Neutral Citation Number: [2019] EWCA Crim 887

Case No: 201800961 C1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM BRISTOL CROWN COURT
HIS HONOUR JUDGE LONGMAN
T20177269

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2019

Before:

LADY JUSTICE NICOLA DAVIES DBE
MR JUSTICE SPENCER
and
MR JUSTICE MORRIS

- -

Between:

REGINA	**Respondent**
- and -	
SR	**Appellant**

- -

(Transcript of the Handed Down Judgment.
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Andrew Taylor (instructed by **Evans & Co Solicitors**) for the **Appellant**
Dominic Connolly (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 3 May 2019

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Judgment As Approved by the Court

Lady Justice Nicola Davies DBE:

1. On 5 February 2018 in the Crown Court at Bristol the appellant was convicted on a ten-count indictment of Count 2 and Counts 4 to 10. On 9 March 2018 he was sentenced by the trial judge HHJ Longman as follows:

   - Count 2, sexual assault of a child under 13: 3 years' imprisonment concurrent;
   - Count 4, assault of a child under 13 by penetration: sentence pursuant to section 236A Criminal Justice Act 2003 ("CJA 2003") of 9 years, a custodial term of 8 years and an extended licence of 1 year;
   - Count 5 (rape): 12 years' imprisonment concurrent;
   - Count 6 (assault by penetration): 8 years' imprisonment concurrent;
   - Count 7 (rape): 12 years' imprisonment concurrent;
   - Count 8 (rape): 12 years' imprisonment concurrent;
   - Count 9 (assault by penetration): 8 years' imprisonment concurrent;
   - Count 10 (rape): 12 years' imprisonment concurrent;
   - The total sentence was one of a standard determinate sentence of 12 years and a sentence pursuant to section 236A CJA 2003 of 9 years comprising a custodial term of 8 years and an extended licence of 1 year to be served concurrently.

2. The appellant was acquitted of Count 1 (sexual assault of a child under 13) and Count 3 (assault of a child under 13 by penetration). He appeals against conviction by leave of the single judge.

3. The provisions of the Sexual Offences Amendment Act 1992 apply to these offences. Under those provisions where a sexual offence has been committed against a person no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence.

Facts

4. The appellant is the half-brother of the complainant, E, he is six years older than her. They share the same mother but different fathers. E went to live with the appellant and her mother in Brighton in 2008 when she was 10. Prior to that she had lived with her father and spent some time in care.

5. In 2009, following a referral from social services, E alleged that the appellant had sexually abused her. Sussex police commenced an investigation and on 8 December 2009 temporary Detective Constable Josey Kennedy and Paula Pettit, a social worker, visited E and her mother. In the police log of the investigation it is recorded E said that whilst at home over the past few months the appellant had been inappropriate

with her. She claimed that he had initially touched her “breasts and bum”. This had later progressed to digital penetration. E alleged that a few days ago the appellant had got onto the bed with her and tried to put her hand down his trousers at which point she told him to get out. Text messages were exchanged between the pair when E told the appellant that he should “tell mum”. E thought the appellant needed help. Their mother was informed and she had spoken to the appellant. In the police log it is noted that the mother had said that “E just needs a few weeks respite and wants to be fostered or rehoused for a while”. A mobile phone was taken from E; the police log notes that it contained messages between herself and the appellant.

6. On the same day the social worker accompanied E and her mother to the hospital for a medical examination.

7. The police log details that E had been scheduled to give an ABE interview on 10 December 2009 but had taken an overdose the day before and had been admitted to hospital.

8. The officer in charge of the investigation was DC Josey Kennedy. On 12 January 2010 the log records that Paula Pettit had spoken to E and her mother, they said they no longer wished to take part in an ABE interview. E wanted her mobile phone back. It is recorded that the social worker was of the opinion that neither E nor her mother would “care either way if we interviewed the half-brother SR or not”. E’s phone was returned to her on an unspecified date.

