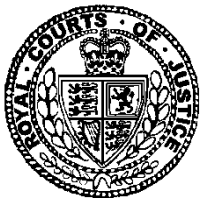

Neutral Citation Number: [2023] EWCA Crim 1362 Case No: 202203828 B1

IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT SNARESBROOK
His Honour Judge Southern

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 8 November 2023

Before:

LORD JUSTICE STUART-SMITH
MR JUSTICE HOLGATE
and
THE COMMON SERJEANT
HIS HONOUR JUDGE MARKS KC

REX
V
BEF

MISS H BRICKEL appeared on behalf of the Appellant
MR J BEARMAN appeared on behalf of the Crown

NOTE – THE RE-TRIAL IN THIS CASE HAS NOW TAKEN PLACE. ACCORDINGLY THIS JUDGMENT IS NO LONGER SUBJECT TO REPORTING RESTRICTIONS PURSUANT TO S.4(2) CONTEMPT OF COURT ACT 1981.

IT REMAINS THE RESPONSIBILITY OF THE PERSON INTENDING TO SHARE THIS JUDGMENT TO ENSURE THAT NO OTHER RESTRICTIONS APPLY, IN PARTICULAR THOSE RESTRICTIONS THAT RELATE TO THE IDENTIFICATION OF INDIVIDUALS.

Approved Judgment

LORD JUSTICE STUART-SMITH:

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

2. On 30 November 2022 in the Crown Court at Snaresbrook before His Honour Judge Southern, the appellant, who was then aged 36, was convicted of five counts of sexual assault on a child under the age of 13 and four counts of rape of a child under 13. The complainant in each case was the appellant's stepdaughter, who we shall call Z. The offending was alleged to have happened between 2010 and 2013 when the appellant was aged 23 to 26 and Z was aged between seven and 10.

3. He now appeals against his conviction. The basis of his appeal is that the judge was wrong to admit as evidence in this case the fact that in [redacted] he had been convicted of raping a [redacted] woman in the circumstances we describe more fully below. Although the appellant was convicted of two counts, and we refer to them as the [redacted] convictions, they arose out of one incident that gave rise to separate counts of oral and vaginal rape. The admission of the evidence is said to have been wrong on two grounds: first, the appellant submits that the evidence of his [redacted] convictions did not show a propensity to commit sexual assaults and rape against a young child and was therefore not admissible; second, if the evidence was admissible it would have such an adverse effect on the fairness of the proceedings that the court ought not to have admitted it.

The factual background

4. It is not necessary to outline the facts that are the subject of the present proceedings in detail. Z alleged that the appellant started by rubbing her "down there" and then progressed over time to licking her vagina, making her suck his penis and to penetrative sexual intercourse which was the subject of the four counts of rape.

5. All of the offending occurred in the home or the equivalent of a home. One offence was alleged to have occurred when the appellant was in bed with Z and another woman, not her mother.

6. In addition to Z's evidence, the prosecution relied upon evidence that Z had made disclosures to three people, including her mother.

7. The appellant denied all of Z's allegations. He said that there had never been any sexual activity between them and that he had no sexual interest in children. The issue for the jury was therefore whether they believed Z and were sure that the offending had occurred.

The bad character evidence

8. During the course of the trial the prosecution applied to adduce the evidence of the appellant's [redacted] convictions. The application gave as the reason why the convictions were relevant as: "The previous convictions demonstrate a propensity on the defendant's part to sexually offend and rape females". The prosecution skeleton gave as the relevant details that:

> "The Crown seek leave to admit [redacted] convictions for rape, the offences having been committed on the [redacted]. The victim was a [redacted] female. The brief circumstances of this case are that the complainant was out for the night with friends and having left their company at approx. 2am, was walking home when she encountered the Defendant and another male. They struck up a conversation with her and offered her a drink to which she agreed and suffice it to say that matters progressed to her being taken into a secluded area and raped."

9. The Crown's submission was that:

> "... the Defendant's record can demonstrate a propensity to commit serious sexual offences and so leave should be granted under Section 101(1)d."

