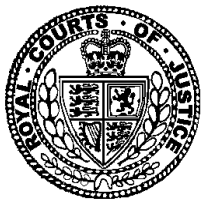

Neutral Citation Number: [2022] EWCA Crim 1592

Case No: 202201412 B3 / 202201686 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
Mr Justice Jeremy Baker
T20210213

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2022

Before :

PRESIDENT OF THE KING'S BENCH DIVISION
MR JUSTICE SWEENEY
and
MR JUSTICE LINDEN

- -

Between :

R	**Respondent**
- and -	
IMRAN KHAN	**Appellant**

- -
- -

Ms Gudrun Young KC (instructed by **Janes Solicitors**) for the **Appellant**
Mr Sean Larkin KC (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates : Tuesday 15 November 2022

- -

Approved Judgment

MR JUSTICE SWEENEY:

Introduction

1. This is an appeal against conviction and (in the alternative) sentence, by leave of the Single Judge.

2. On 11 April 2022, at the conclusion of his trial before Jeremy Baker J and a jury in the Crown Court at Southwark, the appellant was convicted of an offence of sexual assault, contrary to section 3 of the Sexual Offences Act 2003, which was alleged to have been committed in January 2008 – at which time the complainant was a 15 year old boy, and the appellant, who is now 49, was aged 34.

3. On 23 May 2022, before the same Court, the appellant was sentenced to 18 months' imprisonment.

4. The provisions of the Sexual Offences (Amendment) Act 1992 apply in relation to the complainant. No matter relating to him shall, during his lifetime, be included in any publication if it is likely to identify him as such. We have anonymised our judgment accordingly, and will refer to the complainant as "C".

5. In addition, reporting restrictions in relation to two witnesses, made at trial by Jeremy Baker J under the provisions of section 46 of the Youth Justice and Criminal Evidence Act, continue to apply. We shall refer to the witnesses as "A" and "M".

6. "A" was called by the prosecution, following a successful bad character application, and gave evidence that in November 2010 (when he was aged 25 and the appellant was aged 37) the appellant had sexually assaulted him in Pakistan. "M" was called by the defence, and gave evidence in connection with the alleged events in Pakistan. In relation to each of these witnesses, no matter shall, during his lifetime be included in any publication if it is likely to identify him as being a witness in these proceedings. In particular, in relation to each of them, there must be no publication of his name, address, the identity of any place of work, or of any still or moving picture of him.

7. "A"s evidence of the alleged sexual assault on him in Pakistan was said by the prosecution to be evidence of propensity and/or to involve such similarities as to support the credibility of "C"s account. It is the admission of "A"s evidence, and of other evidence relating to his allegation, that lies at the heart of the appeal against conviction.

8. The Ground of Appeal is that the judge erred in ruling in favour of the prosecution's bad character application relating to the complaint made by "A", in that:

    (1)The evidence was not sufficiently relevant or probative.

    (2)It was used to bolster a weak case (having regard to the various versions of "C"s evidence, which was not corroborated but contradicted).

    (3)The judge's ruling (given later) conflicted with the directions given to the jury and the 'similarities' were not such as to justify its admission.

(4)The admission of the evidence resulted in unfairly prejudicial satellite litigation.

Summary of the facts

9. In January 2008 "C" (then aged 15 years and 8 months) was living with his parents and his four siblings (then aged from 6 to 21) in a relatively remote property in Staffordshire. The parents had moved there because they wanted their children to have an "old-fashioned" childhood. As a result the children were not particularly worldly wise, and (according to his mother) "C" was very young for his age.

10. On 3 January 2008 there was a celebration of the oldest daughter's 21st birthday, which began with an evening meal at the family home. A small number of guests were invited to the evening meal, including the daughter's then relatively new boyfriend, and two friends of the boyfriend, one of whom was the appellant. They were all made welcome. At the end of the meal everyone went on to a café / bar where there was a much larger party.

11. During the course of the evening the appellant impressed a number of those present with his charm and wit, and they (including "C") understood him to have some sort of connection with foreign royalty.

12. Between around 11pm and midnight the family and a number of others, including the appellant, returned to the family home.

13. Thereafter, there was an incident between the appellant and "C"s 18 year old brother, who was wearing a kilt, when they were said by the brother to be alone together in the kitchen. It was alleged that the appellant had said something like "Are you a true Scotsman?" and had then lunged forward, grabbed the bottom of the kilt, and attempted to pull it up, which the brother had managed to prevent.

14. Ultimately, "C"s mother, who was apparently unaware of this incident, allocated the last spare bed in the house to the appellant. It was a single bed in the attic bedroom which was used by "C" and his then 11 year old brother. They had bunk beds. There was another attic bedroom that was fully occupied by others.

15. Combining his various interviews and evidence on oath "C"s ultimate account in relation to the sexual assault included that, after getting back from the party, he had gone upstairs, as had his brother. At one point he had been doing pull ups in the bathroom on the first floor and the appellant had remarked on how well he was doing. The appellant, "C" said, had come up to the attic bedroom with a bottle of gin and a tumbler – from which he was drinking gin and tonic. He had then offered "C" a drink and "C" had had a taste, but did not like it – despite which the appellant had pushed the glass back into his mouth. Thereafter, "C" continued, the appellant had started to playfight with him and had slapped him quite hard on the back.

16. "C" said that he had then got into bed on the top bunk, after which the appellant had suggested that he ("C") should watch pornography on his ("C"'s) computer which was in the bedroom. "C" had declined. Thereafter, the appellant had asked "C" to show him where the toilet was, which "C" thought was odd, because the appellant already knew where it was. However, he had got out of bed to show the appellant,

deliberately making quite a lot of noise as he went downstairs to the toilet, which was on the middle floor of the house. Once in the toilet, the appellant had changed into his pyjamas. "C" said that after that the appellant had pulled him upstairs, including pulling the cat (that "C" was by then holding) out of his arms and throwing it to one side.

17. "C" continued that when they got back upstairs, the appellant had thrown him onto the single bed. When he had got up the appellant had got hold of one of his arms and had told him that he was very intelligent and attractive. "C" said that he had then got back into bed on the top bunk, which had wooden rails around it. He was dressed in pyjama bottoms and got inside an old sleeping bag which had some holes in it. The appellant stood at the foot end of the bed for a couple of minutes and then started to move towards the head end - trying (at first) to put his hands in between the wooden rails and to touch "C"s foot and leg. At some point, "C" said, the appellant told him not to tell anyone about what was happening. The appellant's hands kept getting stuck in the rails, and so he next put his hand over the top of the rails, so as to give himself easier access to "C"s lower body. The appellant then touched "C"s leg and "C" tried to push him away. "C" said that, as the appellant had got nearer to his groin, he had tried to move away to the opposite side of the bed, but ultimately could get no further away in the bed. So, when the appellant got very close to his groin, which "C" feared that he was going to touch, he had jumped out of the bed and run as fast as he could down one floor to his parents' bedroom – where he woke his mother and said words to the effect that "the man tried to touch me". It was, by then, after 1.30 in the morning of 4 January 2008.

18. C's younger brother gave evidence confirming that he had been in the lower bunk, and that the appellant had persistently tried to talk to "C" and had not let him go to sleep. He recalled the appellant repeatedly getting out of the spare bed and coming over to the bunk beds. He could see the appellant's pyjama bottoms but not his arms, and the appellant appeared to be leaning on the top bunk bed, which appeared to be creaking. The younger brother continued that "C" had politely asked the appellant to go back to bed on a handful of occasions, and that he had sounded nervous when he did so. The younger brother said that his last recollection, before going to sleep, was of the appellant staring at him from the single bed. He also had a fuzzy memory of being half asleep and again seeing the appellant's legs going from one side of the bunk bed to the other. The next thing he had been aware of was being dragged out of bed by his mother and taken downstairs to his parents' bedroom, where "C" was crying uncontrollably, which had caused him to cry as well.

