact that Mr Hill was unable to cross-examine Mr Bullough.

40. In our view, the judge gave a set of detailed and careful directions about the letter from Mr Bullough, which included the following:

> "Now, the letter was written as part of the routine process of his medical undertakings with a patient reporting back to the referring GP, and it is not suggested that any of this entry is deliberately falsified for any purpose. What is suggested is that Mr Bullough was either mistaken and/or that he read more into what he was looking at in his report to Dr Graham than ought to be without knowing more of the circumstances of that. For example, the defendant suggests that he went to that appointment and he had his arm -- he would have had his arm around W comforting her, and that she was crying. There was, he said, no more than that to be seen. It is said that perhaps he thought there was something unusual in the small age gap between the two, despite the fact that the defendant was her stepfather. The defence do point out that in light of all this you must decide whether, or not, you can safely rely on the entries in these records as being accurately relied upon to support the prosecution case of rape.
>
> The fact that this letter was read does not mean that the prosecution and the defence agree that its meaning is clear; clearly, they don't. In particular, it is disputed by the defence that the words are a clear indication of a suspicion that the pregnancy was caused by the defendant. You, of course, ladies and gentlemen, must decide how much importance, if any, you give to this evidence, and when you are doing so, of course, you will bear in mind that this evidence does have a number of limitations. First, although Mr Bullough signed it, it is not signed as a formal statement with details concerning what aroused his suspicions and what, in detail, those suspicions were or might have been. Secondly, if Mr Bullough had given evidence in court, of course, he would have been cross-examined, and you don't know how he and his evidence would have stood up to that. Such cross-examination is, of course, not possible due to his more recent death before the complaint was made to the police. If you are not sure that the letter does clearly support the prosecution case as to the nature of the relationship between the defendant and W, leading to the pregnancy that was terminated, then this letter will not help you in this case. When you are deciding whether, or not, you can rely on what Mr Bullough said in his letter, you of course also will take account of what you know about his job, the nature of it and the purpose of the letter being sent to the GP. And, finally, when you are deciding how much importance, if any, you give to the letter, of course you must look at it in the light of the other evidence in the case, such as that given by W herself, together with the other witnesses' evidence adduced, and the other medical records that you have been taken to which are all in your bundles, of course, in the pages after this. You will remember that when the defendant gave evidence, he contradicted Mr Bullough's assertion of a sinister circumstance if you like, my words, between he and W. So, you should take account also, therefore, of the defendant's evidence when deciding whether, or not, Mr Bullough's written account was reliable."

41. Mr Hill properly accepted that he could not criticise those directions. In our view, that was a proper concession: the directions gave proper warnings to the jury about the limits of this element of the evidence.

42. We should add one final point. On appeal from a judge's refusal to exclude evidence under s.78 of PACE, this court will only interfere with the judge's exercise of discretion on the grounds of "*Wednesbury unreasonableness":* see May LJ in *R v O'Leary* (1988) 87 Criminal Appeal Reports 387 at 391. It could not be said that, in respect of Mr Bullough's letter, the appellant has come close to clearing such a high hurdle. As we have said, the judge applied the proper test and his decision to allow in what was a routine business letter, created almost 40 years ago as part of W's ongoing medical treatment, was not and could not be perverse in the legal sense. It was not a decision to which no reasonable trial judge could have come.

43. For all those reasons, therefore, we reject Ground 2 of the appeal. We consider that the evidence was properly admitted under s.116 and/or s.117 of the 2003 Act and that the judge was right not to exclude the evidence under s.78 of PACE. The letter from Mr Bullough was therefore properly part of what we have already said was a particularly strong case against the appellant.

6. Ground 1: The Evidence About The Attendance At The Police Station

44. During the trial, the appellant made an application to introduce evidence of W's bad character. The application was in two parts. The first went to the appellant's attempts to explain why, on his case, W had been motivated to fabricate these allegations against him. So the first part of the application was the appellant's alleged discovery, in the late 80's, that W and Martin had been stealing money which they had supposedly been raising for a cancer charity.