The ruling

10. The essence of the prosecution's submission was repeated and recorded in paragraph 4 of the judge's ruling where the judge said:

> "The prosecution say this evidence is admissible because it demonstrates that the defendant has a propensity to force himself sexually upon females and to have non-consensual or unlawful intercourse, and as the defendant denies that any sexual activity of any kind took place between him and his step daughter, this is likely to be a matter in issue between the defendant and the prosecution say that the gateway of s101(1)(d) is open."

11. The prosecution developed that submission by suggesting similarities between the conduct the subject of the [redacted] convictions and the alleged behaviour with Z, namely:

> "a. Both demonstrate the defendant's appetite for unlawful sex;
>
> b. Both demonstrate that the defendant has a tendency to force his victims to give him oral sex as well as engaging in vaginal sex;
>
> c. Both demonstrate a willingness to embark on non-consensual sex where there is an acute risk of discovery."

12. The judge explained the prosecution's case on "c" above as being that the secluded area (as it was described in the prosecution's skeleton) where the appellant took his victim was an alleyway overlooked by houses and the incident came to an end when the occupier of an adjacent house became aware of what was happening and shouted out, which gave the victim a chance to escape.

13. The judge set out the defendant's submissions at paragraph 7 of the ruling. They were that the circumstances of the [redacted] convictions were not sufficiently similar to engage the gateway under section 101(1)(d) or to open that gateway because they do not show any propensity to commit the offence with which the current trial was concerned. In the alternative, it was submitted that the evidence should be excluded under section 101(3).

14. Having set out the relevant provisions of sections 101 and 103, the judge noted the need for special caution when dealing with old convictions, while also noting that in the present case the situation was unusual because the convictions upon which the prosecution wished to rely were relatively recent. The judge then identified the "matter in issue":

> "Here, it seems to me, the matter in issue is whether the defendant committed the acts alleged, his case being that there was no sexual activity of any kind between him and [Z] and so whether he has a propensity to have unlawful sex with females who, for one reason or another, are vulnerable."

15. The judge then prefaced his analysis by reference to the three well-known questions from *Hanson* [2005] EWCA Crim 824, namely:

> "1. Do the matters relied upon by the prosecution establish a propensity to commit offences of the kind charged?
>
> 2. If so does that propensity make it more likely that the defendant committed the crime now charged?
>
> 3. If so, is it unjust to admit them, given the provisions of s101(3) to which I have just referred?"

16. The judge accepted that there were differences between the index offences and the facts underlying the [redacted] convictions:

> "The conviction for rape involved a sexual assault on an adult, not a child. It occurred after an encounter with a stranger late at night in a public place and after alcohol had been consumed. The alleged sexual assaults we are concerned with in this trial involve allegations of sexual assault and rape of a child in respect of whom he had a parental relationship."

17. Having done so, he referred to the facts and judgments in the case of *Miller* [2010] EWCA Crim 1578, where both sets of offending had involved relatively young girls. In doing so he drew attention to two passages from the judgment of Leveson LJ in that case. The first was:

> "... This case concerns a younger girl, again taken advantage of, if the allegation is true. The conviction for rape demonstrates a clear propensity for sex with a young girl in circumstances where for whatever reason she is not consenting. It may also show an appetite for such unlawful sex. It is therefore clearly capable

of demonstrating a propensity."

18. The second passage was the observation at paragraph 18 of *Miller* that:

> "... in our judgment, the fact that both the conviction and these allegations contain within them an underlying abuse of power in the way that [counsel] suggests is sufficient to justify the conclusion that the judge reached (that it was capable of being evidence of propensity), notwithstanding the differing ages of the victim in the first case and [the complainant] in the second."

19. The judge then came to the kernel of his reasoning where he identified similarities he considered to be relevant and concluded his analysis at paragraphs 18 to 22 as follows:

> "18. Similarly, in this case, there are plain similarities in that on both occasions the defendant is said to have taken advantage of a young female in circumstances of vulnerability in order to engage in unlawful sex, one because she was a child in his care at the time and the other because she had taken drink, was alone and separated from her friends and unable to escape from the dark alleyway into which she had been taken by the defendant.
>
> 19. It is plainly established that a single conviction is capable of being sufficient to establish propensity and that a subsequent conviction is potentially admissible just as is a previous conviction. For all of these reasons, in my judgment the first of the two questions posed in *Hanson* return positive answers.
>
> 20. I turn, therefore, to consider s101(3). Would admission of evidence of the conviction for rape have such an adverse effect on the fairness of the proceedings that the court ought not to admit it?
>
> 21. The fact that admission of this evidence would damage the defence case or would provide support for the prosecution case is not reason to exclude it once it passes through the gateway of s101(1)(d). After all, that is the precise reason why the prosecution seek to admit it. Nor can I categorise this to be a situation whereby the prosecution seeks to bolster a weak case by seeking to rely upon evidence of the other conviction. Nor is the chronology of events here, in my judgement, an obstacle to admission of the evidence in the light of s.101(4).
>
> 22. Drawing all of this together I am satisfied that the evidence of [the defendant's] conviction for rape is admissible through the gateway of s101(1)(d) and that to do so does not give rise to such unfairness that the protective power of exclusion provided by s.101(3) is engaged, nor that provided by s.78 PACE."

20. It is to be noted that the judge did not either in paragraph 18 or elsewhere in his ruling indicate that he accepted or relied upon the asserted feature of acute risk of detection.

The summing-up

21. The judge dealt with the [redacted] convictions in part one of his summing-up where he said:

> "The next topic I have to deal with concerns [the appellant's] [redacted] convictions for rape. Those convictions were in [redacted] for an offence committed on [redacted]. You heard details of that offence, or those offences, which were committed at the same time, in the evidence given by the officer in the case and, again, I will remind you of that when we look at the evidence after the speeches. You have this evidence because the prosecution say that the fact that Mr R has these convictions for rape means that he has a tendency to commit offences of this type, so that it is more likely that he sexually assaulted and raped [Z] in the ways she has described.
>
> The defence say that, for a number of reasons, these convictions do not demonstrate that at all. They say that the convictions were for offences committed in [redacted], and so between [redacted] years later than the events that we are concerned with in this trial. During the period we are concerned with in this trial, [the appellant] had not committed any offences of a sexual nature at all. In any event, the defence say also that the offences of rape in [redacted] were against a [redacted] woman and not a child. Thirdly, that woman was a stranger encountered late at night in a public place, whereas, in this trial, we are concerned with allegations that are entirely different, being in a domestic context. So, for those reasons the defence say that these convictions do not show that Mr R has a tendency to act in such a manner, so that it is more likely he acted as alleged by the prosecution towards [Z].
>
> It is, of course, for you to decide whether those convictions for rape do, in fact, show that Mr R has a tendency to act in this way. If you are not sure that his convictions for rape in [redacted] show that he had such a tendency years earlier, when the events alleged by [Z] took place, then you must ignore them, because, in those circumstances they would have no relevance to the issue in this case. However, if you are sure that the convictions for rape in [redacted] do show such a tendency, then this may support the prosecution case. It is for you to say whether or not it does and, if so, to what extent. However, of course, the fact that someone has committed a rape in [redacted] does not prove that he did so on the occasions that we are concerned with in this trial. [The defendant's] convictions may only be used as some support to the prosecution case. You must not, of course, convict him wholly or mainly because of it."

22. There is no ground of appeal on the basis of the summing-up. Despite that, it is material to this appeal that although the judge said that he would remind the jury of the evidence about the [redacted] convictions, he did not in fact do so. The only reference to the [redacted]

convictions in the summing-up was therefore in the passage that we have set out above.

The applicable principles

23. Section 101 of the Criminal Justice Act 2003 provides so far as relevant:

> "101 Defendant's bad character
>
> (1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—
>
> (a) ...
> (b) ...
> (c) ...
> (d) it is relevant to an important matter in issue between the defendant and the prosecution
> (e) ...
> (f) ...
> (g) ...
>
> (2) ...
>
> (3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged."

24. Section 103 provides (again so far as relevant):

> "103 'Matter in issue between the defendant and the prosecution'
>
> (1) For the purposes of section 101(1)(d) the matters in issue between the defendant and the prosecution include—
>
> (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
>
> (b) ...
>
> (2) Where subsection (1)(a) applies, a defendant's propensity to commit

offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of—

(a) an offence of the same description as the one with which he is charged, or

(b) an offence of the same category as the one with which he is charged.

(3) Subsection (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case."