19. "C"s mother said that, when he entered the parental bedroom, "C" was "shaking and shaking", and had said words to the effect that the appellant had been trying to feel him. He had also told her that she must get his brother out of the top bedroom. So she had gone to the bedroom and collected the brother, leaving the appellant apparently asleep. "C"s father said that "C" had said that he had been molested by the appellant, and that "C" was in shock, shaking, and had cried throughout the night.

20. The parents took the decision to leave the appellant asleep, but to require him to leave first thing in the morning, which was what was done. Other members of the family also gave evidence about "C"s distress.

21. The police were called to the house later that day. Two detectives attended one of whom, DC Burton, made a note in her notebook of what they were told. "C" and his parents made clear that they had already decided that they did not wish to pursue the complaint to trial, they only wanted the appellant to be spoken to by the police. Therefore only an initial account was taken from "C", rather than a full interview being conducted. Both "C" and his mother signed the notebook. There was an issue at trial (which we consider in detail below) as to whether what was recorded in the notebook was consistent or inconsistent with "C"s ultimate account. Police records showed that the two detectives had reported that there had been no assault – sexual or otherwise.

22. In due course the appellant, who had been given to understand shortly after leaving the house that "C" had alleged that the appellant had attempted to interfere with him in some way, was spoken to by DC Burton. However, she was unable to recall what was said, but accepted that she might have mentioned an allegation of a non-sexual assault. If she had described the assault as sexual, she would not have been referring to the pornography.

23. "C" tried to put the matter behind him. However, he relived it during an "emotional recall" session at the Oxford School of Acting in 2015 - about which he made a written record in which he referred to: "*The time I was almost, well was, touched by a guy when I was young"*. There matters rested until 2019. It was then that the appellant stood for Parliament in the General Election, and that came to the attention of "C" and his family. In the result, "C" said, he realised that he could not bury what had happened to him anymore, and that he had to deal with it.

24. Thereafter, the appellant was elected and, two days later, made a phone call to "C"s brother-in-law and left a message expressing concerns which, from other evidence, it was clear related to the incident in 2008. Following a family meeting, "C" contacted the police on 17 December 2019. Later that month he was ABE interviewed about the alleged offence, and (following the recovery of DC Burton's notebook) was further ABE interviewed in February 2021 about the surrounding circumstances.

25. In the meanwhile, and against the background of the start of the pandemic, the appellant had been provided with a questionnaire by the police, in relation to "C"s allegation, which he duly completed and returned in May 2020. He denied that he had ever sexually assaulted "C". The only physical contact between the two of them, he said, had been when he had touched "C"s elbow to reassure him after "C" had become upset as a result of a conversation they were having about "C"s sexuality. That conversation had begun at the party and had been instigated by "C". He had asked "C" whether he had ever watched pornography, not suggested that "C" watch it. After he had left the house he had been told that "C" had said that he had attempted to interfere with him, but that had not happened.

26. The prosecution of the appellant was commenced in 2021. The resultant publicity came to the attention of "A", who (as we have touched on) thereafter made a complaint to the Police that the appellant had sexually assaulted him in Pakistan in November 2010, when he ("A") was aged 25 and the appellant was aged 37. Given "A"s age at that time, there was no jurisdiction to prosecute his complaint (about which he was interviewed in July 2021) in this country, but that did not, in itself,

preclude the use of the complaint as evidence of bad character in the prosecution of "C"s complaint.

27. The appellant was first made aware of "A"s allegation in October 2021.

28. In the meantime, an application had been made on behalf of the appellant to dismiss the charge of sexual assault on "C", on the basis that there was insufficient evidence of sexual touching. The application was rejected in September 2021 – on the basis that any inconsistencies in "C"s account were matters for the jury.

29. After the judge had ruled in favour of the admission of the bad character evidence (which we consider in detail below), "A"s evidence at trial was that, in 2010, he was working with the appellant in Pakistan, for an organisation. It had been an open secret that the appellant was homosexual. "A" said that on three or four occasions, when watching television and drinking alcohol in the organisation's premises, the appellant had inappropriately tickled him or put his feet across him, and so he had moved away. On trips away they would normally stay in separate rooms. However, on a trip to Peshawar in November 2010 they had had to share a bedroom, which had a double bed and a single bed. On their first night there they had attended a function where alcohol had been consumed, and possibly cannabis. On returning to their hotel room the appellant had offered "A" a sleeping pill which he had taken. He had gone to bed in the single bed. "A" said that he had woken to find that the appellant had interfered with his lower clothing and was sucking his ("A"s) penis. He had pushed the appellant away, and had then gone back to sleep. In the morning, he had not spoken about it to the appellant, but had returned to Islamabad where he had quit his job. "A" said that he had told a colleague and a former colleague, and later his parents, about what had happened. He had also reported what had happened to the High Commission, but had decided that he would not report it to the police - given his concern as to the extent of the appellant's influence with the police and the risk that they would turn the complaint back on him. He denied the appellant's suggestion that what had happened had been consensual.

30. Confirmatory evidence was given by "A"s then colleague and former colleague (the latter having come forward during the trial), and by his parents, as to what he had told them (although, for example, his mother recalled "A" saying that the appellant had entered his bedroom, rather than that they were sharing a bedroom), and of the fact that "A" had made a complaint that had been passed on to the Foreign and Commonwealth Office (albeit that no documentation could be found – which may have been because it had been routinely destroyed).

31. As we have touched on above, the appellant's evidence at trial in relation to "C" was that he had done no more than briefly touch "C"s elbow, by way of re-assurance, when "C" had appeared upset following their conversation about his ("C"s) sexuality. As to "A", the appellant's evidence was that their encounter had been consensual, the nature and circumstances had been very different to those in relation to "C", and he had been disadvantaged by the fact that "A"s allegation related to events in 2010 and had only recently been made.

32. Looking at the appellant's evidence in more detail. Having dealt with his upbringing, education, and professional life, he gave evidence as to how he had come to be invited to the 21st birthday party of "C"s sister. He said that "C" (who he had believed was

over 16) had latched on to him at the café / bar, and had talked to him a lot. When, during their conversation, the appellant had mentioned his own boyfriend, "C" had become animated and had asked how someone knew if they were straight or gay, as a result of which, the appellant said, he had thought that "C" was concerned about this own sexuality. The appellant said that the tone of their discussion had been "philosophical, moralistic and theological" and that "C" had asked him if he could talk to him again about the subject. He had agreed. The appellant accepted that, after return to the family home, he may have made a joke about the older brother's kilt, but said that others had been present, and that he had not tried to lift it up. "C" had told him that he was going up to bed and that he wanted to carry on the conversation about his sexuality, but the appellant had said that he was going to remain downstairs.

33. The appellant said that he and "C"s grandmother (whose statement, which was said to be broadly supportive of the appellant's account, was read) had been the last to go up to their rooms. The appellant continued that, after reaching his assigned bedroom, he had asked "C" to show him where the bathroom was, and had then gone down there alone to change into his pyjamas. On his return to the top bedroom "C" had tried to engage him in conversation about his ("C"s) sexuality, but he had been too tired join in. Standing by the bunk bed he had told "C" not to worry as everything would sort itself out in time. He had not tried to touch "C"s legs or gone anywhere near his groin, whether through or over the rails. Rather, in an attempt to close down the conversation, he had asked "C" whether he had watched any porn, as that would be a good indicator of his sexuality. At that, "C" had become tearful and jumped down off the bunk, and the appellant had placed his hand on "C"s elbow and told him not to worry – whereupon, he said, "C" had bolted.