45. The second part of the bad character application went to another element of the appellant's defence, namely that W's behaviour was inconsistent with him having been her abuser. The particular piece of evidence he wanted to rely on again went back to the late 80's: he said that W had been accused of theft from her employer, and she asked him to accompany her to the police station. The application said that, in respect of this second allegation, it was not asserted that it (namely the theft) "was necessarily true", and that it may therefore fall outside the provisions of s.100 of the 2003 Act "subject only to a test of relevance".

46. The judge rejected the application in respect of bad character and gave a detailed ruling explaining his reasons. Amongst other things, he said about the alleged attendance at the police station that "it does not add a jot to this issue, which is that the complainant and [the appellant] continued to have a relationship familiarly even after she had left when she was 16". He went on to say that "it's not even directly relevant to the matters in issue in this case. It is not important explanatory material in terms of the relationship".

47. On behalf of the appellant, Mr Hill does not seek to resurrect, as part of the appeal, the first part of the application concerned with the alleged stealing from charity boxes. However, he now submits that the evidence about the attendance at the police station was not bad character evidence at all, but was merely evidence that was inconsistent

with W's allegations of abuse. He said that the judge had erred in excluding this evidence and that its absence rendered the convictions unsafe.

48. In our view, it is harsh to criticise the judge for dealing with the evidence about the attendance at the police station as part of a bad character application, when that was precisely how it was introduced. That is particularly so when it was directly linked to another allegation of stealing money. The judge was entitled to think that the appellant was linking the two points, particularly as the furthest the appellant would go concerning the theft from work was that it was "not necessarily true".

49. We consider first whether the judge was right to treat this as bad character. In our view he was: the fact that, according to the appellant, W was "under investigation for theft" falls within the words of ss.98 and 112 of the 2003 Act. That then brings into play the gateways at s.100(1). It was not important explanatory evidence and it was not agreed, so neither s.100(1)(a) or 100(1)(c) were relevant. As to s.100(1)(b), in effect the judge concluded that i) the evidence did not have substantial probative value; ii) did not relate to a matter in issue in the proceedings, and iii) was not of substantial importance in the context of the case as a whole.

50. We can see that, at least arguably, the nature of the relationship between W and the appellant after the relevant period of 1982-1984 was a matter in issue in these proceedings. However, we consider that the judge was right to conclude that the evidence as to the attendance at the police station did not have substantial probative value (see *R v Scott* [2009] EWCA Crim 2457). Furthermore, as the judge correctly found, it was not a matter of substantial importance in the context of the case as a whole (s.100(1)(b)(ii)). As we have said there was plenty of evidence about that relationship after W left home.

51. Accordingly, even though the appellant now eschews reliance on the bad character provisions of the 2003 Act, we consider that they were engaged and that the judge was entitled to reach the conclusion he did. But even if we are wrong about that, we do not consider that the absence of this evidence had any effect on the safety of the appellant's convictions. Before considering that point further, we should address the police station attendance on the assumption that Mr Hill is now right and this was never a question of bad character evidence.

52. Let us assume that there could have been a way of asking W whether she had asked the appellant to accompany her to the police station, after she had voluntarily agreed to go, expressly excluding any suggestion that there was anything in the underlying allegations. What would that have added?

53. Mr Hill submits that such evidence would have been inconsistent with the allegations of abuse and would have significantly undermined W's credibility. But we disagree: we are not persuaded that this evidence would have added anything of substance to that which was already before the jury. There are three reasons for that.

54. First, the appellant was still her stepfather and, at the relevant time, was still in a relationship with her mother. He was older than Martin, W's husband, and therefore W's oldest close male relation. In those circumstances, it by no means follows that her decision to ask him to accompany her to the police station, even if true, was inconsistent with the underlying allegations.

55. Secondly, this was not a case in which W had said that she had drawn the curtain down on her abuser once she had left home and had her own child, or that she had had no contact with the appellant thereafter. On the contrary, the appellant called a good deal of evidence to demonstrate that there was plenty of contact between W and Martin, on the one hand, and the appellant, W's mother and the wider family, on the other, throughout the period after she had left home and before the appellant's final split with her mother in around 1993. The purpose of that evidence was to suggest that such contact after the event was inconsistent with W's allegations of abuse. By their prompt verdicts in this case, that was a part of the defence case that did not commend itself to the jury.