25. Certain principles are well established:

(a) There is no minimum number of events necessary to demonstrate propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity but it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged: *Miller* at [9].

(b) Old convictions with no special feature shared with the offence charged are likely seriously to affect the fairness of proceedings adversely unless despite their age it can properly be said that they show a continuing propensity: *Miller* at [11]. We interpose that the same principle must apply in reverse when what is being proposed as bad character is subsequent conduct, rather than conduct that precedes the offence being tried. The question must be whether it can properly be said that the subsequent conduct demonstrates a propensity at the earlier time to commit the offence which is alleged against the defendant.

(c) If a judge has directed himself or herself correctly, this court will be very slow to interfere with a ruling as to admissibility. It will not interfere unless the judge's judgment as to the capacity of prior events to establish propensity is plainly wrong or discretion has been exercised unreasonably in the *Wednesbury* sense: *Miller* at [5]; *Rowe* [2022] EWCA Crim 27 at [94].

(d) Even if it is positively established that there has been an incorrect ruling or misdirection by the trial judge, it should be remembered that this court is required to analyse its impact, if any, on the safety of any subsequent conviction: *Renda* [2006] 1 WLR 2948 at [4].

(e) The exercise being undertaken by the judge on an application to adduce bad character evidence is fact sensitive. Reference to the facts of other cases is therefore generally to be deprecated: *Renda* at [3].

The appeal submissions

26. Miss Brickel, who represents the appellant before us as she did in the court below, essentially repeats the submissions she made to the judge. She submits that the weight to be attached to the [redacted] convictions is less than it would have been had that offending pre-dated the offending that is the subject of the present proceedings. She criticises the judge's treatment of the facts in *Miller*, submitting that it is not analogous to the present case. In *Miller* the historic conviction was for the gang rape of a girl of 15 which was said to be evidence of propensity to commit the offences of rape on the defendant's young niece. Here Miss Brickel submits the [redacted] convictions were against an [redacted] female with whom he had no prior relationship, which she submits to be a major point of difference, not similarity, when compared with the offending against Z. She also criticizes the nexus relied upon by the judge that the [redacted] and Z were both "vulnerable", the nature of their respective vulnerabilities being quite different. She does not accept that there is any real similarity based upon acute risk of discovery, again contrasting the circumstances of the [redacted] convictions where the rape of a complete stranger occurred in a public place overlooked by occupied houses, with the circumstances of the offending against Z which almost exclusively occurred in what amounted to the home environment, where the appellant was in a position of trust in relation to Z which reduced the likelihood of detection, whether or not there were others at home at the time. Finally, she submits that the fact that the [redacted] convictions included the infliction of oral sex on his victim is not a sufficiently distinctive feature to demonstrate propensity in relation to his abuse of Z.

27. Turning to section 101(3), she submits that the admission of the [redacted] convictions had such an adverse effect on the fairness of the proceedings that the judge should have excluded them.

28. For the respondent, Mr Bearman, who represented the prosecution at trial and has represented the Crown before us, submits that the judge's decision was open to him and discloses no error of principle and no basis upon which it could be said that the judge was plainly wrong on admissibility. He relies upon four features of the [redacted] convictions: namely (a) he submits that they demonstrate the appellant's appetite for unlawful sex and an inherent abuse of power; (b) he submits that they demonstrate a tendency to force his victims to give him oral sex; (c) he submits that they demonstrate a willingness to embark on non-consensual sexual activity in circumstances where there was an acute risk of discovery; and (d) he submits that the [redacted] convictions and the behaviour alleged against Z demonstrate the appellant preying on extremely vulnerable complainants.

29. Turning to section 101(3), he adopts the approach suggested by the Court of Appeal in *Hanson* where the following factors were said to be relevant but not exhaustive:

    (a) The degree of similarity between the previous conviction and the offence charged.

    (b) The respective gravity of the past and previous offences.

    (c) The strength of the prosecution case. If there is no or very little other evidence against the defendant it is unlikely to be just to admit previous convictions whatever they are. Previous convictions cannot be used to bolster a weak case.

30. Overall he submits that the judge did not err in law either in his ruling on admissibility or in refusing to exclude the evidence of the [redacted] convictions.