34. On the appellant's behalf reliance was placed, amongst other things, on what were said to be significant differences in "C"s accounts over the years, and it was suggested that much of the supporting evidence relied on by the prosecution significantly undermined or contradicted "C"s evidence, rather than corroborating it.

35. In relation to "A"s allegation, the appellant said that "A" had told him in October 2010 that he was going to resign in November 2010, as he was unhappy with operational decisions in relation to the project that they were working on. "A" had repeated that on the way to Peshawar, where they had each had a bedroom. The appellant continued that he had not been attracted to "A", though he might have previously tickled his feet in horseplay. On the night in question, they had returned to the guesthouse after drinking quite a lot, and had gone to their respective rooms. However, "A" had then walked into his (the appellant's) room with a bottle of whisky. The appellant said that he might have offered a sleeping pill to "A", but not with any ulterior motive. To his surprise, he said, "A" had then got undressed and had got into bed with him - after which there had been kissing, cuddling, and fumbling, which had included mutual masturbation and oral sex (which he had given to "A"). In the morning he had gone to give "A" oral sex again, but "A" had told him to stop, and he had. "A" he said, had seemed upset, ashamed, angry and regretful about what had happened between him and the appellant, and had left and returned to his own room. The appellant said that he had not seen or spoken to "A" again after that, but that he (the appellant) had continued to work with the Foreign and Commonwealth Office, which would not have been allowed if he had been the subject of a complaint.

36. As we have touched on above, the appellant called "M", who said (albeit via a poor quality video link) that the appellant and "A" had had separate rooms on the night in question in Peshawar, and that he had never seen the appellant smoke cannabis.

37. Finally, the appellant, who had no previous convictions or cautions, called evidence from a number of character witnesses who spoke very highly of him and his qualities.

38. The ultimate issue for the jury in relation to the charge of sexual assault on "C" was whether, on all the evidence, the prosecution had made them sure that the appellant had repeatedly touched "C"s legs with a view to touching his genital area.

The admission of the bad character evidence

39. The Prosecution applied for the evidence of "A", and of his two former colleagues and his parents, to be admitted, under section 101(1)(d) of the Criminal Justice Act 2003, as being relevant to an important issue between the prosecution and the defence. The application was heard after the prosecution had called all their other evidence.

40. Ultimately, the application was advanced upon two bases, namely that:

> (1)"A"s evidence amounted to an allegation of a sexual assault which had sufficient similarities with the allegation made by "C", namely that both involved the appellant consuming alcohol before the assault, the appellant was sharing the same bedroom with the complainants, and the complainants were in bed at the time, as to found evidence that the appellant had a propensity to commit offences of sexual assault.
>
> (2)In any event, "C"s credibility was the central issue in the trial and the jury's assessment of that issue would be assisted by considering the unlikelihood of similar allegations being made by two unconnected individuals, given that further similarities existed between the two allegations, including the sexual disinhibition shown by the appellant prior to the alleged assaults, the provision of alcohol to "C" and of a sleeping pill to "A", and the manner in which both complainants had reacted.

41. The appellant objected to the admission of the evidence upon various grounds, including that:-

> (1)"A"s evidence was in relation to a single matter, which was insufficient to demonstrate propensity given that it lacked any unusual or striking feature which set it apart from the category in which it was placed – see e.g. *R v Halliday* [2019] EWCA Crim 1457. The suggestion of sexual disinhibition was grossly overstated. The fact that both allegations involved the complainant being in bed in the same room as the appellant, after alcohol had been consumed, was not unusual or striking. Equally, there were significant differences in that "C" was a 15 year old boy at the time, and it was said that the appellant had touched his leg, whereas, in "A"s case, the allegation was of performing non-consensual oral sex on an adult man almost 3 years after the date of "C"s allegation. In addition, it was underlined that the appellant's defence was different in each case.

(2) Even if the Court were to find "A"s allegation to be capable of showing propensity, it would be unfair to admit it, given that:

(a) It would create a substantial and complex satellite trial about a wholly separate and more serious allegation, which would entirely distract from the proper focus of the jury.

(b) The prosecution were seeking to use the evidence to bolster a weak case.

(c) Given that he had not been notified of the allegation until some 11 years after the incident was said to have taken place, and that the evidence was "stale and incomplete", the appellant was prejudiced in trying to meet the case to the extent that he was unable to defend himself effectively.

(d) Given that appellant could not be prosecuted in this country in relation to "A"s highly prejudicial allegation, if the jury were to find that allegation proved, there would be a real temptation for them to abandon proper analysis of the evidence and to punish the appellant by convicting him in relation to "C"s allegation.

(3)In the result, the consequent unfairness would be such that the court should exercise its discretion to exclude the evidence – under either section 101(3) of the 2003 Act or section 78 of PACE. In particular:

(a) No trace had been found of any official complaint made by "A".

(b) Other than that, there had been no investigation of the complaint at the time or since – as a result of which key witnesses had not been spoken to, relevant records and documents had not been seized, and evidence had not been gathered.

(c) For example, evidence would have been available at the time, by way of witnesses and / or records, to show that the appellant and "A" had had separate rooms, and to show that "A" and one of his colleague witnesses had motives to distort the truth, as they had a personal and professional agenda against the appellant. If the appellant now introduced those motives (and thus the allegations of misconduct, embezzlement etc that they had resulted in) without being able to demonstrate that those allegations were malicious, that would be gravely prejudicial to him.

(d) He was thus in an invidious position – not least as there were particular categories of missing evidence that represented "*a significant and demonstrable chance of demonstrating"* that "A" was wrong about room allocation and had motives to make a false allegation.

(e) The recording of "A"s ABE interview was of extremely poor quality.

42. After the conclusion of the submissions, the judge ruled that the bad character evidence was admissible, but reserved his reasons, which were handed down in a written judgment and delivered orally, after he had given the jury his legal directions.

43. The reasons were, in summary, as follows:

(1) This was not a weak case. Albeit that "C" had not wished to pursue it at the time, and that the Police had reported that there had been no sexual assault, he had given clear and credible evidence of a sexual assault by the appellant, which he had described in the combination of the notebook interview in 2008, his ABE interview in 2019 about the offence, and his ABE interview in 2021 about the surrounding circumstances. There was also confirmatory evidence from "C"s younger brother, parents, and others who heard C's account at the time and observed his demeanour. The appellant had also confirmed in his answers to the police questionnaire that, after departing from the house, he had been given to understand that "C" had said that the appellant had interfered with him in some way; and that, after the General Election in 2019, the appellant had made a phone call to "C"s brother-in- law expressing concerns which, from other evidence, it was apparent were related to the 2008 incident.

(2) It was clear that the central issue to be determined by the jury was the credibility of "C" who was alleged to have variously fabricated or exaggerated, rather than providing the jury with a truthful account.

(3) Whilst there were differences between the accounts of "C" and "A", there were sufficient similarities in the circumstances of the sexual assaults which would enable a jury to safely conclude that, despite there being only one other complaint, if they were sure that "A" was telling the truth, the appellant had a propensity to commit offences of sexual assault. The similarities included - the relative youth of both complainants, as compared with the older age of the appellant; the relatively short time span in which the two assaults were alleged to have taken place; the mutual encouragement of the complainants to take some form of intoxicant prior the alleged assault; the fact that both complainants were in bed when the assault was alleged to have taken place; and the similarity of their reaction to it.

(4) Moreover, and likelier to be of assistance to the jury, given the centrality of "C"s credibility, the jury would be entitled (by reference to cases such as *Freeman and Crawford* [2008] EWCA Crim 1863, *McAllister* [2008] EWCA Crim 1544, and *Hay* [2017] EWCA Crim 1863) to consider the likelihood or otherwise of it being a mere coincidence that two relatively young males (at the time) had come forward, independently of one another, to allege that they had been sexually assaulted in similar circumstances between 2008 – 2010.