9. On 18 January 2010 an email received by DC Kennedy from Paula Pettit records: “[E] not retracting but does not want to proceed with ABE. She is not saying it didn’t happen. Mum and [E] moving to Bristol…”

10. DC Kennedy interviewed the appellant on 26 January 2010. All that now exists of that interview is a summary to be found in the police log. The appellant denied E’s allegations but described one incident when the two of them were watching television and she “came onto him”, grabbed his hand and tried to put it on her breast. He pulled away, left the room and slept in another room. Following this, text messages were exchanged between them. In the messages E said he should “tell mum” what had happened. Their mother spoke to the appellant who admitted the incident but said that E had come onto him. He denied all the allegations of sexual assault. He said he did not have any feelings of a sexual nature towards E and never had. Asked why he thought E had made the allegations the appellant said she is a very confused person who wants to go into foster care. She had made a number of advances towards his friends and other older males, some of whom he believed she had been sexually active with. He said he believed he is the scape goat and she had wrongly tried to blame him for something she had done.

11. Following the appellant’s interview DC Kennedy records in the police log a note to her Detective Sergeant which states:

> “As per my update the suspect attended the police station and was interviewed today. He has denied the allegations. Neither [E] or her mother wish to make a formal allegation and both appear to be motivated from the outset with ‘getting [E] a place in respite’. [E] has made similar allegations in the past against

> her father which were not proven to be true. Both myself and SSD Paula Pettit have doubts about the truthfulness of the allegation and motivations of both mother and daughter. Worryingly [the mother] is training to be a social worker and during the initial JV appeared more excited than anything about 'knowing the system and seeing how it works'. [E] has since made an attempt to take her own life although the blood tests in the hospital and subsequent 'seizures' are questionable. In my opinion both [the mother] and [E] may have some mental health problems which might need to be explored further, if these allegations are in fact false then it is extremely worrying to think they would both make them against a member of their own family.
>
> The suspect appeared very plausible in interview and was visibly upset with the situation, he does not have any previous bad character and the account given by him is very possible given the information we do currently hold…" (emphasis added)

12. On 9 February 2010 DC Kennedy informed the appellant that the police would be taking no further action on the matter.

13. E and her mother moved to the Bristol area. At a later date the appellant joined E and her mother.

14. On 31 July 2013 E reported to police at Bristol further sexual abuse by the appellant during their time in Bristol, together with the sexual abuse which she said she had experienced in Brighton. She underwent an ABE interview on 12 August 2013, however the officer conducting the interview omitted to ask any questions about the alleged abuse in Brighton. On 13 February 2015 the appellant was interviewed and denied the Bristol allegations. He referred as before to an incident in Brighton where he said E had placed his hand on her breast. It was not until 24 January 2017 that E was ABE interviewed in respect of the Brighton allegations by which time DC Osborne had taken charge of the investigation.

15. By 2017 DC Kennedy had left the police. She was contacted by DC Osborne in order to obtain information about the original investigation. Ms Kennedy declined to assist, she was unwilling to meet DC Osborne. As of the date of the appellant's second interview the tape/record of his first interview no longer existed. The only account of what had been said was the summary contained in the police log ([10] above). Prior to trial it was the Crown's understanding that no ABE interview of E in Brighton in 2009 had taken place.

16. At the outset of the trial counsel on behalf of the appellant applied for the indictment to be stayed on the basis of abuse of process, it being the appellant's case that a fair trial was impossible. The essence of the argument being that the appellant's case relied upon the credibility of the complainant, E, she being the only witness of fact for the prosecution. Ms Kennedy's refusal to meet DC Osborne meant that questions had not and could not be asked of her. Ms Kennedy and the social worker Paula Pettit had doubted the truthfulness of the allegations made by the complainant and the

motivation of herself and her mother. It was accepted that Ms Kennedy's view was not relevant but what was required was an investigation as to the reason for the doubts which Ms Kennedy expressed in the police log as to the veracity of the original complaint. Further, missing was the tape of the appellant's 2009 interview. The complainant's phone had been seized, however it was unclear whether it had been examined, if it had been, there was no information as to what it contained. Within the police log was reference to a medical examination of E, insofar as any results were available they were said to be neutral.

17. The judge refused the application upon the basis that the appellant could receive a fair trial. The jury could be directed about the need to take into account difficulties confronting the appellant as a result of the missing material when deciding if the prosecution had made them sure of his guilt. The positive case advanced by the appellant when he was interviewed was at least summarised in the log which contained his denial of the allegations. Further, the jury would hear the evidence of the complainant who would be cross-examined, any matters of concern to the defence could be put to her. Relevant parts of the log would be placed before the jury. The jury would hear evidence both from the complainant and the appellant. They would be able to judge for themselves the credibility of the complainant and whether the Crown had discharged the burden of proving the defendant's guilt.

