Neutral Citation Number: [2020] EWCA Crim 790

Case No: 201902509 B5 & 201901598 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT LUTON & CROWN COURT IPSWICH
HHJ Mensah and HHJ Pugh
T20197017 & T20187160

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2020

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
and
MRS JUSTICE CHEEMA-GRUBB DBE
and
SIR NICHOLAS BLAKE

- -

Between :

CARL BATER-JAMES	**1st Appellant**
AND	
SULTAN MOHAMMED	**2nd Appellant**
- and -	
The Queen	**Respondent**

- -
- -

Ms Pamela Brain (instructed by **Representation Order**) for the **1st Appellant**
Mr Chris Whitehouse (instructed by **A2 Solicitors**) for the **2nd Appellant**
Mr Tom Little QC & Ms Gabrielle McAvock (instructed by **CPS Appeals & Review Unit**) for the **Respondent in Bater-James**
Mr Tom Little QC & Mr Andrew Thompson (instructed by **CPS Appeals & Review Unit**) for the **Respondent in Mohammed**

Hearing dates : 27th March 2020

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Approved Judgment

Lord Justice Fulford :

The Issues of Principle

1. These two otherwise unrelated cases have been listed together to provide the court an opportunity to consider various issues relating to the retention, inspection, copying, disclosure and deletion of the electronic records held by prosecution witnesses. These issues frequently arise in the context of sexual offences as regards material stored on complainants' mobile telephones, but they occur in a wide range of other circumstances. Therefore, although this judgment focusses on the position of complainants who allege sexual impropriety, the principles will be equally relevant – depending always on the facts – to other prosecution witnesses. For these reasons we have used the words "complainant" and "witness" interchangeably.

2. We have first summarised the circumstances of these two cases before analysing certain issues of principle concerning digital records in this overall context which are relevant to the merits of the individual grounds of appeal; the latter are dealt with in the concluding section of the judgment.

Carl Bater-James

Introduction

3. On 11 June 2019 at the Luton Crown Court, Carl Bater-James (now aged 28) pleaded guilty to assault by beating of an emergency worker (count 7).

4. On 21 June 2019 at the Crown Court at Luton, he was convicted by a jury of assault occasioning actual bodily harm (count 1), sexual assault (count 2), assault by penetration (count 3) and making a threat to kill (count 4).

5. On 14 November 2019 he was sentenced to 9 months' imprisonment on count 1; 12 months' imprisonment concurrent on count 2; 9 years' imprisonment concurrent on count 3; and 2 months' imprisonment consecutive on count 7.

6. The total sentence, therefore, was 9 years and 2 months' imprisonment.

7. He appeals against conviction on counts 1 to 4 by leave of the single judge.

8. The provisions of the Sexual Offences (Amendment) Act 1992 apply to counts 2 and 3 (sexual offences committed against the complainant on those counts). No matter during the complainant's lifetime shall be included in any publication if it is likely to lead members of the public to identify her as the victim of these offences.

9. The complainant and appellant split up, having been partners. The appellant, following their separation, arrived at her home address on 19 December 2018 whilst under the influence of alcohol and cocaine. He was abusive to the complainant, he pushed her and, when asked to leave, refused. He threw money in her direction and called her a prostitute. He covered her mouth when she cried out to a neighbour for help. She screamed and bit his hand. Her daughter awoke and came into the room, and witnessed the appellant slapping and punching her mother. The appellant grabbed the latter's telephone to inspect her messages. During this altercation, the complainant was scratched and suffered bruising to her arm (count 1).

10. The appellant placed his hands around the complainant's neck and forced her to kiss him, placing his tongue in her mouth (count 2). By now all three children were present and she moved them into the living room. The appellant calmed down to an extent, but he then started to accuse her of sleeping with a friend of his. While she was holding one of her children, he pulled her trousers down, saying that he wanted to check if she had slept with anyone else. He inserted his finger into her vagina, which he smelt when he pulled it out (count 3). He told her that she was lucky he could not detect anything.

11. The appellant stayed the night at the complainant's home. The following day the appellant questioned her daughter about their whereabouts the previous evening, and he once again became angry. He grabbed a knife which he held against the complainant's face, threatening to kill her (count 4).

12. Police officers attended in response to a 999-telephone call but the appellant had left the premises. There was an attempt to arrest the appellant on 9 January 2019 when he assaulted a police constable and escaped (count 7). Thereafter, he was arrested on 11 January 2019 having tried to climb from a window at the address to which he had been traced.

13. In addition to the matters set out above, the complainant gave evidence that she had loved the appellant and was aware that he had had a difficult life. Although she had known him for longer, their relationship had lasted for only approximately 5 months. She wanted to help him but she was of the view he had "gone too far". She said that, nonetheless, she missed and still loved him. There had been telephone contact between them whilst he was on remand.

14. The appellant's case was that the complainant and her daughter were lying. He denied he had assaulted the complainant, or that he had grabbed a knife and threatened her. He suggested that any kissing or sexual touching had been with consent (he maintained they had consensual sexual intercourse that night). He said it was the complainant who had acted violently by swinging a pole at him. He had disarmed her. It was suggested that the complainant was manipulative and had "drip-fed" information to the court.

The Rulings on the admissibility of the complainant's bad character (11 June 2019)

15. During the trial the judge ruled on two applications to introduce bad character evidence relating to the complainant.

The First allegation

16. The first incident concerned an allegation by the complainant in 2008, which it was suggested by the appellant was false. The complainant told the police on 22 February 2008 that she had been assaulted. The appellant sought to demonstrate her report was untrue on the basis of the contents of a police record ("Crime Print J/8634/2008": see [44] below). The complainant had alleged to the police that she had been spat at and punched whilst at school, and she suffered swelling and slight bruising to her cheek. However, when the police investigated the matter, two witnesses, who were referred to as being independent, gave a contradictory account suggesting that her injuries had been caused when she walked into a wall. The police were told by the complainant's mother that she wished to withdraw the complaint. It was recorded as "no crime". The suspect apparently told the police in interview that there had merely been an argument.

17. The judge took into account that the complainant had been 12 years old at the time, the incident had occurred over 10 years earlier and it was not a "straightforward" false allegation. In all the circumstances, she decided that it would not assist the jury and it was not admitted.

The Second Allegation

18. The second example of suggested bad character related to an allegation the complainant had made in 2010 of a sexual assault on her by a male, which it was said bore similarities to the present allegations. The person against whom the allegation was made had suggested, when interviewed by the police, that they had been in a relationship and he maintained that the allegation was entirely malicious.

19. The relevant factor as regards this incident in the context of the present appeal is that the complainant informed the police that she had deleted the entirety of the

Facebook messages between herself and the suspect, messages which it was submitted had the potential to throw light on the nature of their relationship.

20. It appears, however, that the complainant subsequently admitted to the police that she had lied about deleting the Facebook messages, which she had retained. Following this admission, she was repeatedly requested to provide them to the prosecution. Eventually the police set a seven-day deadline. At some stage after the deadline had passed, she told the officers that she had deleted the messages having received a voicemail message informing her that the case would not be pursued if she failed to provide these records.

21. The judge permitted this evidence to be introduced, albeit, with the agreement of the appellant's counsel, the context was described as an assault, without reference to any sexual element. Although there is no ground of appeal relating to the limitation imposed on the way the offence was described, the decision by the judge to admit this evidence is relevant to the approach taken by the judge on the abuse of process application (see [25] *et seq*. below).

The Ruling on the prosecution application to recall the complainant (13 June 2019)

22. During the cross-examination of the complainant, she was asked about her use of mobile telephones because the appellant suggested that they had remained in close contact throughout the entirety of the relevant period. The appellant suggested, therefore, that their relationship had endured without interruption, including after his remand into custody.