(5) Whilst it would be necessary for the jury to be sure that "A"s allegation was true, neither his evidence nor the evidence that would be required to support and dispute his allegation was such as unfairly to distract the jury from the central issue in the case (i.e. "C"s credibility) so as to amount to

> unfairly prejudicial satellite litigation. In particular, although time had passed, there was nothing so important, whether alone or in combination with other aspects of the evidence, as to render unfair the jury's ability to make a fair determination of the truth or otherwise of the new allegation. Nor was there any aspect of the appellant's defence which it was necessary to deploy, which would render him unfairly prejudiced in disputing "A"s allegation.
>
> (6) Therefore, the judge was satisfied both that the separate allegation of sexual assault by "A" was both sufficiently relevant to the central issue in the case to be admissible, and that its admission would not render unfair the trial of the appellant.

44. Finally, the judge recorded that there had already been discussion with the parties about his directions to the jury, during the course of which it had been agreed, amongst other things, that there was no evidence of collusion or contamination between "C" and "A", and that thus there was no need to direct the jury about those topics. The directions had already been provided to the jury in writing.

The bad character direction to the jury

45. The judge provided his proposed directions of law to counsel in advance of the summing up. Ms Gudrun Young KC, appearing then, as now, on the appellant's behalf, concluded (rightly in our view) that, given that the evidence had been admitted, the direction was unimpeachable. It was in the following terms:

> *"The reason why you were provided with this evidence was not to cause any unfair prejudice to the accused, and you should guard against that when you are considering the evidence concerning the charge on the indictment relating to ["C"].*
>
> *Indeed, the reason why you were provided with this evidence is because of the nature of the accused's defence to the allegation concerning the sexual assault upon ["C"], namely that it never occurred and that ["C"] has fabricated a false account against him.*
>
> *The relevance of the evidence concerning ["A"] is that if it is true, then it may assist you in determining the truth or otherwise of ["C"s] account.*
>
> *In this regard the prosecution submit that it is beyond mere coincidence that two relatively young males have come forward independently of one another to allege that they were sexually assaulted by the accused in similar circumstances between 2008 – 2010, and instead ["A"s] evidence supports the credibility of what ["C"] has told you in the course of this trial.*
>
> *On the other had the defence submit that, for a number of reasons, this evidence has no relevance to your appraisal of the*

evidence concerning ["C"]. Firstly, the accused denies that he sexually assaulted ["A"], rather the incident arose from a consensual sexual encounter between the two of them, and therefore there is no question of the accused having done anything to ["A"] without his consent. Secondly, the nature and circumstances of the two incidents are not sufficiently similar to enable you to draw any supportive comparisons between them. Thirdly, the Defence submit that because this allegation has only recently been brought to his attention, the accused has been disadvantaged in challenging it.

The first direction which I am going to provide to you in relation to this aspect of the evidence is that your main focus of attention throughout this trial should of course remain upon determining the truth or otherwise of the allegation concerning the sexual assault on ["C"].

Secondly, the evidence concerning the allegation in relation to ["A"] will only be of potential relevance to your consideration of this case if you are sure that what he has told you is true, namely that the accused sexually assaulted him, rather than it being a consensual sexual encounter between them. In this regard, if you conclude that the accused has been significantly disadvantaged by the fact that this allegation has only recently been brought to his attention because, for example, the memories of witnesses, including the accused's, have faded, or evidence which may have assisted the accused in challenging the allegation is no longer available to him such as contemporaneous records of the High Commission and/or the Foreign and Commonwealth Office, then you should bear this matter in mind when determining whether you can be sure that ["A"] has provided you with a truthful account of what took place.

If, having regard to the evidence to this aspect of the evidence, you consider that what occurred in Pakistan in 2010 either was, or may have been, a consensual encounter between ["A"] and the accused, then you should completely disregard this aspect of the evidence, and concentrate on the evidence you have heard concerning the count on the indictment.

On the other hand, if you are sure that ["A"] has provided you with a truthful account of what took place, and that the accused did sexually assault him in 2010, then you will be entitled to consider whether it assists you in determining the credibility of the account provided to you by ["C"].

Thirdly, even if you are sure that the accused did sexually assault ["A"] , you should not convict the accused of sexually assaulting ["C"] either wholly or mainly on this basis, as it forms only part of the evidence in the case, and it will be

necessary to concentrate on the evidence provided to you by ["C"] and others concerning the incident in 2008.

Fourthly, however if you are sure that the accused did sexually assault ["A"] in 2010, then you will be entitled to consider whether it assists you in determining the truth or otherwise of ["C"s] account.

In this regard the defence submit that the fact that the two individuals have alleged that the accused sexually assaulted them, is a mere coincidence and has no relevance to your consideration of ["C"s] account. Moreover that there are no sufficient similarities between the two accounts for you to be enabled to make any worthwhile comparisons between them. Indeed, the defence submit that there are clear dissimilarities including, the age difference between the two complainants and the nature of the alleged sexual act involved.

On the other hand, the prosecution submit that it is beyond mere coincidence that two young males have come forward independently of one another to allege that they were sexually assaulted in similar circumstances between 2008 – 2010, and instead ["A"s] evidence supports the credibility of what ["C"] has told you in the course of this trial. In this regard the prosecution point out that both complainants were relatively young compared to the older age of the accused, the two incidents occurred in a relatively short time period of each other, both alleged that they were encouraged to have some form of intoxication, whether by alcohol or a sleeping pill before the incident occurred, and both complainants were lay on their bed and sought to push the accused away when the incident took place."

Submissions on the appeal against conviction

46. In the combination of her written and oral submissions, Ms Young relies upon the asserted inconsistencies in "C"s accounts, the alleged lack of support for his evidence, and the consequent alleged weakness of the prosecution case which were advanced on the appellant's behalf during the proceedings in the Crown Court.

47. Ms Young argues that there were significant differences (which she took us through in detail) between the account given by "C" to the police on 4 January 2008, his ABE interview in December 2019, his ABE interview in February 2021, his evidence at trial up to re-examination, and his evidence in re-examination

48. Ms Young then asserts that the judge did not have any, or sufficient, regard to either the written or oral submissions advanced on behalf of the appellant in relation to the admissibility of the bad character evidence, and that he arrived at his decision without full consideration of those arguments, as illustrated by his alleged failure to

appreciate, from the written submissions, that the appellant's case in relation to "A" was that the only reason that they had ended up sharing a room, and indeed a bed, was that "A" had wanted to do so.

49. Ms Young also asserts that it was "something of a surprise" to discover, on receipt of his reasons, that the judge had decided to admit the evidence on the basis of both propensity and to rebut the likelihood of coincidence, whereas the directions to the jury related only to the unlikelihood of coincidence.

50. Ms Young goes on to submit, amongst other things that:

(1)The allegation made by "A" was of a single, untested, and unproven incident and as such (see *Hanson* [2005] EWCA Crim 824) was not capable of showing propensity.

(2)The similarities relied on did not in truth bear the requisite hallmarks to justify admission in that:

(a) "A"s allegation was of a more serious penetrative sexual assault committed against an adult who woke up half way through it; whereas "C" was a fully awake 15 year-old boy who, taken at its highest, was touched fairly briefly on his legs through a sleeping bag and over clothing.

(b) There is a considerable difference between a 15 year old boy and a 25 year old work colleague.

(c) The fact that both incidents took place in a bed or bedroom was in no way unusual, quite the contrary.

(d) The incidents were nearly three years apart.

(e) The defence in "C"s case was that there had been no sexual contact, whereas in "A"s case it was that sexual contact had been consensual.

(f) The fact that both "C" and "A" said that they had pushed the appellant away was an entirely commonplace feature of an unwanted sexual assault.