Discussion and resolution

31. It is essential to bear in mind that the matter in issue between the prosecution and the defence was not simply whether the appellant had a propensity to commit sexual offences against females but whether he had a propensity to commit offences of the kind with which he was charged, namely the sexual abuse and rapes committed against a young child. Had the charges that the appellant faced in these proceedings been sexual abuse or rape of an adult female, we consider that it would have been plain beyond argument that the [redacted] convictions were admissible. However the situation here is different.

32. We start with the judge's reasons which are encapsulated in paragraph 18 and which we have set out above. The first feature relied upon by the judge was that both occasions involved a "young female" drawing a comparison with *Miller*. We have two major and connected reservations about this feature. First, it seems to us to be stretching language too far to describe Z and the victim of the [redacted] convictions as a "young female" as if that were potentially probative of a propensity to offend sexually against a seven to nine-year-old child. It is not in our judgment self-evident that a propensity to offend sexually against a [redacted] woman is probative of a propensity to engage in paedophile abuse against a seven to nine-year-old girl. In this context a [redacted] woman is mature, both physically and generally, whereas the seven to nine-year-old child is immature. We express no concluded rule because there is no evidence in the case to support it but we do not consider that there was any basis on which the judge could draw support on the basis of "youth" from the fact of the [redacted] convictions. What may be said with confidence on the basis of the experience of the courts on an almost daily basis is that the psychology that drives people to paedophilia is not necessarily or even probably the same as the psychology that drives people to commit sexual assaults on mature victims. There appears to have been no consideration of these differences in the judge's reasoning.

33. Second, we do not consider that the analogy that the judge drew with the facts of *Miller* was sustainable. In *Miller* the age of the victims, 11 and 15, were more closely aligned than in the present case. It is in that context that the Court of Appeal recognised in *Miller* that the previous conviction, though founded on different circumstances, demonstrated a propensity for "sex with a young girl". Furthermore, the passage from paragraph 18 of *Miller* relied upon by the judge, which we have set out above, concentrated more on the underlying abuse of power as evidence of propensity. Reminding ourselves of the fact-sensitive nature of the decision to be taken in each case, we accept that many serious sexual offences may involve an abuse of power, since the will of the victim is overborne. But that feature is only one factor to be weighed in the balance when considering whether and to what extent a previous or subsequent conviction is probative of a propensity to commit the offence with which a defendant is charged.

34. The second feature relied upon by the judge in paragraph 18 of his ruling was the

vulnerability of each of his victims. Once again, such a feature can be identified from significant number of cases of serious sexual offending. But the question to be asked is whether and to what extent it is a feature that renders the bad conduct probative of a propensity to commit offences of the type charged. Here as the judge acknowledged the circumstances of the vulnerability of the victim in the [redacted] convictions was quite different from the circumstances of the offending alleged against Z. Furthermore, because of the limited information about the circumstances of the [redacted] convictions, there was little information before the judge that would have been enabled either him, or later the jury (not least because the judge did not return to the evidence in part two of his summing-up) to make any real assessment of the level of vulnerability of the victim of the [redacted] convictions. Once again, we do not consider it to be self-evident that the nature of the victim's vulnerability in the [redacted] convictions demonstrates or even evidences a propensity to commit the offences alleged against Z, whose vulnerability was quite different as a young child and where the source of the vulnerability because of the familial relationship was also quite different.

35. It seems to us to be tenuous, though not completely irrelevant, to bring into account that the other sexual offending was committed against a vulnerable victim. At its highest, the weight to be attributed to it as a feature in the absence of more compelling factors such as a distinctive mode of operation is likely to be slight.

36. The judge was right to remind himself that propensity can be established by a single conviction. But he did not in paragraph 19 or elsewhere give reasoned consideration to the essential question whether the *differences* between the circumstances of the [redacted] convictions, taken together with the *similarities* that he had identified viewed overall meant that the [redacted] convictions could or could not be regarded as probative of a propensity on the part of the appellant in 2010 to 2013 to carry out the offences of the kind alleged against Z.

37. In our judgment, given the nature of the facts underlying the [redacted] convictions, the differences between those facts and the matters alleged against the appellant in these proceedings can only be described as stark. The [redacted] convictions involved a mature adult aged [redacted]. The offences against Z were alleged to have occurred when she was aged seven to ten. For the reasons we have given, we regard this difference as being of the highest importance in the absence of evidence or good reason to suppose that a willingness to carry out the [redacted] offences could or did demonstrate a propensity to have committed offences of the kind alleged against Z some [redacted] years before.