23. The police took possession of one of the complainant's mobile telephones, the contents of which were downloaded. There was evidence, in addition, that she had been provided with a "secret" telephone in November 2018 after, as she alleged, she had been harassed by the appellant. Although it had been in her possession at the time of the present incidents, she said she had lost it at some stage thereafter. She also had access to a mobile telephone owned by a friend which she had used to contact the appellant. She maintained this device was no longer available. Finally, there was evidence concerning her "current" telephone, which the complainant was utilising at the time of the trial and which she had used to contact the appellant. She accepted she had refused to allow the police to examine or download the contents of this device. She suggested this was because she feared the police would seize it and it would not be returned before the trial. The officer in the case indicated that she had told her that they would only need it for a short period of time, because the download of the contents would be completed within a few hours. The complainant referred to the private nature of the material on this device.

24. Following the complainant's cross-examination in which she gave evidence that she had been in contact with the appellant after he had been charged, she made a further statement and produced voicemail messages and a selection of correspondence which she had previously resisted disclosing. She had played the voicemail messages to a police officer who recorded them. The judge allowed the prosecution application to recall her to give evidence in order to correct what was suggested to be an unfair impression that had been created during her cross-examination. The judge indicated that she would afford the appellant time to call additional evidence, including his mother who had been a conduit for some of the communications between the complainant and the appellant. The complainant was directed to bring her mobile telephone to court. She complied on or about 13 June 2019. She agreed that some further information had recently been deleted or otherwise was unavailable. She suggested she "felt bad" for the appellant and she believed she was protecting him, given that he should not have been using a mobile phone in prison.

The Ruling on the abuse of process application (17 June 2019)

25. The appellant submitted that it had become impossible for him to receive a fair trial. It was suggested that the complainant had manipulated the trial process, in particular by destroying evidence of some of the communications between herself and the appellant. The material she had provided to the police did not, until on or about 13 June 2019 (close to the end of the prosecution case), include the telephone she had used at the relevant time.

26. The judge rejected the appellant's contention that the complainant was "running" the prosecution. She bore in mind that she had admitted lying, that she had remained in contact with the appellant and had deleted messages from her mobile telephone. However, as she observed, she had not at any stage withdrawn her allegations about the events on 19 December 2018. The judge noted that the appellant had not produced his own mobile telephone (illegally held by him in prison), and determined there would have been no information on the complainant's mobile telephone of assistance to him. There was significant evidence of the conversations between him and the complainant, none of which tended to indicate the complainant had been inaccurate as to the events with which the jury were concerned. The judge concluded that the deleted material would not have added to the jury's understanding of the case. As noted above, the complainant made her mobile telephone available to the police on or about 13 June 2019 and they took "screen shots" of potentially relevant material. None of the material produced, albeit incomplete, contradicted the account of the complainant as regards the alleged offences with which the jury were dealing.

27. The judge ruled that the inconvenience and frustration caused by the way that these events had unfolded did not amount to an abuse of the process of the court. In the event, the jury had been provided with the relevant facts. The judge determined that the failure by the complainant to provide the telephone she had used to contact the appellant after the incident until a late stage in the trial was a side issue.

The Appeal

28. Against that background, there are three grounds of appeal.

The First Ground of Appeal

29. It is submitted the judge erred in refusing to admit bad character evidence in relation to the incident in 2010, in that there was sufficient material to establish a false allegation had been made, which demonstrated a propensity on the part of the appellant to make false allegations. It is suggested this was of direct relevance to the critical issues in the case.

30. The respondent submits that the Crime Report did not prove that the complainant's allegation was false, it did not demonstrate a propensity to make a false allegation and it was irrelevant to the issues the jury had to decide.

The Second Ground of Appeal

31. It is submitted the judge erred in allowing the prosecution to recall the complainant, and to introduce evidence of the voicemails and letters, on the basis that she had been allowed to subvert the disclosure process; she had destroyed independent evidence in the case; she was being permitted to select the evidence that was introduced before the jury; and there was an absence of core material, such as a call log.

32. The respondent submits that it was appropriate to recall the complainant to deal substantively with the evidence introduced during the cross examination of her to the effect that she had been in contact with the appellant whilst he was in custody. She was able to produce evidence of voicemail messages from the appellant and his mother, and letters written to her, that she received via his mother. It was agreed that the complainant had not written to the appellant. The appellant chose not to call his mother to give evidence.

The Third Ground of Appeal

30. It is submitted the judge erred in refusing to stay the proceedings, essentially on the basis of the alleged obstructive behaviour on the part of the complainant. It was suggested that she had deliberately manipulated the proceedings, particularly by withholding evidence and then disclosing it at a time that was damaging to him.

33. The respondent submits that the various allegations made against the complainant and her conduct before and during the trial were all matters of evidence for the jury to evaluate. They were well placed to assess whether the complainant may have deliberately destroyed evidence that had a tendency to exonerate the appellant. It is contended that in all the circumstances the trial was fair.

Sultan Mohammad

Introduction

34. On 12 April 2019 in the Crown Court at Ipswich, the applicant was convicted of rape, contrary to section 1 Sexual Offences Act 2003. On 17 April 2019, before the same court, he was sentenced to 8 years' imprisonment. There were various consequential orders that are irrelevant for these purposes.

35. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. No matter during the complainant's lifetime shall be included in any publication if it is likely to lead members of the public to identify her as the victim of these offences.

36. The applicant renews his application for leave to appeal his conviction, following refusal by the single judge.

37. The complainant in this matter, who was aged 22 at the material time, had arrived in the UK on 13 September 2018 from the USA on a scholarship, studying for a one-year Masters' degree at the University of Essex. On 2 October 2018 the complainant visited the Sub Zero club on the university campus with her flatmates; she had been feeling tipsy on arrival (she had earlier drunk some cider and wine), and consumed more alcohol at the club (vodka and alcopops). She was sober when she left. She arrived home at approximately 3.45 am and went to sleep at approximately 4.45 am. The complainant woke sometime before 6.00 am and felt the applicant on top of her with his penis in her vagina. She was very confused and it took her a while to understand what was happening. She pushed the intruder off, whilst he repeated the words "you're fine, you're fine". The complainant noticed that the man was not wearing a condom and told him to get off. He told her his name was Michael and that they had met at the club. The complainant started crying and the applicant got dressed and said that he was going outside for a smoke. Shortly afterwards, the applicant returned; he called her ridiculous and left.

38. There was CCTV footage of the applicant entering the block of flats at 5.16 am and then returning to the lobby area at about 5.27 am. As result, the applicant

spent no more than 10 minutes in the complainant's room. This was of particular significance because the applicant's account was that he and the complainant had sex for about 30 minutes, and that in all he was with her for about 45 minutes.

39. The complainant recorded a video on her mobile telephone after the incident, at 5.26 am, setting out what she said had occurred. She tried to contact her friends and then went to sleep. She sent a long message to one of her friends, stating "I think I was raped" and "I'm almost positive", and shortly afterwards she sent her a long message setting out her account.

40. The toxicology was inconclusive as to the complainant's level of alcohol at the relevant time.

41. The applicant was not a student, but he visited the University of Essex with friends during fresher's week to drink, party and make new friends.

42. It was the prosecution's case, therefore, that the applicant had entered the complainant's room uninvited and raped her whilst she was asleep. In addition to the matters set out above, the Crown relied on inconsistencies in the applicant's evidence, including his assessment of the height of the complainant and his assertion in interview that he was going straight home when he left the complainant, whereas CCTV showed him going to another building, where he put his hand through a window.

43. The applicant's case was that the sexual intercourse was consensual. He gave evidence that he had been at Sub Zero, where he met some international students who had told him that there was an "after-party" at the Meadows. After the applicant became separated from a friend of his called Wayne, he went to a different party in North Towers. When it started to break up, he tried to find the party at the Meadows. Instead, he encountered the complainant, and was invited into her room where she initiated sexual intercourse. She did not appear drunk. He suggested that in due course the complainant began to act strangely, repeatedly asking his name. She asked him to stop, which he did. He thought her unexpected behaviour was possibly the result of her having consumed drink or drugs. He asserted, moreover, that an intoxicant may have led her to forget what had happened at the commencement of their encounter.