(g) There was nothing unusual or significant about the fact that intoxicating substances were said to have been offered / consumed, as such behaviour was commonplace.

(h) In any event, "C"s evidence was that he had refused the drink offered to him and that he was not affected by alcohol at the material time, yet the appellant had gone on to assault him.

(3)The case in relation to "C"s allegation was weak, and there was no proper basis for concluding that he had given clear and credible evidence. The judge failed to engage with the internal contradictions in "C"s account, and the inherent contradictions with other evidence – which meant that large parts of

his evidence could, at best, be described as fantasy. Thus the judge should have had very significant concerns about admitting hugely prejudicial evidence.

(4)In order to undermine "A"s credibility, and to show that he may have had an ulterior motive for making his allegation at the time, the appellant would have had to introduce evidence of professional rivalries and jealousies felt by "A" towards him, which had resulted in simultaneous allegations of malpractice and dishonesty being made against him by "A" and one of his colleague witnesses, in circumstances where, because of the passage of time, he could no longer prove that the allegations were unfounded. In the result, he had had no alternative but to choose not to adduce any of that material, which was detrimental to him.

(5)The admission of "A"s allegation involved satellite litigation in which the dangers envisaged in *McKenzie* [2008] EWCA Crim 758 came to pass, in that:

(a) "A"s evidence was stale and incomplete.

(b) Given that they were suddenly asked to embark upon trying a wholly separate allegation of sexual assault, and although the defence did their best to limit the time taken up by this evidence, the jury must have been distracted by it, thereby losing their focus on the real issue in the case.

(6)The appellant was further disadvantaged in relation to "A"s allegation for the following reasons:

(a) There having been no police investigation, the appellant had not had the opportunity of being interviewed and thereby being able to point the police to lines of investigation that may have assisted in his defence. Nor had he had the benefits of the other formal aspects of the prosecution of an allegation - which are there to protect an accused and to ensure that the matter is dealt with properly, even when there has been a significant lapse of time. It was more than a mere formality that "A"s allegation could not be prosecuted for jurisdictional reasons. In reality the appellant was significantly worse off because "A"s allegation was not capable of being a separate charge on the indictment.

(b) Vital evidence in the form of room bookings, the Guest House log books, and the accounts were no longer available. Equally, if they ever existed, the records of the complaints said to have been made at the time to the High Commission and the Foreign and Commonwealth Office had been lost / destroyed – such that the appellant was not able to establish if complaints had in fact been made and, if so, to look at the details of what had been reported at the time.

(c) Given the passage of time, the appellant was not in a position to prove that "A" had tendered his resignation and made

arrangements to leave the organisation before the alleged assault.

51. In the combination of his written and oral submissions on behalf of the Respondent, Mr Sean Larkin KC argues, in summary, that the bad character evidence was properly admitted; that the judge had regard to all the appropriate authorities; and that the judge correctly exercised his discretion.

52. In support of those propositions, Mr Larkin argues that the issue before the jury was whether there had been any touching at all as "C" had claimed, or whether he had consciously or unconsciously invented/exaggerated the account or made some form of terrible mistake. "C"s credibility and reliability were at the core of the case. In the result, the bad character evidence was relevant to "C"s credibility and also to the appellant's propensity to commit a sexual offence, and the jury were entitled to consider whether it was a coincidence that two unconnected complainants had made complaints of sexual assault against the appellant.

53. The facts of the two complaints were sufficiently similar and unusual, Mr Larkin continues, for them to amount to propensity, and whilst the evidence was of a single incident, that was not a bar to admissibility, and the judge had properly considered it. Equally, whilst it was an unproven allegation, parliament had envisioned the admission of such bad character evidence when passing the Criminal Justice Act 2003, and the jury had been properly directed that they could not rely on the bad character evidence unless they were sure it was true.

54. Mr Larkin continues that the appellant had sought to intoxicate the complainant whom he wished to assault. The fact that he had failed to do so was irrelevant.

55. Mr Larkin further argues that the appellant was able to deal with the bad character evidence, in that –

(1)He could, and did, give evidence about the incident involving "A".

(2)He could, and did, call supporting evidence on the issue of whether the appellant and "A" had occupied the same or separate rooms.

(3)In his ABE interview, "A" had spoken about his concerns in relation to the appellant's professional conduct. These concerns were set out in detailed contemporaneous email correspondence, which had not been admitted. The appellant's decision not to cross-examine "A" about his being motivated by professional rivalries and jealousies was a tactical decision, and the appellant could not now complain that he did not do so.

(4)The appellant's complaint about not now being able to obtain further evidence was a common issue in historic cases. It is not an automatic bar to prosecution or bad character applications. If it was a question of needing more time to make further enquiries, the appellant could have asked for the bad character argument to be heard at the start of the trial and, if admitted, could have applied to adjourn the case. That was not done.

(5)If the appellant held that "A" was not telling the truth about a consensual act, it would mean he had invented the allegation a very short time after the incident in 2010 in order to make the complaint in 2021.

(6)As to the effect on the trial, one prosecution witness was called, and the appellant gave evidence about it and also called a witness. This did not distract from the evidence that related to the sexual assault against "C".

56. Mr Larkin rejects the appellant's suggestion that the prosecution case was weak, submitting that:

(1) As demonstrated by a schedule in the Respondent's Notice (which we reproduce, with one addition, immediately below) the judge had been correct to say that "C" had given a consistent account. In particular, there was a consistent account that the appellant had kept trying to 'feel' "C", which was noted even at the time of the 2008 report to the police. "C"s evidence had, moreover, been thoroughly tested before the jury. Any inconsistencies had been comprehensively explored and explained by "C" by factors such as his age at the time, the shock he had sustained at being sexually assaulted, and the passage of some 12 years between the incident and the ABE interviews and the 2 year gap after that to trial.

NOTEBOOK	EVIDENCE AT TRIAL
14.15 spoke to ["C"] *who stated following a party……at his h/a one of the guests at the party Imran Khan had slept on the spare bed in his bedroom and that during the night…..*	This was common ground.
*an incident had occurred where Imran Khan had told ["*C*"] to go downstairs and show him where the toilet was…..*	"C" confirmed this in evidence.
and then he pulled ["C"] *upstairs and threw the cat away….*	"C" confirmed this in evidence
["C"] *was then dragged upstairs and Imran pushed him onto the bed….*	"C" confirmed this in evidence.
["C"] *managed to get off and onto his bunk and then walked around and he kept on putting his hand onto the mattress and moved it towards him*.	"C" confirmed this in evidence. (This related to the allegation of assault)
["C"] *stated that he moved it away…..*	"C" confirmed in evidence that he had pushed the hand away but that the appellant had kept trying to touch him.
and then got up to leave the room. Imran tried to pull him back in and ["C"] *managed to escape and go to his mother.*	It was accepted that "C" had left the room. He explained that it was a direct result of the assault. The appellant accepted that he had touched "C"s elbow as he left the room.
This incident had frightened ["C"]. *He had not got any physical injuries as a result of*	"C" confirmed this in evidence.

this.	
He had not been sexually assaulted but felt concerned that this was the reason for Imran trying to get hold of him.	C explained in evidence that he had believed that sexual assault involved penetration. He was 15, led a sheltered life in a remote farmhouse a mile away from neighbours. At the time he did not consider that he had been sexually assaulted.
["C"] *had discussed this with his mother…..and decided that he did not wish to make an official complaint about this incident.*	"C" and his mother confirmed this in evidence.
He stated that he would like Imran to be spoken to about this matter and his mother agreed with this.	"C" and his mother confirmed this in evidence.
Before we went to bed he tried to get me drunk……	"C" confirmed this in evidence. This was a reference to the appellant pressing gin on him.
and when I went to the bedroom and turned my computer on he kept saying to me show me some porn and slapped me on the back	"C" said that he switched on his computer to listen to music and the appellant made reference to porn.
He started to play fight with me	"C" confirmed this in evidence.
He told me I was a good looking boy and very intelligent	"C" confirmed this in evidence.
He said that he would have a chat later and made me promise not to tell anyone	"C" confirmed this in evidence.
In C's presence, his mother added that "C" had told her that Imran Khan "kept trying to feel me"	"C" confirmed this in evidence.