18. At the trial E gave evidence through the ABE interviews, she was cross-examined. In summary, E's evidence was as follows.

Brighton allegations

19. In 2009 the appellant had gone into her room, got into her bed and cuddled her. On five or six occasions he had moved his hands up and down her thighs and touched her breasts and nipples (Counts 1 and 2).

20. The appellant continued to get into bed with E and digitally penetrated her vagina (Count 3 when the appellant was under 18, Count 4 when he attained the age of 18). Both were specimen counts.

Bristol allegations

21. The appellant had moved back in with E and her mother after about a year. The mother was studying at university away from Bristol and left E and the appellant alone in the house during the week. During the week the appellant had digitally penetrated and vaginally raped E (Counts 5 and 6). Later the appellant anally raped E and ejaculated over her bottom and thigh (Count 7). She had cried and protested but the appellant put his hand on her neck, forcing her head into a pillow and caused her difficulty in breathing.

22. E moved out and stayed with friends but had returned home when her mother agreed to be home from university each Friday to Monday. The arrangement swiftly broke down and the mother stayed at university. The sexual abuse resumed. The appellant vaginally raped E, then aged 15, in her bedroom after his girlfriend who had been visiting from abroad had returned home (Count 8). On another occasion E returned home from a party intoxicated and went to bed. The appellant got into the bed and

digitally penetrated her vagina (Count 9). In June 2012 E went to bed and awoke to find the appellant in the bed with her. He proceeded to vaginally rape her (Count 10).

23. At the trial, in addition to the evidence of E given in her ABE interviews and in court, the prosecution relied on the evidence of E's initial complaint as contained in the police log of 2009, E's account to PC Haddrill in 2013 and the evidence of the OIC DC Osborne which included the attempts he had made to engage Ms Kennedy in the investigation.

24. DC Osborne was called by the Crown. He said that in taking over the investigation he realised that his predecessor had failed to ask any questions of E relating to the Brighton allegations. He therefore arranged a further ABE interview of the complainant. E's mother had declined to provide a witness statement. He knew it was important to speak to Ms Kennedy as she had been the officer in the case in Brighton and held all the information. In the Sussex police log are recorded Ms Kennedy's personal views as to E's credibility and that of E's mother together with the views of a social worker on these issues. DC Osborne wanted to understand why Ms Kennedy had formed the view she had of E. Her personal view of the truth or otherwise of the allegations was irrelevant, what DC Osborne wanted to know were the reasons for her opinion. He spoke with Ms Kennedy on two occasions. She said she could not remember the case, there was nothing she could add. Ms Kennedy did not wish to meet, provide a statement or review the material. DC Osborne was unable to find out why she thought that E was not telling the truth. He eventually concluded that Ms Kennedy was being wilfully obstructive. He stated that he had concerns about the integrity of her investigation. Substantial parts of the police log were read out during the course of his evidence which included the entries set out at [5] to [11] above.

25. DC Osborne was not asked and gave no information as to any efforts made to obtain Paula Pettit's presence as a witness at trial.

26. DC Osborne confirmed that the tape of the appellant's 2010 interview had been destroyed. He agreed that it could not be known precisely what was said during the course of that interview.

27. As to E's telephone, DC Osborne said that a download of the phone would have assisted but there was no mention in the log of such being undertaken. He had no idea of the basis of the information contained in the police log that the phone contained messages between E and the appellant. He wished to ask Ms Kennedy about that because it was key information for both the prosecution and the defence.

28. DC Osborne accepted that if E's account was correct that she had given an ABE interview in Brighton in 2009 or early 2010 then the police log was inaccurate because there is no mention in the log of such an interview taking place. On the contrary it indicated that E did not wish to give evidence.

29. As to the medical examination on 9 December 2010, there was a letter from a paediatrician to the GP which recorded the result of the examination as being neutral, there being no injuries, but that did not mean that E was abused or not abused. The log contained no reference to such a letter.

30. DC Osborne was asked about entries in the log that E had made similar allegations in the past against her father which were not proven to be true. He said that was not something he had read in the unused material. He did not know the source of Ms Kennedy's information. He would also have wanted to ask Ms Kennedy the basis for her view that both E and her mother had some mental health problems.