38. Second, the [redacted] convictions involved a stranger. The offences alleged in these proceedings were against a close family member.

39. Third, the [redacted] convictions arose out of a spontaneous and opportunistic encounter with the victim. The allegation in these proceedings was of long term and determined grooming and sexual abuse within the protective environment of the family.

40. Fourth, and related to the previous point, the [redacted] offence could be described as a

one-off. That is quite different from the course of conduct alleged in these proceedings.

41. Fifth, the [redacted] offending occurred when the appellant had been drinking. There is no such suggestion in relation to the offending against Z.

42. Sixth, we consider that the reference to an acute risk of discovery is of limited if any value, given the differences between the facts of the [redacted] convictions (where the appellant lured the victim down an alley with no one immediately present) and the facts of the offending alleged against Z (which, as we have said, occurred in what was for the appellant protective of his position of trust in the home environment).

43. We accept that it can be said of the [redacted] convictions that they showed a willingness to have non-consensual and unlawful sex with his victim in that case. But for the reasons we have given, it seems to us that this is of limited value when trying to assess whether the appellant had a propensity to abuse Z as alleged.

44. Turning to the matters now relied upon by the prosecution, the only additional feature is the fact that the appellant was convicted of oral rape and Z said that the same had happened to her. While that is a feature that is common to the [redacted] convictions and the offending alleged against Z, it seems to us to be a feature that should be given little weight, falling far short of being a feature that could properly be regarded as distinctive so as to be significantly probative.

45. We return to the first question in *Hanson*. Do the matters relied upon by the prosecution establish a propensity to commit offences of the kind charged in relation to Z? We remind ourselves that we are reviewing the judge's decision and it would not be sufficient, or even particularly relevant, that we think either individually or collectively that we would have come to a different answer than that reached by the judge.

46. In our judgment, the reasons given by the judge for answering this first question as he did, did not justify the conclusion he reached. What is lacking is an absence of any assessment of the similarities and differences with a view to determining whether the [redacted] convictions did in fact establish the relevant propensity. Had the judge engaged in such an exercise, as in our judgment he should have done, he should have reached the conclusion that the probative value of the [redacted] convictions was limited. At their highest and at the most general level the [redacted] convictions could be said to establish a propensity to commit serious sexual offences against adult females. But that leads directly to the second *Hanson* question: does that propensity make it more likely that the defendant committed the crimes against Z with which he was charged? The judge did not separately address this question. Had he done so, he should in our judgment have concluded that the entirely general propensity identified in answer to the first question did not make it appreciably more likely that he committed the particular offences alleged against Z.

47. We use the phrase "appreciably more likely" for two reasons. First, because we recognise that a propensity to commit sexual offences generally could filter through to make it at least theoretically more likely that the appellant would commit sexual offences against anyone,

including Z. But second, the question whether the propensity evidenced by the [redacted] offences makes it more likely that the appellant committed the offences against Z, must also take into account not only the differences to which we have referred but also the time difference between[redacted] and the time of the offences alleged against Z.

48. In our judgment, the facts of the [redacted] convictions provided only limited evidence that is capable of going to support a conclusion that the general propensity identified in answer to question 1 made it more likely that the appellant committed the offences alleged against Z. Once all the features to which we have referred are taken into account, we consider that the second *Hanson* question should be answered by saying that any increased likelihood was at best slight.

49. Turning then to the third *Hanson* question, we are in no doubt that the impact of admitting the convictions would be very potent and that their prejudicial effect would substantially outweigh their limited probative value. In his measured and realistic submissions, Mr Bearman recognised the potency of the impact that the admission of the [redacted] convictions would be likely to have, though he did not accept that their probative value was limited. Once the limited probative value of the [redacted] convictions is weighed against the likely prejudice to the appellant, we are satisfied that the decision not to exclude them is insupportable.