56. Thirdly, in cases such as this, the courts have stressed how important it is to get away from the stereotypical thinking that, if the appellant had abused W, W would not have engaged in a so-called 'normal' relationship thereafter. The relevance of any evidence as to that 'normal' relationship is inevitably limited.

57. Accordingly, even if we assume that this was evidence that could have been admitted, either as bad character, or as 'ordinary evidence' on the issue of inconsistency in W's relationship with the appellant, we consider that it would have added nothing, or very little, to the evidence that was adduced at trial on precisely that topic. It is the opposite of the situation in *R v Clarke* [2015] EWCA Crim 350, a case where there were attempts to ringfence the relevant part of the evidence itself from its 'bad character' background, but where the evidence in question (being identification evidence) was "highly probative".

58. We therefore reject the suggestion that, had this evidence been admitted, it would have brought into doubt the safety of the appellant's convictions. In our judgment, it would have had no effect at all on the safety of those convictions. Ground 1 of the appeal is therefore refused.

7 Ground 3: The Fresh Evidence

7.1 *The Evidence Itself*

59. The fresh evidence on which the appellant now wishes to rely comes from his cousin, Maxine Wilson. We allowed her to give oral evidence, on which she was cross-examined by Mr Comb, in order to test its credibility and relevance.

60. Without wishing to be too critical (giving evidence is no easy task, and it is particularly difficult over a live link), Ms Wilson could not be described as a clear or cogent witness. It is unnecessary to rehearse here all the matters on which Ms Wilson was unable to help, or flatly contradicted herself, because at the end of her evidence, Mr Hill realistically submitted that the only relevant evidence Ms Wilson could give concerned the termination. Even then, he accepted that, following Ms Wilson's evidence, he could not say that Ground 3 of the appeal was as strong as Grounds 1 and 2.

61. Ms Wilson's evidence about the termination was this. She said that, sometime after W had left home (the precise timing was vague but it may have been in about 1991), W told her that she had had an abortion when she was 15 years old and still at school, and that the father was Martin Henderson.

7.2 The Law

62. The law as to fresh evidence is set out in s.23 of the Criminal Appeal Act 1968 and in particular s.23(2) which reads as follows:

> "(2)The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—
>
> (a)whether the evidence appears to the Court to be capable of belief;
>
> (b)whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
>
> (c)whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
>
> (d)whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

The four elements of subsection (2) are all separate. But each needs to be considered as part of a multi-factorial evaluation as to whether or not the fresh evidence should be received.

7.3 Section 23(2)(d): Reasonable Explanation

63. It is logical to start with this factor, even though it comes last in the list. An appellant seeking to adduce fresh evidence must satisfy the court that, with reasonable diligence, the evidence could not have been obtained for the trial (*R v Beresford* [1971] 56 Cr App 143: *R v Nabarro* [1972] Crim LR 497). Was there a reasonable explanation for the failure to adduce the evidence of Maxine Wilson at the trial? In our view, there was not.

64. Maxine Wilson is the cousin of the appellant. She had contact with him during and after the relevant period (1982-1984). She was in contact with him at least until 2013. On the face of it, she would therefore have been one of the first people to whom the appellant would have turned to give evidence about his role as W's stepfather, the family life in general, and the ongoing relationship with W after she left home. As we have said, the appellant called 7 witnesses going to these points, who were mainly family members. One, Hayley Diamond-Steel, was a cousin through marriage, rather than a direct cousin like Maxine Wilson. Ms Wilson agreed that she and they were all part of what Mr Comb called "the general scene".

65. So why, in this careful preparation of the evidence called on the appellant's behalf, was Maxine Wilson not apparently considered? Mr Appleyard, who had assisted in the preparation of the evidence on behalf of the appellant, also gave oral evidence to this court in an attempt to answer that question. Mr Appleyard is an investigative agent and case worker engaged by the appellant's solicitors. He sought and obtained, through the appellant's current wife, a character reference from Maxine Wilson, to be provided to the judge for the purposes of sentencing. That document was uploaded to the DCS shortly before he gave evidence to this court. The fact that this character reference was prepared swiftly, following a family member's request to Maxine Wilson, demonstrates that she was somebody that was easily available to, and contactable by, the appellant's legal team to give evidence on his behalf, if they

chose. We have no explanation as to why – if it be the case - the appellant's wife contacted Ms Wilson for the sentencing hearing, but not in connection with the trial.