The Ruling on disclosure (2 April 2019)

44. The police undertook what on any view was a thorough investigation in this case, which included downloading and copying the contents of the complainant's relevant mobile telephone. The extract from the first Disclosure Management Document dated 5 February 2019 contained the following:

> "The OIC (Officer in the Case) is looking at all data from that phone from the 12/09/2018. The police are looking at any patterns in the complainant's behaviour that might be relevant to understanding the case. They will look for communications that might further the understanding of this case in any way, including references to behaviour that might be relevant to understanding any aspect of the events, particularly whether consensual sex may have taken place. They will look for any reference to the events and they will look for anything that support or challenge assertions made by the defendant and material witnesses. They will look for anything that might have an impact upon the question of whther (sic) the defendant and the material witnesses as reliable witnesses of fact (the relevance test)."

45. A full review of the messages, beginning with those sent on the evening of the 2 October 2018 through into 2019, was provided as part of the evidence in the case. In order to identify if there was any other material, "targeted" search terms were used. It was from this process that a particular exchange of messages relating to an incident in 2017 was identified, which appeared to reveal an unsatisfactory sexual encounter between the complainant and a male friend. The material relating to this incident and exchanges concerning yet another incident was disclosed to the defence as unused material that subsequently formed the basis for the applicant's application to introduce material pursuant to section 41Youth Justice and Criminal Evidence Act 1999 ("YJCEA") (see [59]).

46. A second Disclosure Management Document was provided on the 1 April 2019, the day before a court hearing on 2 April 2019. This document listed the 21 keywords that had been used to conduct the searches of 40,000 pages of material. It set out a description of the full content of the communications that had previously been disclosed to the defence, as a result of the use of the search terms.

47. The applicant submitted to the judge that the 40,000 pages of communication seized from the complainant's phone should be examined in their entirety. Although the communications had been searched by the police using the search terms just described to find relevant material, the applicant submitted this was an inadequate approach to the disclosure process and all the items should be considered individually.

48. The judge ruled that the use of search terms by the police in a case in which there was this quantity of material was appropriate. He observed that the defence had

been invited by the prosecution to provide additional search terms but the invitation had seemingly been ignored. He determined that the disclosure process was appropriate and met the obligations and responsibilities of the Crown; he observed that any additional search terms that the defence sought to be used could be notified to the prosecution.

49. Following that hearing, the applicant provided further search words which did not result in any additional disclosure.

The First application under section 41: ruling on the complainant's previous sexual history (11 April 2019)

50. The applicant advanced submissions under section 41(3) YJCEA (see [59]). The content of some of the communications from the complainant's mobile telephone tended to show that there had been the previous occasion in 2017 referred to above when she had told a friend that she thought that she had been raped but could not remember what had happened. She was unable to recall what had then occurred because she had consumed alcohol. This incident had not been reported to the police and it was submitted that the complainant must have concluded that she had overreacted. Her behaviour in 2017 was said by the applicant to have been so similar to the present case that the evidence of the applicant's messages sent at the time ought to be admitted in evidence. In particular, it was submitted they demonstrated that the applicant had been unable to remember what had occurred because she had consummed alcohol and she had simply surmised that she might have been raped. She wrote in 2017, *inter alia*, "So last night I had sex with this guy and I barely remember I was super fucking drunk… I'm super disgusted with myself" and "I'm just crying because I was so drunk and so stupid" and "I'm pretty sure we had sex with no condom". She decided she was not going to report the incident as a rape, indicating she was not going to be "one of those girls who pins someone for rape because I was drunk" and she concluded "I think I was being dramatic" and "I totally overreacted". She expressed the view that "There is a difference between having fun and being dangerous and I am always playing with that line."

51. Other messages revealed that there had been another occasion when she had "blacked […] out" when she had a sexual encounter which she could not remember and had asked the man to tell her what had happened. His description failed to jog her memory.

52. Additional disclosure from the Crown included notes from sessions with a psychologist (2017-2018) which revealed that the complainant had reported "I have done something I have regretted because of drinking" and "When I drink alcohol I can't remember what happened".

53. The judge ruled that this evidence was inadmissible as the previous incidents had occurred approximately two years earlier, they involved individuals the complainant knew and occurred in the context of her admitted drunkenness. As a result, any similarity could be explained as a coincidence.

The Second application under section 41: further ruling on the complainant's sexual history (12 April 2019)

54. A further application was made in relation to the complainant's previous sexual history, following the cross-examination of the applicant in which he was asked about the use of condoms. The application was made under section 41(5) YJCEA (see [59]). The prosecutor asked whether, prior to intercourse, there had been any discussion about the risk of pregnancy or passing on disease. The applicant replied there had not. The applicant submitted that the question implied that it was unbelievable that the complainant would have had unprotected consensual sexual intercourse without prior discussion, and that in the absence of protection, she must have been raped. It was submitted that the records from the complainant's telephone showed that there had been a previous incident in which she had had sex without a condom and that as a result this evidence should be admitted.

55. The prosecution responded that the question had been limited to asking whether there was a discussion before unprotected sexual intercourse occurred, and that the absence of protection had not been equated with rape.

56. The judge ruled against the defence application, on the basis that this application did not come within the ambit of section 41 YJCEA. The question put by the prosecution was whether there had been a conversation about the use of protection, in the context of the applicant's case that what occurred was consensual. The judge was of the view that this was entirely appropriate way of exploring whether this was a truthful account. As the judge paraphrased the question, it was essentially to the effect "well, on that basis (*viz.* it was consensual) was there any discussion beforehand about issues such as preventing pregnancy or preventing any sexual disease?" It did not involve a direct question about the sexual behaviour of the complainant. The judge found that in those circumstances section 41(5) YJCEA did not apply, but that even if it did, the refusal of leave did not have the result of rendering the conviction unsafe and as a consequence he rejected the linked application to discharge the jury.

The Appeal

57. There are two grounds of appeal.

The First Ground of Appeal

58. It is submitted that a review by the prosecution of the entirety of the telephone messages on the complainant's telephone should have been ordered; alternatively, a full copy of all the material should have been provided to the defence. It is contended that this was necessitated by the overarching right of the applicant to a fair trial, whilst recognising the protection afforded to the complainant under Article 8 European Convention on European Rights. It is conceded that the prosecution's search terms had been appropriate in the sense that they had "yielded results", namely the messages which had provided the basis for the section 41 YJCEA applications. However, it is suggested that the use of the expression "I am always playing with that line" necessitated wider enquiry. It is argued that the applicant could not know which search terms to furnish that would reveal material relevant to the kind of dangerous behaviours that this expression suggested. A further difficulty is said to lie in the complainant's nationality (American) and the use of idioms unknown to the applicant which might provide additional search terms.

The Second Ground of Appeal

59. It is submitted the judge erred in refusing the two applications under section 41 YJCEA. The section, as relevant, provides:

> **"41.— Restriction on evidence or questions about complainant's sexual history.**
> (1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—
>
> (a) no evidence may be adduced, and
>
> (b) no question may be asked in cross-examination,
>
> by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.
>
> (2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—
>
> (a) that subsection (3) or (5) applies, and
>
> (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—

(a) that issue is not an issue of consent; or

(b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or

(c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,

that the similarity cannot reasonably be explained as a coincidence.

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

(5) This subsection applies if the evidence or question—

(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual

behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate)."

[…]

60. As set out above, the first application was under section 41(3) and the second was under section 41(5).

61. Regarding the first application under section 41, it was the applicant's case that the complainant had consented, having initiated the sexual activity. The common features that are said to have been "so similar" for the purposes of section 41(3) (c) were the complainant's intoxication, her suggested consequential loss of memory and the *ex post facto* enquiry that was conducted to establish what had happened, assisted by friends and directed at the security staff (particularly regarding any relevant CCTV footage). Against that background, it is argued that the relevant strikingly (or "so") similar features are to be found in her inability as a result of drunkenness to recall, as regards both instances, how the sexual intercourse began or what happened during the encounter.