(2) The evidence from the other witnesses in the case supported "C"s account. His younger brother, who had been present in the room at the time of the assault, gave evidence that the appellant had kept walking around the bunk bed whilst "C" was telling him politely to go back to his bed. He also stated that the bed was very creaky while the appellant was leaning over the top bunk, and described "C" as getting agitated, nervous, quivering, and frightened when asking the appellant to go back to his bed (for which the appellant had no explanation). The evidence from "C"s parents, who were the first ones complained to, included that "C" had said the appellant 'was trying to feel me' and they had confirmed that he was in shock, shaking, and had cried throughout the night.

(3) In 2015 "C" had recorded in his exercise diary the emotional recall exercise during which he had recalled the sexual assault, noting "the time I was almost, well was, touched by a guy when I was young".

(4) The appellant, in his own account to the police, had admitted that he had been informed within hours of the incident that he had been asked to leave as "C" had said that "I had somehow attempted to interfere with him". Shortly after the General Election, the appellant had left the voicemail message for "C"s brother in law expressing concerns relating to the 2008 incident.

Appeal against conviction – discussion and conclusion

57. Standing back from the detail, it is not disputed that, in dealing with the bad character application, the judge was directed to, and applied, the correct legal principles. Likewise, it is accepted that the judge's decision to admit the bad character evidence was made in the exercise of his discretion and that, for the appeal to succeed, the appellant must show that it was *Wednesbury* unreasonable. Equally, there is no dispute that the case necessarily turns on its own facts.

58. The judge was clearly right to defer consideration of the bad character application until after the completion of the prosecution evidence in relation to "C"s complaint. In the result he had the considerable advantage of having seen, in particular, "C" give evidence and be cross-examined as to the differences in his account over the years.

59. The judge was plainly entitled to conclude that the prosecution case in relation to "C"s complaint was not weak. Indeed, in our view, the case was far from weak, for the following reasons:

(1) Within a short time of the appellant starting to share "C" and his younger brother's bedroom, "C" (aged 15 years and 8 months and very young for his age) fled in great distress, went straight to his parents' bedroom, and immediately complained to the effect that the appellant had kept trying to feel him / he had been molested.

(2) "C" also told his mother that she had to get his younger brother out of the bedroom, and she immediately did so.

(3) "C" cried all night.

(4) The appellant was asked to leave early in the morning and was given to understand that it was alleged that he had attempted to interfere with "C" in some way.

(5) The police were informed that same day.

(6) Albeit that "C" did not wish to pursue a prosecution at that stage, he did want the police to speak with the appellant, and the account that he gave to the Police that day was consistent with the evidence that he gave at trial, which was direct evidence of the offence.

(7) "C" was cross-examined in detail, and explained that the differences in his accounts over the years were variously the product of matters such as his age at the time, the shock that he had sustained at being sexually assaulted, the passage of time between the offence and his ABE interviews,

the absence of DC Burton's note at the time of the 2019 ABE interview, and the two year gap between the ABE interviews and trial.

(8) Against that background, the judge was entitled to conclude that "C" had given clear and credible evidence of a sexual assault by the appellant.

(9) Although the younger brother was drifting in and out of sleep at the time of the alleged offence, aspects of his evidence were supportive of "C"s evidence.

(10) The wider family evidence was variously supportive of "C"s distress and his recent complaint.

(11) The note that "C" made in 2015 was also consistent with his evidence.

(12) The appellant's voicemail, left shortly after his victory in the General Election in 2019, showed his concern about what had happened in 2008.

60. The judge's bad character ruling showed that he was on top of the relevant issues. Equally, there was no conflict between the ruling and the bad character direction to the jury. As we have recorded above, the bad character application was advanced upon two bases – propensity and the unlikelihood of coincidence supporting "C"s credibility. In his ruling, whilst admitting the evidence on both bases, the judge recognised, correctly in our view, that the latter basis was likelier to be of assistance to the jury, given the centrality of "C"s credibility. Thus, confining the direction to that basis was entirely appropriate. The more so as the direction was both crystal clear and fair to both sides.

61. There were similarities and differences between the complaints of "C" and "A". The principal similarities were the relative youth of both complainants, as compared with the appellant; both incidents were said to have happened within a short time of the complainant being required to share a bedroom with the appellant for the first time; the mutual encouragement of the complainants to take some form of intoxicant prior to the alleged assault; the fact that both complainants were said to have been in bed at the time of the assaults upon them; and the fact that, in each instance, the appellant had sought to explain their conduct in the aftermath as being caused by anxiety / confusion in relation to their own sexuality.

62. The judge rightly took account of both the similarities and the differences. Whilst it may be that some judges might have exercised their discretion differently, we are not persuaded that the judge's conclusion, on the particular facts of this case, that the similarities were sufficient for "A"s evidence to be admitted, was outwith the legitimate scope of his discretion.

63. Nor, in our view, did the admission of the evidence lead to unfairly prejudicial satellite litigation. "A" was the only witness called by the prosecution in relation to this incident. The appellant gave evidence, was able to call a witness, and made strategic decisions not to use other material that was available.

64. Further the judge's bad character direction (set out in full above) explained why the jury had heard the evidence; the potential relevance of the evidence; the defence

submissions as to why the evidence had no relevance; how the jury's main focus of attention should remain upon determining the truth or otherwise of "C"s allegation; that they could only take "A"s allegation into account if they were sure that it was true; that if they concluded that the appellant may have been disadvantaged by the late revelation of "A"s complaint they should bear that in mind when assessing the truthfulness of "A"s complaint; that if they decided that the encounter between the Appellant and "A" was, or may have been, consensual they should disregard the prosecution evidence in relation to "A"; that even if they decided that "A"s evidence was truthful, they could not convict the appellant of the alleged sexual assault in "C" either wholly or mainly on that basis; the defence submissions as to why, even if non-consensual, the encounter with "A" did not support "C"s credibility; and the prosecution submissions as to why it did support "C"s credibility.

65. Against that overall background, we have no doubt that the appellant's trial was fair and that his conviction was safe.

66. Accordingly, the appeal against conviction is dismissed.

Grounds of appeal against sentence

67. The maximum sentence for an offence of sexual assault is 10 years' imprisonment.

68. There are four grounds of appeal, namely that the judge –

(1) Made findings of fact regarding the use of violence which were not supported on the evidence and were unreasonable in all circumstances.

(2) Determined a category on the Sentencing Guidelines which was too high.

(3) Placed too much emphasis on the aggravating factors and gave insufficient regard to the mitigating factors.

(4) Erred in declining to suspend the sentence.

The sentencing hearing

69. As to harm. the Respondent submitted that, whilst there was some evidence of violence (the dragging /pulling upstairs, throwing the cat, and pushing "C" on to the spare bed) which (applying the relevant Guideline) was a Category 1 element, and that there were two Category 2 elements – namely that the incident was sustained, and the victim was vulnerable.

70. As to culpability, the Respondent submitted that two elements were present, namely the use (or attempted use) of alcohol to facilitate the offence, and (applying the definition in *Forbes* [2016] EWCA Crim 1388) abuse of the parent's trust in allocating to the appellant the spare bed in "C"s bedroom.

71. In the result the Respondent submitted that the offence fell into Category 2A, and thus attracted a starting point of 2 year'' custody, with a range from 1 – 4 years.