66. It appears from Mr Appleyard's evidence that the firm for whom he worked had acted for the appellant for a year or so prior to the trial. During that time, he did not contact Ms Wilson for the purposes of the trial. He said that that was because he was given a list of potential witnesses by the appellant, and those were the only people he then approached to give statements. In other words, the explanation for the lack of this evidence at the trial appears to be because the appellant chose who was going to give evidence on his behalf, and he did not choose her. Mr Appleyard confirmed that he had never sought an explanation for that from the appellant. There is therefore no explanation, let alone a reasonable one, as to why Maxine Wilson did not give evidence at the trial.

67. We should also observe that the state of the evidence about whether or not Ms Wilson knew about the trial was unsatisfactory. The character reference said that Ms Wilson had found it "heart-breaking…to watch all of this unravel from afar". That, and the present-tense terms of the reference, clearly suggested that she was both aware of the trial and in regular contact with him. Her first statement, taken by Mr Appleyard after conviction, made no mention of any reason why she had not given evidence at the trial. It was only her second statement, taken by Mr Appleyard a week later, at the request of the partner at the firm, which suggested that there had been a falling-out involving their children, although it was clear that they had met at her mother's funeral in 2013. Ms Wilson's oral evidence was again different: that "he works away and I'm at home…we don't really cross paths".

68. We consider that, taken in the round, that this was an unconvincing explanation about why Ms Wilson was not called or considered as a witness for the trial. Nothing, not even the alleged falling-out, had prevented either the request to, or the prompt response by, Ms Wilson in respect of the character reference for sentencing.

69. For all these reasons, s.23(2)(d) is not made out in this case. There is no reasonable explanation for the failure to adduce this evidence at the proper time. However we recognise that that is not the end of the s.23 exercise and that if, for example, this court concluded that it was in the interests of justice to admit the fresh evidence, the absence of a reasonable explanation may not necessarily be fatal: see ***R v Cairns*** [2000] Crim LR 473.

7.4 s.23(2)(a): Is Ms Wilson's evidence capable of belief?

70. We consider that Ms Wilson's evidence on the issue of who W said was the father of the baby was capable of belief. Of course, the fact of the termination itself had never been in issue.

7.5 s.23(2)(b): Is It A Ground For Allowing The Appeal

71. Accordingly, the final question is whether this one element of relevant evidence that Ms Wilson gave is capable of belief - namely what W had allegedly said to Ms Wilson about the paternity of the baby - is a ground for allowing the appeal. In our view it is not. There are three main reasons for this.

72. First, the conversation with W does not appear to us to be of any great probative value. It did not touch on the rapes at all. It allegedly happened some years after the relevant events. Ms Wilson accepted in answer to questions from Mr Comb that, when this conversation had taken place, she did not know that W had been prescribed various drugs to help her with her depression or that, by then, W had already told a number of people that she had been sexually abused by the appellant. Moreover, the alleged conversation took place when W was in a steady relationship with her husband Martin. It seems to us that, in her fragile mental state, she would inevitably be focussed on Martin and the stability he provided, rather than the traumatic events of the past. Furthermore, W was talking to the appellant's cousin: a member of the appellant's family. She might well have been very careful in what she said to a member of the appellant's family.

73. Secondly, evidence that others thought that Martin was the father of the baby was already before the jury. It was what Martin himself thought. So a conversation some years later, following a chance meeting with the appellant's cousin, seems to us to add little to that evidence.

74. Finally, on the question of weight, we consider that this new evidence on the issue of paternity is outweighed by the evidence of W herself, the evidence of recent complaint and disclosure, and the letter from the consultant, Mr Bullough, all of which we have addressed above.

7.6 Summary

75. Accordingly, drawing those strands together, we consider that the evidence of Maxine Wilson does not meet two of the relevant s.23 hurdles and cannot be relied on. There is no reasonable explanation for the failure to adduce that evidence at trial. If she had critical evidence to give that may not be fatal, but her evidence goes to one limited issue, on which there was already conflicting evidence before the jury. It does not raise in our minds any doubt as to the safety of the conviction and does not afford any ground for allowing the appeal.