62. The respondent submits that the references to previous sexual behaviour were not strikingly similar and they otherwise did not meet the criteria for disclosure.

63. As to the second application under section 41, as summarised above, it is argued that when prosecution counsel asked whether, prior to intercourse, there had been any discussion about the risk of pregnancy or passing on disease, this constituted evidence adduced by the prosecution about sexual behaviour on the part of the complainant. As a result, it became necessary to explore the incident that occurred two years earlier to enable the applicant to rebut or explain the suggestion that in the absence of a discussion about protection, this must have been rape.

64. The respondent submits that the question did not raise any issue concerning the sexual behaviour of the complainant or, indeed, any other issue that required rebuttal or explanation.

Discussion

The Issues of Principle

65. Over the last four decades there have been exponential changes in the ways that individuals gather, store and exchange information by digital means. These two cases involve consideration of a number of issues that frequently arise in

present-day police investigations, which are all linked to the privacy concerns of complainants and other witnesses who are asked by the police to share the contents of their mobile telephones and similar devices. These frequently-arising issues of principle, as exemplified by the present cases, are as follows:

> ***The First Issue of Principle***
> Identifying the circumstances when it is necessary for investigators to seek details of a witness's digital communications. These are usually, but by no means always, electronic exchanges conducted by way of multiple platforms on smart mobile telephones, tablets or computers. These platforms are so numerous that it is pointless to attempt to list examples. In essence, the question in this context is when does it become necessary to attempt to review a witness's digitally stored communications? The linked question is when is it necessary to disclose digital communications to which the investigators have access?
>
> ***The Second Issue of Principle***
> When it is necessary, how should the review of the witness's electronic communications be conducted?
>
> ***The Third Issue of Principle***
> What reassurance should be provided to the complainant as to ambit of the review and the circumstances of any disclosure of material that is relevant to the case?
>
> ***The Fourth Issue of Principle***
> What is the consequence if the complainant refuses to permit access to a potentially relevant device, either by way of "downloading" the contents (in reality, copying) or permitting an officer to view parts of the device (including, *inter alia*, copying some material, for instance by taking "screen shots")? Similarly, what are the consequences if the complainant deletes relevant material?

66. There is an extensive legislative and regulatory framework governing disclosure in this context. Of greatest direct relevance are:

    a. Sections 3(1)(a) and 23(1) of the Criminal Procedure and Investigations Act 1996 ("CPIA");
    b. The Code of Practice to the CPIA (March 2015) ("CoP") and in particular paragraph 3.5;
    c. The Attorney General's Guidelines on Disclosure (December 2013);

d. The Crown Prosecution Service's "Guidelines on Communication Evidence" (January 2018); and
e. The "Guide to 'reasonable lines of the enquiry' and communications evidence" (July 2018) by the Director of Public Prosecution, particularly paragraphs 13 – 19.

The First Issue of Principle: identifying the circumstances when it becomes necessary for the investigators to seek details of a witness's digital communications and thereafter to disclose material to which they have access

67. There is no obligation on investigators to seek to review a witness's digital material without good cause. The request to inspect digital material, in every case, must have a proper basis, usually that there are reasonable grounds to believe that it may reveal material relevant to the investigation or the likely issues at trial ("a reasonable line of inquiry").

68. The Criminal Procedure and Investigations Act 1996 ("CPIA") provides:

> **"3.— Initial duty of prosecutor to disclose**
>
> (1) The prosecutor must—
>
> > (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused,"
>
> […]

69. The CoP at paragraph 3.5 provides:

> "In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances. For example, where material is held on computer, it is a matter for the investigator to decide which material on the computer it is reasonable to inquire into, and in what manner."

70. It is not a "reasonable" line of inquiry if the investigator pursues fanciful or inherently speculative researches. Instead, there needs to be an identifiable basis that justifies taking steps in this context. This is not dependent on formal evidence in the sense of witness statements or documentary material, but there

must be a reasonable foundation for the inquiry. In *R v H and C* [2004] UKHL 3; [2004] 2 AC 134; [2004] 2 Cr App R 10 the House of Lords observed in the context of whether there was a duty to disclose material that had been obtained and retained:

> "35. If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. **The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good.** Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court. […]" (our emphasis)

71. It is clear, therefore, that investigators should not request such material and applications to the court should not be granted if they come within the category of a 'fishing expedition'. Such a false approach was addressed in the Attorney General's Guidelines on Disclosure: Supplementary Guidelines on Digitally Stored Material (2011) at A 40 (replaced by, but annexed to, the current Attorney General's Guidelines on Disclosure (2013) (see pages 4 and 18):

> "It is important for investigators and prosecutors to remember that the duty under the CPIA Code of Practice is to "pursue all reasonable lines of enquiry including those that point away from the suspect". Lines of enquiry, of whatever kind, should be pursued only if they are reasonable in the context of the individual case. **It is not the duty of the prosecution to comb through all the material in its possession [...] on the lookout for anything which might conceivably or speculatively assist the defence. The duty of the prosecution is to disclose material which might reasonably be considered capable of undermining its case or assisting the case for the accused which they become aware of, or to which their attention is drawn**" (our emphasis).

72. That statement of approach remains entirely correct nearly a decade after it was formulated. The importance of a material justification for an invasion of the witness's privacy is reflected in the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases (2013) at paragraph 47:

> "[…] Victims do not waive... their right to privacy under article 8 of the ECHR, by making a complaint against the accused. The court, as a public

authority, must ensure that any interference with the right to privacy under article 8 is in accordance with the law, and is necessary in pursuit of a legitimate public interest […]".

73. Digital material of the kind currently under consideration is no different from any other information or record. A single mobile device now frequently contains an array of information that 40 years ago would have been found in multiple different locations, often in "hard copy" and stored separately (in diaries, photograph albums, letters, postcards, bank records, address books, personal journals, odd scraps of paper, the contents of desk drawers etc.). The ease with which this material is now accessible does not make it more susceptible to scrutiny than would have been the case if it was only available in hard copy. It is necessary to state this obvious point because there is a misconception, that is possibly widespread, that certain types of criminal allegations – most particularly those that are sexual in nature – *ipso facto* result in the right to automatic and unfettered access by investigators to the complainant's digital information. This is assuredly not the case. As this court observed in *R v McPartland and another* [2019] EWCA Crim 1782; [2020] 1 Cr. App. R. (S.) 51:

> 44. It was suggested on behalf of the defence in the course of argument that it is now entirely usual practice in cases involving allegations of sexual assault, that the mobile phone of a complainant should be examined. This is not and should not be thought to be correct. What is a reasonable line of enquiry depends on the facts of each case.

74. In *R v E* [2018] EWCA Crim 2426, Sir Brian Leveson P. expressed a similar conclusion:

> "24. […] in reaching his decision to stay the prosecution, the judge did so on the basis that there was always a duty on investigators to seize and interrogate the phone of any complainant who makes an allegation of a sexual offence. […] For our part, however, we do not accept that the police were or are under such a duty. If the judge had made his finding on that basis then it may well have been that he did so based on an error of law which impacted on his own assessment of the position."

75. We stress, therefore, that mobile telephones or other devices should not be obtained as a matter of routine by investigators from witnesses. This is reflected in the "Guide to 'reasonable lines of the enquiry' and communications evidence" (July 2018) by the Director of Public Prosecution ("DPP"):

> "13.The examination of mobile devices belonging to the complainant is not a requirement as a matter of course in every case. There will be cases where there is no requirement for the police to take the media devices of a complainant or others at all, and thus no requirement for even a level 1 examination to be undertaken. Examples of this would include sexual offences committed opportunistically against strangers, or historic allegations where there is considered to be no prospect that the complainant's phone will retain any material relevant to the period in which the conduct is said to have occurred and/or the complainant through age or other circumstances did not have access to a phone at that time."