72. On behalf of the appellant it was underlined that he had given evidence that he did not know at the time that "C" was under 16.

73. As to harm it was accepted that "*on some versions of the account*" given by "A" reference had been made to elements of violence, but it was submitted that the evidence was unclear, inconsistent, and not supported, such that it would not be safe to sentence the appellant on that basis. The touching of the feet and legs had been over the clothing and the sleeping bag until the very end, when "C" had said that the appellant had got his hand inside the sleeping bag and was touching him over his pyjamas, and at or near his genital area. The whole episode had lasted for some two minutes and was therefore neither prolonged nor sustained. Nor had "A" been "***particularly*** *vulnerable"* such as to put the offence into Category 2 harm. Rather, in accordance with a note made by the SIO, harm was in Category 3.

74. As to culpability, it was accepted that the use of alcohol to facilitate the offence was arguably present. However, given the small amount that "C" had consumed, it was questioned whether the matter fell into Culpability A. It was further submitted that whilst "C"s parents might have felt that their trust had been abused, that did not justify a finding of breach of trust – especially after applying the full guidance given in *Forbes* (above), and supplemented in *R v TF* [2019] EWCA Crim 1785. In the instant case there was no evidence that the appellant had deliberately used his position or influence to gain entry to "C"s room; that the appellant knew that "C" was under 16; that he was in a structural power relationship with "C"; that he had any duty of care towards "C"; or that he had any parental or quasi parental relationship with "C". Thus there was insufficient evidence to make a finding of Culpability A, and the offence fell more comfortably within Culpability B. In the alternative, even of it did fall into Category A, it should be placed at the very bottom end.

75. Category 3A carries a starting point of 26 weeks' custody with a range from a high level Community Order to 1 year's custody, whereas Category 3B carries a starting point of a high level Community Order with a range from a medium level Community Order to 26 weeks' custody.

76. As to aggravating factors, the Respondent's assertion that, if breach of trust was not found, the timing and location of the offence were aggravating factors should, it was submitted, be viewed in light of the fact that the sleeping arrangements were at the behest of the family. Equally, although the 11 year old brother had been present, he was either asleep or had not really witnessed anything, and the evidence that the appellant had told "C" not to tell anyone was confused and contradictory, and he had reported what had happened to his parents.

77. As to mitigating factors, the appellant had no previous convictions, and was of positive good character and, it was submitted, it would be wrong to deprive him of either as a result of the unproven allegation made by "A". In any event, some 12 years had passed since the events in relation to "A", and there had been no wrongdoing since, but the effects of the time gap between the offence against "C" and sentence meant that a custodial sentence would be particularly harsh. The appellant suffered from a number of health conditions, was the registered carer for his mother, who suffered from a range of health conditions, and had said that he deeply regretted the upset and hurt felt by "C".

78. Finally, it was submitted that the court could properly suspend any sentence imposed of 2 years or less in length, as there were none of the features that would suggest that a suspended sentence was not appropriate, and three of the features that would suggest

that a suspended sentence was appropriate - namely a realistic prospect of rehabilitation; strong personal mitigation; and immediate custody would result in a harmful impact on his dependant mother – were present.

Sentencing remarks

79. The judge found a number of facts, including the following:

(1) The appellant had allowed himself to be thought of as some sort of foreign royalty.

(2) Whatever his purpose in that regard, the effect was that the family had all been charmed and reassured about him, to the extent that "C"s mother had had no hesitation in allocating him the last unoccupied bed – which was in the bedroom on the top floor shared by "C" and his brother.

(3) The appellant had brought a bottle of gin to the bedroom, had started drinking a glass of gin and tonic, and had encouraged "C" to do likewise whilst sitting on the floor with him. When "C" had appeared to be reluctant, the appellant had pushed the glass back into his mouth.

(4) After "C" and his brother had got into their respective bunks, the appellant had suggested to "C" that he could watch some pornography on his laptop .

(5) Having not persuaded "C" to do so, and although aware of where the bathroom was, the appellant had asked "C" to show him where the toilet was, which "C" did.

(6) Thereafter, the appellant had grabbed hold of "C" and effectively dragged him back upstairs and thrown him onto the bed that the appellant had been allocated.

(7) When "C" had got up in order to go to his bunk bed, the appellant had taken hold of one of his arms and had told him that he was very intelligent and attractive.

(8) Although "C" had managed to get away and to get into his bunk bed, the appellant had then moved around the bed placing his hand through the side rails and inside some of the holes in the sleeping bag in order to feel ("C"s) legs.

(9) At some point, the appellant had told "C" not to tell anyone about what was happening.

(10) Thereafter, although "C" had repeatedly moved his body away, and pushed the appellant's hand away, the appellant had persisted in touching various parts of C's legs as he progressed towards "C"s groin.

(11) At one point, the appellant had moved his hands over the bed rails and thereby gained further access to "C"s body.

(12) Throughout the process, which lasted for a couple of minutes, "C" had been getting increasingly anxious, as it had become apparent to him that the appellant's purpose was to touch his genitals.

(13) So, just as the appellant was about to do so, "C" had "freaked out" and had managed to jump off the bunk bed and to run to his parents' bedroom, where he was shaking and inconsolable, but had managed to tell them that the appellant had molested him by trying to feel him, and had said that they should get his younger brother out of his bedroom.

(14) Thereafter, "C"s parents, wanting to deal with the matter with as little fuss as possible, had decided to leave the appellant upstairs until the morning, when the appellant was asked to leave.

(15) Although it may have been that, over the years, the appellant had led himself to believe that he had got away with committing the offence, he had known that there was a risk of a day of reckoning – hence his call to "C"s brother in law after the General Election.

(16) "C" had been profoundly affected by what the appellant had done to him. Since the offence he had found it difficult to be touched. More recently, he had struggled with intimacy with his fiancée. He was abnormally concerned for the children now in the family, and worried how he might overcompensate in relation to children of his own in the future. His mental health had been affected and, after suicidal thoughts, was now attending counselling. He was also wrestling with guilt because members of the family had had to relive the events as a result of the criminal proceedings.

80. As to harm, the judge accepted the evidence of "C"s mother that, at the time, "C" was not worldly-wise and very young for his age, and was thus sure that "C" had been particularly vulnerable, and that therefore, on that basis, the offence involved category 2 harm. Whilst, the judge said, the offence had caused "C" a considerable degree of psychological harm, there had also been a significant degree of brutality, and the offence had been far from momentary, those matters were not taken into account in relation to the categorisation of harm, but as additional aggravating factors.

81. As to culpability, the judge said that whilst "C"s parents had undoubtedly resided trust in the appellant, it was not necessarily of the nature and degree envisaged in the Guideline. However, he was satisfied that the appellant's use of alcohol on "C" had been intended to facilitate the appellant's subsequent actions, and that therefore the appropriate level of culpability was category A.

82. The aggravating factors that the judge found were the degree of psychological harm that had been caused; the significant degree of brutality in the lead up to the offence; the significant period of time over which the offence had taken place; the degree of trust that the appellant had been aware had been resided in him; the fact that the appellant was under the influence of drink at the time; the fact that the appellant had taken some steps to prevent "C" from reporting the offence; and the presence of "C"s 11 year old brother who, albeit that he did not realise that the offence was being committed, had been aware of his brother's agitation and subsequent distress.

83. In mitigation, the judge took into account the absence of previous convictions; the positive good character evidence and the consequent loss of status via the conviction; the fact that the appellant had some aspects of ill health; and that the appellant had provided care for his mother, who suffered from a significant degree of ill health.