8. Summary on Conviction Appeal

76. For the reasons set out above, we reject Ground 2 of the appeal. The letter from Mr Bullough was one strand of a particularly strong case against the appellant. We reject Grounds 1 and 3 for the reasons that we have given but, even if one or both of them had been successful, we are confident that they would have had no effect on the safety of the appellant's convictions.

9. Renewed Application In Respect Of Sentence

77. When rejecting the application under s.31, the single judge said:

> "The trial judge was in the best position to assess whether your case fell within the category of "a campaign of rape" and the evidence given by [W] was an ample basis to support such a finding. Having taken the starting point of 22 years the judge then made sufficient reduction for the various mitigating factors, most importantly your relative youth at the time of the offending. Good character is of less significance in

> offending of this nature, as is made clear in the footnotes within the guidelines. The sentence passed was neither manifestly excessive nor wrong in principle."

78. We agree and endorse that reasoning. We add our own brief observations.

79. The principal sentence of 17 years was in respect of Count 3, the specimen rape count, which we have addressed at the outset of this judgment, at paragraphs 5-7 above. The sentencing guidelines for a single category 1A offence identify a recommended starting point of 15 years and a range of 13 to 19 years. The guidelines also note that, for cases involving a campaign of rape, sentences of 20 years and above may be appropriate. The judge concluded, on the evidence, that this had been a campaign of rape with the appellant raping W at least every week, sometimes many times a week.

80. The judge put this offending into culpability category A, and that was not disputed. There was a gross abuse of trust and also what the judge called "routine planning" because, as he put it to the appellant, "the opportunity was there and you just kept taking it, frankly, until such time that W found her own voice and moved out".

81. As to harm, a number of the category 2 factors were found by the judge to exist. There was severe psychological and physical harm. There was a pregnancy. There was some violence and repeated threats. W was vulnerable because she was in her own home. Accordingly the judge concluded that the extreme nature of one or more of the category 2 factors or a combination of them elevated this to category 1 harm.

82. The judge therefore took a starting point of 22 years and then reduced that to take account of mitigating factors to a term of 18 years. He then reduced that still further by a year to reflect Covid conditions in prison, to arrive at a term of 17 years on Count 3. He passed a concurrent sentence on Count 2 of 8, years the single rape reflecting the first occasion the appellant raped W.

83. In our view, no criticism can be made of the A1 categorisation on Count 3. There is no dispute about the finding of high culpability and there can be no serious argument about the finding that the various harm ingredients combining to make this a case of severe harm. In view of the mental health issues W has suffered as a result, the pregnancy and the threats, it cannot sensibly be said that this was anything other than an A1 case. That is before the sheer number of offences are taken into account.

84. This was, by reference to the jury's verdict and the judge's finding, a campaign of rape. It was not a single offence but a repeated offence. In our judgment, in those circumstances, the judge was entitled to go outside the recommended range and do exactly what the guidelines suggest, namely take a starting point in excess of 20 years. For these reasons, we consider that there is nothing whatsoever wrong with the starting point of 22 years.

85. The judge made a number of reductions to take into account the age of the offending, the age that the appellant was at the date of the offences, other mitigating factors, and the effect of Covid in prisons. But his reduction of the term to 17 years properly reflected all those matters and again cannot be criticised.

86. That leaves the concurrent sentence on Count 2. It is said that this is inconsistent with category A1 because it was for 8 years only. We understand that criticism as far as it goes, but that is not very far. The first rape may well have fallen into category A1 itself, and so should have attracted a higher term than 8 years, even allowing for the fact that it was a single offence. But it was not anomalous, as Mr Hill suggested: it was simply too generous to the appellant. Furthermore, since it was a concurrent sentence, it is ultimately immaterial. The judge did what judges are encouraged to do when sentencing in this type of case: pass a sentence on the lead offence that reflects all the relevant criminality, and made the other sentences concurrent.

87. Accordingly, we agree with the single judge. There is nothing in the renewed application for permission to appeal against sentence. It is refused.

88. Finally we should express our gratitude to Mr Hill KC and Mr Comb for their efficient and focused advocacy at the appeal hearing.