76. Similarly, the electronic or digital nature of many modern records does not change or dilute the test for disclosure, which remains whether it might reasonably be considered capable of undermining the prosecution's case or assisting the case for the accused.

77. In conclusion on the first issue, and answering the question: "when does it become necessary to attempt to review a witness's digitally-stored communications and when is it necessary to disclose digital communications to which the investigators have access?", we stress that regardless of the medium in which the information is held, a 'reasonable line of enquiry' will depend on the facts of, and the issues in, the individual case, including any potential defence. There is no presumption that a complainant's mobile telephone or other devices should be inspected, retained or downloaded, any more than there is a presumption that investigators will attempt to look through material held in hard copy. There must be a properly identifiable foundation for the inquiry, not mere conjecture or speculation. Furthermore, as developed below, if there is a reasonable line of enquiry, the investigators should consider whether there are ways of readily accessing the information that do not involve looking at or taking possession of the complainant's mobile telephone or other digital device. Disclosure should only occur when the material might reasonably be considered capable of undermining the prosecution's case or assisting the case for the accused.

The Second Issue of Principle: when a properly founded request is made, how should the review of the witness's electronic communications be conducted?

78. If a reasonable line of inquiry is established to examine, for example, communications between a witness and a suspect, there may be a number of ways this can be achieved without the witness having to surrender their electronic device. The loss of such a device for any period of time may itself be an intrusion into their private life , even apart from considerations of privacy with respect to the contents. Thus the investigator will need to consider whether,

depending on the apparent live issues, it may be possible to obtain all the relevant communications from the suspect's own mobile telephone or other devices without the need to inspect or download digital items held by the complainant. The investigator, furthermore, can potentially review the relevant social media posts of the complainant without looking at the individual's mobile telephone, provided he or she is willing to provide a password. Consideration should, therefore, be given to whether all the relevant messages or other communications in this context are available on the suspect's digital devices, within the witness's social media accounts or elsewhere, thereby potentially avoiding altogether the need for recourse to the witness's mobile telephone etc.

79. If material on the complainant's device needs to be reviewed as part of a reasonable line of enquiry, an important question is whether a review of a discrete part of the digital record will suffice. Indeed, it may be unnecessary to ask the witness to surrender the device or to facilitate a digital download. Instead, putting focussed questions to the witness together with viewing any relevant digitally recorded information, and taking screen shots or making some other suitable record, may meet the needs of the case. This approach is reflected in paragraph 5.1 of the CoP:

> "The investigator must retain material obtained in a criminal investigation which may be relevant to the investigation. Material may be photographed, video-recorded, captured digitally or otherwise retained in the form of a copy rather than the original at any time, if the original is perishable; the original was supplied to the investigator rather than generated by him and is to be returned to its owner; or the retention of a copy rather than the original is reasonable in all the circumstances."

80. None of the observations set out above are intended to detract from the situations when it is considered necessary to seek to look in detail within the contents of a witness's mobile telephone or other device. This is summarised in the DPP's July 2018 Guide:

> "16. […] This will […] be the case where, beyond the issue of consent being raised at all by either complainant or accused, the credibility of the complaint or reliability of the complainant is put in issue from the outset and in circumstances that make a detailed examination of the complainant's phone necessary. This is a case by case assessment, but examples would include cases where the account of the complainant or an account provided by an accused either in interview or to others at a stage identifies a need to examine the past history and content of contact between the complainant and accused, or the complainant and an

identified third party, and where there it is thought likely to be material of a kind that a level 1 search may not identify relevant to such issues."

81. This is not in any sense an exhaustive list of the situations in which scrutiny of the device may be required and it should not be treated as providing a complete formula.

82. If detailed examination of a copy (a "digital download" or "digital device extraction") of the device is necessary, depending on factors such as the issues in the case and the quantity of the material stored, it may well be necessary to use search terms rather than an individual "page-by-page" inspection. It is wholly unexceptional for an individual's personal content on messaging platforms such as WhatsApp to take up thousands or tens of thousands of pages of a mobile telephone download. Following the passage at A40 (see [71] above) in the Attorney General's Guidelines on Disclosure: Supplementary Guidelines on Digitally Stored Material (2011) (replaced by, but annexed to, the current the Attorney General's Guidelines on Disclosure December 2013), there is set out:

> A41. In some cases the sift may be conducted by an investigator/disclosure officer manually assessing the content of the computer or other digital material from its directory and determining which files are relevant and should be retained for evidence or unused material.
>
> A42. In other cases such an approach may not be feasible. Where there is an enormous volume of material it is perfectly proper for the investigator/disclosure officer to search it by sample, key words, or other appropriate search tools or analytical techniques to locate relevant passages, phrases and identifiers.
>
> A43. In cases involving very large quantities of data, the person in charge of the investigation will develop a strategy setting out how the material should be analysed or searched to identify categories of data. Where search tools are used to examine digital material it will usually be appropriate to provide the accused and his or her legal representative with a copy of reasonable search terms used, or to be used, and invite them to suggest any further reasonable search terms. If search terms are suggested which the investigator or prosecutor believes will not be productive - for example because of the use of common words that are likely to identify a mass of irrelevant material, the investigator or prosecutor is entitled to open a dialogue with the defence representative with a view to agreeing sensible refinements. The purpose of this dialogue is to ensure that reasonable and proportionate searches can be carried out.

A44. It may be necessary to carry out sampling and searches on more than one occasion, especially as there is a duty on the prosecutor to keep duties of disclosure under review. To comply with this duty it may be appropriate (and should be considered) where further evidence or unused material is obtained in the course of the investigation; the defence statement is served on the prosecutor; the defendant makes an application under section 8 of the CPIA for disclosure; or the defendant requests that further sampling or searches be carried out (provided it is a reasonable line of enquiry)."

83. This remains an accurate description of the correct approach in this context. In *R v Pearson and Cadman* [2006] EWCA Crim 3366 (a case in which it would have taken at least a lifetime to read the seized computer material) at paragraph 20, Hughes LJ VP stated:

> "[…] If the submission is made that it was the duty of the Crown to trawl through every word or byte of this material in order to see whether any of it was capable of undermining the Crown's case or assisting that of the appellant, we do not agree. […] Where there is an enormous volume of material, as there was here, it is perfectly proper for the Crown to search it by sample or, as here, by key words. […]"

84. Similarly, in *R v R and others Practice Note* [2015] EWCA Crim 1941; [2016] 1 Cr App R 20 the court set out:

> *"The law is prescriptive of the result, not the method*
> 36. This is particularly relevant in respect of a case such as this where the prosecution has recovered vast volumes of electronic material. In our judgment, it has been clear for some time that the prosecution is not required to do the impossible, nor should the duty of giving initial disclosure be rendered incapable of fulfilment through the physical impossibility of reading (and scheduling) each and every item of material seized; common sense must be applied. In such circumstances, the prosecution is entitled to use appropriate sampling and search terms and its record-keeping and scheduling obligations are modified accordingly: […].
>
> 37. […] The right course at the stage of initial disclosure is for the prosecution to formulate a disclosure strategy, canvass that strategy with the court and the defence and to utilise technology to make an appropriate search or conduct an appropriate sampling exercise of the material seized. That searches and sampling may subsequently need to be

repeated (to comply with the prosecutor's continuing duty of disclosure under s.7A of the CPIA or to respond to reasoned requests from the defence under s.8) is neither here nor there; the need for repeat searches and sampling does not invalidate the approach to initial disclosure involving such techniques. The problem of vast quantities of electronic documents has, in a sense, been created by technology; in turn, appropriate use must be made of technology to address and solve that problem."

85. However, in addition to the use of search terms it is becoming increasingly possible to search a mobile telephone download by way of data parameters, thereby avoiding consideration of irrelevant periods or aspects of the witness's life. If a reasonable line of enquiry enables targeted enquiries in this way, the use of unnecessarily broad search terms can be avoided. It is important, however, not to overstate what is currently feasible in this regard.