84. The judge also accepted that the touching may well have been over "C"s pyjamas, and that it was possible that the appellant had not been aware of "C"s precise age – although he was sure that the appellant had known that "C" was considerably younger than his 18 year old brother. Having seen the appellant give evidence, the judge rejected the suggestion that he had any remorse for his offending. Rather, the judge was sure that the appellant's only regret was towards himself – having found himself in a predicament as a result of his actions some 14 years before.

85. The judge continued that the aggravating factors required a significant uplift from the starting point of 2 years' custody followed by making as full a reduction for the mitigating factors as he could. In the result, he said, the custody threshold was clearly passed, an extended sentence was not justified, and the shortest appropriate term was one of 18 months' imprisonment.

86. Finally, in accordance with relevant Guideline, the judge weighed the relevant factors in order to decide whether the sentence should be suspended – to which he gave anxious consideration. In the result, whilst accepting that there was significant personal mitigation; that, to an extent, there had been some rehabilitation; that some degree of harm might result from alternative arrangements having to be made for the appellant's mother's care; and that there was no history of poor compliance with court orders, the judge reached the ultimate conclusion that, given the serious nature of the offence, in terms of both culpability and harm, appropriate punishment could only be achieved by the imposition of immediate custody

87. It was on that basis that the judge imposed the sentence to which we have already referred.

Submissions on the appeal against sentence

88. In the combination of her written and oral submissions Ms Young argues that the judge erred in holding against the appellant the fact that "C"s family considered him to be someone of public importance/royalty, when this was based on something the appellant's friend had said to the family prior to his arrival. The appellant had no input or influence on which room he was allocated.

89. While Ms Young accepts that it was for the trial judge to determine the factual basis upon which to impose sentence, she argues that the judge's findings on the use of violence were unreasonable. She submits that the evidence given by "C" on the use of violence was confused, contradictory, full of discrepancies, and was wholly undermined by other eyewitness testimonies in the case. In those circumstances, she submits, it is difficult to see how the judge could have been sure that violence had taken place.

90. Ms Young further argues that this was not a Category 2 offence, but rather fell under Category 3.

91. In particular, Ms Young submits that the judge's finding that "C" was particularly vulnerable was incorrect as:

    (1) The complainant was not a young child;

    (2) He was not incapacitated through drink or drugs;

    (3) He was not asleep or rendered incapable of summoning for help.

92. Ms Young also argues that the evidence from "C"s mother about him being young for his age related to him not being 'worldly wise'. There was no evidence about his mental, emotional, psychological, or physical development rendering him especially young or vulnerable, and this was insufficient to make a finding that "C" was particularly vulnerable within the meaning of the Guideline. The mere fact of being 15 and not 'worldly wise' could not properly place "C" into the category of 'particularly vulnerable' when bearing all other surrounding circumstances (no other vulnerability, one-off offence lasting 2 minutes, in easy reach of adult siblings and parents, not intoxicated) in mind.

93. Ms Young further argues that the circumstances of the case do not compare in terms of seriousness to the other Category 2 harm factors - which involve touching of naked genitalia or breasts, prolonged detention or sustained incident, or additional degradation or humiliation.

94. As to mitigation, Ms Young submits that whilst the seriousness of the offence was elevated, the mitigating factors, namely previous good character; the age of the offence; the devastating effect of the conviction upon the appellant and the loss of his career and reputation; the appellant's ill-health; and the appellant's mother's ill-health, were downplayed.

95. Ms Young further argues that there were compelling reasons to suspend the sentence, namely:

    (1) The profound loss to the appellant of his career, reputation, status, and good name stemming from being prosecuted for a historic sexual offence 14 years after its commission - that was punishment enough.

    (2) The appellant's mother's significant ill-health and dependence upon him as her registered full-time carer. He was solely responsible for her day-to-day care and health management in the face of serious and life-threatening health-conditions. There was no doubt that immediate custody would have a very significantly harmful impact on her.

96. Finally, Ms Young underlines that the only basis on which the judge refused to suspend the sentence was that appropriate punishment could only be achieved by immediate custody, and argues that, in coming to that conclusion, the judge gave no or insufficient regard to the profound and devastating loss the appellant had already suffered. When balanced against the impact of an immediate custodial sentence on the appellant's mother, the imposition of a suspended sentence was clearly indicated in all the circumstances.

97. Mr Larkin argues, in short, that –

(1) The judge heard all the evidence and his findings on violence were reasonable;

(2) The offence category was correct according to the Guidelines;

(3) The starting point was 2 years' imprisonment; by reducing the sentence to 18 months' imprisonment, it was arguable that the judge gave considerably more weight to the mitigating factors than the aggravating factors

(4) An immediate custodial sentence was appropriate.

98. Mr Larkin underlines that "C" was 15 years and 8 months old at the time of the offence, that he was not worldly wise; rather, that he was very young for his age. "Particular vulnerability" has to be assessed relative to the class of victims who fall within the Guideline as a whole i.e. all victims aged 16 or over. It was thus open to the judge to find that "C" was particularly vulnerable, and thereby to conclude that harm fell into Category 2.

99. On the issue of culpability, Mr Larkin emphasises that the judge found that the appellant had sought to force the complainant to drink which was a factor that provided a basis to conclude that culpability fell into Category A. The judge had not taken abuse of trust into account in that regard.

100. Thus, Mr Larkin submits, the judge was correct the categorise the offence as Category 2A.

101. Equally, Mr Larkin argues, the judge correctly identified the aggravating and mitigating factors in the case.

102. In addition, whilst it was arguable that the aggravating and mitigating factors balanced each other out, the judge had given considerably more weight to the mitigating factors, and thus it could not be said that the sentence was outside the appropriate range.

103. As to suspension, Mr Larkin submits that the appellant has shown no remorse; and that the consequences of the offence were a direct result of his own actions, and not sufficient to justify suspending the sentence. The appellant's mother's ill-health, and his caring responsibilities towards her were duly taken into account, and were a significant factor in reducing the sentence. Moreover, bearing in mind his responsibilities as an MP which involved living in London and working 8.30am to midnight Monday – Thursday, and returning to Wakefield thereafter, other arrangements would have been made for his mother.

104. Accordingly, Mr Larkin submits, the sentence was neither wrong in principle nor manifestly excessive.

Appeal against sentence – discussion and conclusion

105. To state the obvious, the judge presided over the trial and was thus in the best possible position to decide, to the criminal standard, the factual basis upon which to pass sentence. He clearly took very considerable care in doing so, and explained his findings of fact with great clarity in his sentencing remarks.

106. We have set out the principal findings above. We have no doubt that all of them, including those in relation to violence, were open to the judge.

107. Against that background, the judge's finding that the offence fell into Category 2A of the relevant Guideline was, in our view, plainly within the range of findings that were open to him, and he was thus entitled to take a starting point of 2 years' custody. In particular, he was right to find that "C" was, in the context of the relevant Guideline, to be regarded as particularly vulnerable. Ms Young did not challenge the finding that the case fell within culpability A.

108. From that starting point, and having balanced the aggravating and mitigating factors, the judge reduced the actual sentence to one of 18 months' imprisonment. In those circumstances, and given the overall strength of the aggravating factors there is, in our view, no viable basis for the contention that the judge gave insufficient regard to the mitigating factors.

109. It is clear from his sentencing remarks that the judge gave anxious consideration to the issue of whether the sentence should be suspended. In so doing, he took careful account of the relevant Guideline. As he made clear, he accepted that there was a considerable degree of personal mitigation; that, to an extent, there had been some rehabilitation; that some harm might result from alternative arrangements that would have to be made to the appellant's mother's care; and that there was no history of poor compliance with court orders. However, he concluded that, given the serious nature of the offence, in terms of both culpability and harm, appropriate punishment could only be achieved by the imposition of immediate custody. In our view, on the particular facts of this case, he was entitled to reach that conclusion.

110. In the result, the appeal against sentence is also dismissed.