50. The judge in paragraph 21 of his ruling was correct that merely damaging the defence case was not a good reason on its own to exclude the evidence; and he was also right to say that the prosecution case without the [redacted] convictions was not a weak one. We are not sure we understand his reference to the chronology of events not being an obstacle to admission. If he was referring to the fact that the [redacted] offending post-dated the offending alleged against Z that appears to us to be a matter that went to questions 1 and 2, rather than to the question the judge was addressing in paragraph 21 of his ruling.

51. What the judge did not do in his ruling was to engage in any exercise that sought to assess the balance between the probative and the prejudicial effects of admitting the [redacted] convictions. Had he done so, as we have indicated, we consider that he should have concluded that the [redacted] convictions should be excluded. Their admission could only distract from the important questions under sections 101(d) and 103 to which we have referred.

52. We note in passing that the approach we have adopted is materially similar to the approach adopted by a very strong constitution of this court in *Benabbou* [2012] EWCA Crim 1256 at [16] to [24], which it is not necessary to set out in detail here.

53. We have given intense attention to the summing-up to see whether the potential prejudice to the appellant was either obviated or ameliorated by the directions to the jury about how they should approach the facts of the [redacted] convictions and the principles pursuant to which they had been admitted. Regrettably we are unable to find anything in the summing-up that might have cured the potential injustice. In the passage we have set out above, the judge did not identify what, if any, features were said to be probative of the appellant's alleged

propensity to commit offences of the kind with which he was charged and why it was suggested that they might have probative value. His summary of the defence case was brief and did nothing to explain how, for example, the jury should approach the fact that the [redacted] offending post-dated the offending alleged in the current proceedings as they did. It may be that the judge intended to address such topics when he returned to the convictions in part two of his summing-up. But in event he did not do so.

54. Finally we stand back to assess whether the appellant's conviction of the index offences is safe, despite the wrongful admission of the [redacted] convictions. We accept, as did the judge, that the case against the appellant was not weak in the absence of evidence about the [redacted] convictions. But in a case that was substantially the appellant's word against Z's, we are unable to accept that the outcome would necessarily have been the same if the [redacted] convictions had not been admitted. In other words, we are unable to conclude that the convictions are safe in any event.

55. For these reasons, we are driven to conclude that this appeal must be allowed. Mr Bearman, are you going to seek a retrial?

MR BEARMAN:

56. My Lord, we do make an application for a retrial.

LORD JUSTICE STUART-SMITH:

57. We have allowed the appeal. We quash the convictions. We order a retrial on all the counts in respect of which we have quashed the convictions. We direct that the appellant be re-arraigned on the fresh indictment within two months. You will be conscious of the decision of the Lady Chief Justice yesterday about the significance of the two months?

MR BEARMAN:

58. Very.

LORD JUSTICE STUART-SMITH:

59. Are there any other directions that we should give, for example should we give a direction that the trial be conducted by a Presiding Judge or by the Resident Judge or by a judge other than the judge who conducted the last trial? I would expect that as a matter of normal listing practice it will be listed in front of another judge.

MR BEARMAN:

60. My Lord, yes. I would not have thought it necessary to make any direction as to specify the Resident Judge or a Presiding Judge, only that it be retried by a different judge.

LORD JUSTICE STUART-SMITH:

61. And he, as we know, is in custody and not liable to be released in the period leading to -- is that right?

MR BEARMAN:

62. I understand his earliest date of release is some time in 2026.

MISS BRICKEL:

63. Yes.

LORD JUSTICE STUART-SMITH:

64. So we do not need to be concerned about that. If there was any likelihood of him being released the matter should be brought back to court for consideration.

65. I have already given a warning about -- the sexual offences warning. I should probably also make a direction under section 4(2) of the Contempt of Court Act restricting reporting of the proceedings until after the retrial.

MR BEARMAN:

66. Yes, thank you.

LORD JUSTICE STUART-SMITH:

67. Is there anything else?

MR BEARMAN:

68. No, my Lord. My Lord, is he on technical bail therefore on this matter since he is serving on the other matter?

LORD JUSTICE STUART-SMITH:

69. Yes. Do we need to say anything about representation orders?

MISS BRICKEL:

70. My Lord, no.

LORD JUSTICE STUART-SMITH:

71. Let us leave it like this, if we do need to say something about representation orders we make representation orders limited to junior counsel only. But that can always be brought back

if need be.