86. The ambit of the review of the unused material and the details of proposed search terms or the parameters of any searches will be set out in the Prosecution Disclosure Management Document ["DMD"], a copy of which will have been provided to the defence. Search terms can be applied to text/SMS messages as well as messaging platforms such as WhatsApp and the multiple social media applications. As suggested by the respondent, practical and timely engagement by the defence with the DMD is critical as part of advancing his or her interests.

87. If material on the mobile telephone meets the CPIA disclosure test, it can, if appropriate, be served in a redacted form to ensure that irrelevant personal information (such as photographs, addresses or full telephone numbers) are not disclosed. It is important to have in mind that pursuant to section 17 CPIA, if the accused is given or allowed to inspect a document or other object following a disclosure exercise, he or she must not use or disclose any information recorded in it, save in relation to relevant criminal proceedings.

88. In conclusion on the second issue and answering the question: "how should the review of the witness's electronic communications be conducted?", investigators will need to adopt an incremental approach. First, to consider with care the nature and detail of any review that is required, the particular areas that need to be looked at and whether this can happen without recourse to the complainant's mobile telephone or other device. Second, and only if it is necessary to look at the complainant's digital device or devices, a critical question is whether it is sufficient simply to view limited areas (e.g. an identified string of messages/emails or particular postings on social media). In some cases, this will be achieved by simply looking at the relevant material and taking screenshots or making some other record, without taking possession of, or copying, the device.

Third, if a more extensive enquiry is necessary, the contents of the device should be downloaded with the minimum inconvenience to the complainant and, if possible, it should be returned without any unnecessary delay. If the material is voluminous, consideration should be given to appropriately focussed enquiries using search terms, a process in which the defendant should participate. It may be possible to apply data parameters to any search. Finally, appropriate redactions should be made to any disclosed material to avoid revealing irrelevant personal information.

The Third Issue of Principle: what reassurance should be provided to the complainant as to ambit of the review and the circumstances of any disclosure of material that is relevant to the case?

89. It is necessary that the complainant is kept informed as to the use that is proposed to be made of the mobile telephone or other device and its contents, depending on the extent to which the witness wishes to be provided with updates. At present a form entitled "Digital device extraction – information for complainants and witnesses" sets out what may happen if there is a request by the prosecuting authorities to obtain personal or private information. Although much of the relevant material is to be found within this notice, it is densely drafted and includes a significant amount of technical detail (*e.g.* the three levels of extraction, along with reference to "logical" extraction). We respectfully suggest that either in addition to, or in replacement for, the present document there should a short and straightforward explanation of the following matters: i) the defendant does not have a general right to examine the content of a witness's digital device; ii) the police will only seek to examine the contents of such devices when to do so is in pursuit of a reasonable line of inquiry; iii) the witness is not obliged to cooperate with a police request, but if the witness fails to do so, there is a risk that it will be impossible to pursue the investigation, a witness summons may be issued or any trial resulting from the investigation may be halted; iv) the witness's device will only be copied and examined to the extent necessary to pursue the reasonable line of inquiry (if part or all of the device has been copied, frequently examination will be undertaken, at least in the first instance, by focussed "search terms"), and otherwise the contents will not be looked at; v) only material which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused will be disclosed to the defence, and any unnecessary personal details or irrelevant information will be redacted; and vi) the witness will be consulted as to the regularity and extent of any contact by the investigators regarding the disclosure process.

90. It may be that despite the service of such a notice the witness declines to provide access to the material, certainly at that stage. We consider that in those circumstances it may be advisable to warn the witness that potentially relevant

material should not be deleted as this also may impede a fair investigation of the case.

91. There is, in addition, a form currently in use entitled a Digital Processing Notice, which includes a consent form to be signed by the witness if part or all of the device is to be copied. This is equally densely drafted. We respectfully suggest that this form needs to be made more readily understandable and, in particular, there needs to be clarity as to i) the length of time the witness will be without their digital device; and ii) what areas will be looked at following the copying of the contents of the device. These two areas are presently not adequately addressed.

92. In conclusion on the third issue and answering the question: "what reassurance should be provided to the complainant?", the complainant should be told i) that the prosecution will keep him or her informed as to any decisions that are made as to disclosure, including how long the investigators will keep the device; what it is planned to be "extracted" from it by copying; and what thereafter is to be "examined", potentially leading to disclosure; ii) that in any event, any content within the mobile telephone or other device will only be copied or inspected if there is no other appropriate method of discharging the prosecution's disclosure obligations; and iii) material will only be provided to the defence if it meets the strict test for disclosure and it will be served in a suitably redacted form to ensure that personal details or other irrelevant information are not unnecessarily revealed (e.g. photographs, addresses or full telephone numbers).

The Fourth Issue of Principle: what is the consequence if the complainant refuses to permit access to a potentially relevant device or if the complainant deletes relevant material?

93. If a witness does not provide the investigator access to their mobile telephone or other device, it is important to look carefully at the reasons for this stance and to furnish the witness with an explanation as to the procedure that will be followed if the device is made available, and to offer reassurance in line with the guidance set out above. If the witness maintains his or her opposition, the court may need to consider, if an application is made by the defendant, whether the proceedings should be stayed on the basis that it will be impossible to give the accused a fair trial (*Warren v A-G for Jersey* [2011] UKPC 10; [2011] 1 AC 22 (at [22])). A highly relevant or determinative consideration will be the adequacy of the trial process, and whether it will ensure there is fairness to the defendant, particularly by way of cross-examination of the witness, coupled with appropriate judicial directions. This situation is analogous to the cases in which there is a complaint that the prosecution failed to secure relevant evidence or evidence has been lost. In *R v R.D.* [2013] EWCA Crim 1592 Treacy LJ observed:

> "15. In considering the question of prejudice to the defence, it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of the missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to a defendant."

94. We echo the refusal expressed by Treacy LJ to be drawn into guessing at the content and significance of the material that may have become unavailable (in the present context, as a result of the failure to facilitate access to the digital device in question). Instead, the court must assess the impact of the absence of the particular missing evidence and whether the trial process can sufficiently compensate for its absence.

95. An application can be made for a witness summons for the mobile telephone or other device to be produced. The witness in these circumstances will have the opportunity to make representations, to enable the court to assess his or her Article 8 rights under the European Convention on Human Rights (see *R (B) v Crown Court at Stafford* [2006] EWHC 1645 (Admin); [2006] 2 Cr App R 34; see also the Criminal Procedure Rule 17.6). The respondent submits that it would only be in an exceptional case that such an application would be made by the prosecution.

96. It is important to note that a refusal by a complainant or a witness to divulge the contents of a mobile telephone or similar device clearly does not, without more, constitute bad faith or misbehaviour on the part of the police or the prosecutor.

97. If a prosecution witness deletes messages or other relevant items on their mobile telephone, their reasons for doing so, the timing of any such deletion, whether it followed any warning not to do so and (insofar as it can be ascertained) the nature of the material deleted will need to be considered carefully. Each case will turn on its own facts and particularly the assessment of the material that has been removed. In *R v PR* [2019] EWCA Crim 1225; [2019] 2 Cr App R 22 (a case in which material had been accidentally destroyed), the court stated:

> "66. […] the question of whether the defendant can receive a fair trial when relevant material has been accidentally destroyed will depend on the particular circumstances of the case, the focus being on the nature and extent of the prejudice to the defendant. A careful judicial direction, in many instances, will operate to ensure the integrity of the proceedings. This general statement is not meant to preclude the possibility that a fair trial may sometimes be unachievable when relevant material cannot be deployed (see, for instance, *R. v Sheikh (Anver Daud)* [2006] EWCA Crim 2625). But we stress that the strength and the utility of the judge's direction is that it focuses the jury's attention on the critical issues that they need to have in mind."

98. Although each case will need to be assessed on its own facts, we stress the potential force of cross-examination and carefully crafted judicial directions. If the trial proceeds, the uncooperative stance by the witness, investigated by appropriate questioning, will be an important factor that the jury will be directed to take into account when deciding, first, whether to accept the evidence of the witness and, second, whether they are sure of the defendant's guilt. As this court observed in *R v PR*:

> "65. It is important to have in mind the wide variations in the evidence relied on in support of prosecutions: no two trials are the same, and the type, quantity and quality of the evidence differs greatly between cases. Fairness does not require a minimum number of witnesses to be called. Nor is it necessary for documentary, expert or forensic evidence to be available, against which the credibility and reliability of the prosecution witnesses can be evaluated. Some cases involve consideration of a vast amount of documentation or expert/forensic evidence whilst in others the jury is essentially asked to decide between the oral testimony of two or more witnesses, often simply the complainant and the accused. Furthermore, there is no rule that, if material has become unavailable, that of itself means the trial is unfair because, for instance, a relevant avenue of enquiry can no longer be explored with the benefit of the missing documents or records. It follows that there is no presumption that extraneous material must be available to enable the defendant to test the reliability of the oral testimony of one or more of the prosecution's witnesses. In some instances, this opportunity exists; in others it does not. It is to be regretted if relevant records become unavailable, but when this happens the effect may be to put the defendant closer to the position of many accused whose trial turns on a decision by the jury as to whether they are sure of the oral evidence of the prosecution witness or witnesses,

> absent other substantive information by which their testimony can be tested."

99. In conclusion on the fourth issue and answering the question: "what is the consequence if the complainant refuses to permit access to a potentially relevant device or if the complainant deletes relevant material?", it is important to look carefully at the reasons for a refusal to permit access and to furnish the witness with an explanation and reassurance as to the procedure that will be followed if the device is made available to the investigator. If it is suggested that the proceedings should be stayed, the court will need to consider the adequacy of the trial process, and whether this will ensure there is fairness to the defendant, particularly by way of cross-examination of the witness, coupled with appropriate judicial directions. The court should not be drawn into guessing at the content and significance of the material that may have become unavailable. Instead, the court must assess the impact of the absence of the particular missing evidence and whether the trial process can sufficiently compensate for its absence. An application can be made for a witness summons for the mobile telephone or other device to be produced. If the witness deletes material, although each case will need to be assessed on its own facts, we stress the potential utility of cross-examination and carefully crafted judicial directions. If the proceedings are not stayed and the trial proceeds, the uncooperative stance by the witness, investigated by appropriate questioning, will be an important factor that the jury will be directed to take into account when deciding, first, whether to accept the evidence of the witness and, second, whether they are sure of the defendant's guilt.

The Individual Appeals

Carl Bater-James

The First Ground of Appeal

100. The appellant submits the judge wrongly refused the bad character application relating to an allegedly false allegation made by the complainant when she was 12 years of age. The appellant complains that the judge erred in her decision, in that notwithstanding the youth of the complainant, this incident demonstrated a pattern of false allegations by the complainant and her capacity to lie to the police about an alleged assault. Further, it is argued that "the evidence of two independent witnesses" demonstrated that the allegation was false. In all the circumstances, it is submitted that this was important evidence, given the appellant's case was that she had made false allegations of assault against him.

101. The test to be applied by this court remains that described in *R v Hanson and others* [2005] EWCA Crim 824; [2005] 2 Cr App R 21 at paragraph 15:

> "If a judge has directed himself or herself correctly, this court will be very slow to interfere with a ruling either 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: Associated Provincial Picture Houses v Wednesbury Corpn [1948] 1 KB 223"

102. This approach was endorsed in *R v Renda & others* [2005] EWCA Crim 2826; [2006] 1 Cr App R 24 by Sir Igor Judge P:

> "3. We have some general observations. Several of the decisions or rulings questioned in these appeals represent either judgments by the trial judge in the specific factual context of the individual case, or the exercise of a judicial discretion. The circumstances in which this Court would interfere with the exercise of a judicial discretion are limited. The principles need no repetition. However we emphasise that the same general approach will be adopted when the Court is being invited to interfere with what in reality is a fact-specific judgment. As we explain in one of these decisions, the trial judge's "feel" for the case is usually the critical ingredient of the decision at first instance which this Court lacks. Context therefore is vital. The creation and subsequent citation from a vast body of so-called "authority", in reality representing no more than observations on a fact specific decision of the judge in the Crown Court, is unnecessary and may well be counterproductive. This legislation has now been in force for nearly a year. The principles have been considered by this Court on a number of occasions. The responsibility for their application is not for this Court but for trial judges.
>
> 4. Finally, 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. It does not follow from any proved error that the conviction will be quashed."

103. The governing provision is section 100 Criminal Justice Act 2003:

"100 Non-defendant's bad character

(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—

(a) it is important explanatory evidence,

(b) it has substantial probative value in relation to a matter which—

(i) is a matter in issue in the proceedings, and
(ii) is of substantial importance in the context of the case as a whole,

or

(c) all parties to the proceedings agree to the evidence being admissible.

(2) For the purposes of subsection (1)(a) evidence is important explanatory evidence if—

(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and

(b) its value for understanding the case as a whole is substantial.

(3) In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors (and to any others it considers relevant)—

(a) the nature and number of the events, or other things, to which the evidence relates;

(b) when those events or things are alleged to have happened or existed;

(c) where—

(i) the evidence is evidence of a person's misconduct, and
(ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,

the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;

(d) where—

(i) the evidence is evidence of a person's misconduct,
(ii) it is suggested that that person is also responsible for the misconduct charged, and
(iii) the identity of the person responsible for the misconduct charged is disputed,

the extent to which the evidence shows or tends to show that the same person was responsible each time.

[…]"

104. This bad character evidence concerned a complaint by a 12-year-old girl ten years before the present allegations, arising out of a playground incident, in which the complainant said she had been bullied. It was not proposed that any of the witnesses save for the complainant should give evidence about this event. Otherwise, the sole evidence was a brief police record which set out that the complainant's account had been contradicted by two witnesses and the officer's view that there was a distinct possibility the allegation may have been false. However, the report to the police did not result in a conviction.

105. In these circumstances, we consider that it was properly open to the judge to determine that this report of an incident in 2008 would not have had substantial probative value. In essence, an event of some real age had been recorded in brief terms by the police in an incident report, and the matter had not proceeded to trial. Given the lack of any substantive basis to choose between the complainant's account and that of the others with whom the police spoke, it would have been extremely difficult for the jury to make an informed decision as to the significance of this suggested bad character evidence. In these circumstances, it was open to the judge to determine that this material did not potentially demonstrate a pattern of false allegations by the complainant and a capacity to lie. The judge was entitled to conclude that this 'playground' evidence did not have the necessary probative value to justify its admission.

The Second Ground of Appeal

106. As set out above, it is submitted the judge erred in allowing the prosecution to recall the complainant, and to introduce evidence of the voicemails and correspondence. The appellant argues the complainant had been allowed to subvert the disclosure process; she had destroyed independent evidence in the case; she was being permitted to select the evidence that was introduced before the jury; and there was an absence of core material, such as a call log.

107. It would have been preferable for the complainant, having been asked, to have provided access to her mobile telephone at an earlier stage (as set out above, she only brought it to court on or about 13 June 2019). This ground of appeal, as a consequence, highlights the need for witnesses to be given clear reassurance and a full explanation as to what will happen to their digital device if they provide it to the investigators, in accordance with our conclusions on the third issue of principle. In making that observation we are not criticising the explanations given by the investigators in the present case, not least because we do not have sufficient evidence on this issue to make a judgment. It may well be that adequate information was provided, but the complainant's account that she was worried about the consequences of handing over her telephone – that it would become unavailable to her – demonstrates the importance of applying the approach we have set out. In summary, all reasonable steps should be taken to reassure the complainant that his or her personal information will be treated in accordance with the strict legal framework and that the device will only be unavailable to the witness for the shortest possible period of time. If the approach we have described is followed, it is to be hoped that the difficulties of the kind experienced in the course of the present trial will be minimised.

108. The question under this ground of appeal, however, is whether the judge erred in allowing the introduction of this evidence following her cross-examination by the appellant's counsel. The appellant suggested that their contact remained essentially unchanged throughout the relevant period, whereas the material produced by the complainant tended to indicate that the appellant, via his mother, was pressurising her to get in touch with him, albeit the complainant agreed there had been some contact. Therefore, the respondent argues that the evidence of the voice messages and the correspondence tended to correct a false impression created during cross-examination, putting any contact between the appellant and the complainant in its true context.

109. The judge indicated that the appellant would be afforded time to secure additional evidence (for instance, from his mother) and she noted that the complainant's mobile telephone had been made available when it was brought to court, albeit late. These events all occurred before the close of the prosecution case. Whilst the complainant had destroyed or failed to provide some of the potentially relevant material of communication between them, it was possible for the appellant to explore her actions and their impact during cross-examination. Such material as there was suggested that the appellant was initiating contact through his mother. If it had been contended that in the missing communications the complainant had said that her evidence as to the offences was untrue this could have been put. The complainant admitted that she had told lies about the fact of communication but it was for the jury to assess the relevance of that admission and her statement that she thought that revealing it would create problems for the appellant. He was able, furthermore, to advance his case as to the full extent of his contact with the complainant when he gave evidence, and – if he chose to do so – by calling his mother. In the event, in our judgment it was not unfair for this material to be admitted, in order to correct a potentially misleading impression that had been created during the questioning of the complainant.

The Third Ground of Appeal

110. It is submitted the judge erred in refusing to stay the proceedings, principally on the basis of the alleged obstructive behaviour on the part of the complainant. It was suggested that she had deliberately manipulated the proceedings, especially by deleting material and by withholding evidence, which was then disclosed at a late stage, thereby making it particularly damaging to him.

111. The judge appropriately considered the relevant factors described in our discussion of the fourth issue of principle, and she particularly assessed whether the trial process provided appropriate safeguards to ensure fairness. As the judge highlighted to the jury during the summing up, the complainant had accepted that she had been slow in providing her telephone and that some items remained missing. The judge emphasised that the jury needed to consider whether her behaviour in this regard undermined her credibility as a witness. The judge noted that the appellant had been using a mobile telephone illegally in prison for contact with the complainant, which was no longer available to him, but he was able instead to rely on the extensive letters that he had written – the judge described him as a prolific correspondent – along with the transcripts of the telephone calls involving his mother.

112. The judge took into account the fact there was no indication in the extensive contemporaneous material produced by the complainant that she had at any stage provided an account that differed from her evidence in court, which included the admission that she had lied when she maintained there had been no contact between them. In a similar vein, the appellant did not allege in his cross examination of the complainant that she had deleted material that contradicted the account she had given during her evidence. It follows that it was not suggested that identified evidence of any significance had been withheld or deleted by the complainant.

113. Applying the overarching principles set out above as regards the fourth issue, and focussing on the relevant context which includes the nature of the material deleted and the consequences of the complainant's actions, we are confident that what had occurred could be properly addressed as part of the trial process. These events did not involve malfeasance by the prosecution (if that had been the case, this issue would have been cast in a different light) and any prejudice to the appellant was appropriately addressed in the ways set out under this and the immediately preceding heading.

114. In these circumstances, the judge – in our view wholly sustainably – decided, first, that the proceedings had not been vitiated by abuse of process on the part of the prosecution and, second, there was no consequential unfairness in the trial of the appellant. The judge's summing up in this regard was terse, and ordinarily it would have been preferable for there to have been a direction about the potential consequences of any prejudice to the appellant as a result of deleted material. However, given the absence of any substantive suggestion that there had been identified prejudice, this lack of a full direction does not render the verdicts unsafe.

115. It follows that this appeal against conviction is dismissed.

Sultan Mohammad

The First Ground of Appeal

116. As already rehearsed, it is argued by the applicant that the judge should have ordered a review by the prosecution of the entirety of the telephone messages on the complainant's telephone should have been ordered; alternatively, a full copy of all the digital material should have been provided to the defence.

117. This submission is misconceived. It is necessary in this context to return to the first issue of principle. The police should only seek, or be requested, to view

a complainant's personal records if this step is in pursuit of a reasonable line of enquiry (see [67]) *et seq.* above). In this instance, there was no proper basis for interrogating the complainant's mobile telephone for the reasons suggested by the applicant. His defence was that he and the complainant had chatted and flirted before they engaged in sexual relations in which the complainant was a proactive and passionate participant; she was fully awake, sober and engaged throughout. Indeed, he suggested that the complainant initiated sexual intercourse. He had no reason to doubt that she was fully consenting. The applicant's concurrent contention that her repeated requests for his name and to stop intercourse were because she may have been substantially under the influence of alcohol or drugs is not only entirely inconsistent with his defence but it is inherently speculative. These requests by the complainant (*viz.* for his name and for him to desist) did not provide a reasonable foundation for exploring, as proposed, whether she had a history of drunken or drugged sexual encounters with men, leading to loss of memory, given the appellant's own account was that she was sober, fully awake and rational.

118. In our judgment, therefore, there was no properly identifiable foundation for the investigation of the complainant's mobile telephone on the basis argued. The applicant and the complainant were complete strangers, and there was accordingly no history to their relationship or other circumstance that justified this request for the complainant to afford access to her personal records for the reasons advanced by the applicant before the judge and in support of this application. As just observed, the part played by drink or drugs, as suggested by the applicant, had no credible basis. It was, at best, pure speculation.

119. It follows that we do not accept that there should have been a review by the prosecution of part, or the entirety, of the complainant's mobile telephone for the purposes advanced by the applicant. This applies with greater force to the suggestion that a complete copy of the telephone should have been provided to the applicant. This latter suggestion would have involved a highly significant intrusion into the complainant's right to privacy, on the basis of a speculative pretext. Applying the second issue of principle, if a search of the complainant's mobile telephone had been justified, the use of search terms would have been entirely appropriate. The suggested individual inspection of 40,000 pages was entirely unrealistic and unnecessary. This case has amply demonstrated that search terms, if properly formulated with the assistance of the defence, appropriately identify material that is potentially disclosable. Allowance can be made for different dialects and idiomatic expressions.

The Second Ground of Appeal

120. As rehearsed above, it is submitted the judge erred in refusing the two applications under section 41 YJCEA to introduce evidence of two previous

sexual incidents. Section 41 ensures that a complainant's previous sexual experience is only to be made the subject of questioning or evidence if particular criteria are met.

121. Dealing with the first application, it is suggested that the circumstances of the incident in 2017 were so similar that it should have been admitted in evidence. Central to this submission is the contention that on both occasions the complainant had been so adversely affected by drink that she was unable to recall what had occurred. For the reasons set out above [117], this suggestion has no tenable basis as regards the events of 2 October 2018. The CCTV evidence gave a period of 10 minutes for any interaction between the applicant and the complainant. The suggestion that within this short period she initiated sexual contact, consented to sex and then forgot whether she consented or not is absurd. The assertion that the complainant was drunk was a late contention, inconsistent with the applicant's defence and was no more than speculation. Accordingly, there was no similarity between the two incidents which cannot reasonably be explained as a coincidence. It follows that the judge was correct to determine that the 2017 incident did not satisfy the requirements of section 41 (3) (c), in that the circumstances were notably different and could not begin to be regarded as being *"so similar"* that the similarity cannot reasonably be explained as a coincidence.

122. In relation to the second application, the question asked by prosecuting counsel was limited in its ambit and it was open to the judge to conclude that it did not create a misleading impression. Critical to the judge's assessment was that it was the applicant's case that this was consensual sexual intercourse, that followed a period of amicable conversation. It was in that context – exploring whether this occurred by agreement – it was relevant to enquire whether they had discussed in advance issues such as preventing pregnancy or the transmission of sexual disease.

123. In the circumstances, this renewed application for leave to appeal against conviction is refused.