31. As to the alleged admission by the appellant to his mother, when he said it was E who instigated the sexual touching, DC Osborne said he would have liked to have asked the mother about that.

32. The appellant gave evidence. He denied any sexual abuse and said there had been one occasion in 2009 when E had tried to touch him sexually. He is a man of previous good character which was relied upon. The issue for the jury was whether they were sure the appellant had committed the alleged offences.

33. At the conclusion of the evidence the appellant's counsel renewed his application to stay the indictment upon the basis that the police log of the investigation in Brighton, which was now accepted as being incomplete and inaccurate, indicated that E had not been video interviewed. The complainant had indicated in her later ABE interview that she had been interviewed in Brighton. At trial the complainant was questioned as to whether an ABE interview in 2009 had taken place, she was insistent that it had. The prosecution accepted that what she said must be correct, in part because she was their witness and was put forward as a witness of truth, but also because of the detail which the complainant gave as to the location of the interview and its circumstances. It was the appellant's submission at the renewed application that if the complainant was interviewed the evidence was missing but further, its absence meant that the court and those who acted on behalf of the appellant did not know whether her evidence on this issue was accurate or not. The application was refused, the judge accepting it was properly made. The judge's grounds for refusing were that the matters raised were capable of being dealt with by the trial process with proper comment being made and appropriate legal directions being given.

Legal directions

34. The judge gave the jury the following written directions upon the issue identified as "Effect on the defendant of delay/missing material":

> "On any view, there has been a good deal of delay in this case, quite apart from what I have already said about [E] not making an immediate complaint to the police.
>
> A number of different factors have contributed to that delay, but none of them are [the appellant]'s responsibility.
>
> When [E] first went to the police, in December 2009, she was spoken to, but although she made a complaint against him, and [the appellant] was interviewed by the police, no further action was taken against him at that stage.
>
> When [E] spoke to the police again in 2013, she wasn't asked about part of her complaint at all in the first interview, because

the investigating officer forgot. That has led to further delay. [E] wasn't formally interviewed about Brighton until 2017.

When the present OIC took the case over, he spent some time trying to find [the appellant], and [the appellant] wasn't interviewed until February 2015.

You have also heard that the previous investigating officer has wilfully refused to help with this investigation now. We don't know why. Nor do we know whether she could have provided answers to questions that remain unanswered, had she agreed to help.

But her intransigence means that she has given no help in interpreting entries on the case log, which, as a result, cannot be regarded as reliable.

She has not explained why she doubted [E]'s truthfulness or her motives for making her complaint, as she recorded that she did.

The fact that she did doubt [E]'s truthfulness is not in itself relevant: police officers are not allowed to say in evidence that they do or do not believe an account given by a complainant or a defendant. That is because it is for the jury to decide who is and who is not telling the truth, and no one else.

The difficulty that arises here is that the reason for her doubts is not known, and no one can ask her, so it can't be explored out of court, by the prosecution or the defence, as it could have been if she had been able to explain matters to the OIC, so he could have investigated.

Further, as a result of the delay, material has been lost. That is not a unique situation in cases where allegations are made about behaviour said to have taken place a long time ago. But it is something you must be aware of and make allowance for.

[E]'s phone was taken by the police, but was handed back to her. That in itself isn't unreasonable, but we don't know if it was examined or not. If it was, we don't know what was or was not found, because there is no record.

We do know that [the appellant] was interviewed, but the tape recording is not available, so the summary we have can't be checked. It is agreed that it can't be entirely accurate.

Also, although [E] says she was video-interviewed at the time matters were investigated back in 2009-10, the log suggests that she wasn't. One interpretation is that the log is inaccurate, another is that [E]'s recollection is inaccurate. We don't know. But if she was interviewed, we don't know what she said, so

> the defence can't compare it with what she said later, or what she now says, and point out any discrepancies.
>
> There was then enormous delay – which the OIC has explained – between [E] being interviewed about Bristol and then about Brighton. The point is not why there was such delay, or whether there was a good reason for it. The point is that it happened at all, so that by the time [the appellant] comes to be tried for these matters, he has to cast his mind back many years as well as having incomplete information with which to present his defence.
>
> These are all matters which you must have very much in mind. If you feel that because of the delay, and/or because of the absence of material and/or information, the defendant is disadvantaged or prejudiced in his ability to defend himself, that is something you should take into account in his favour when deciding whether or not the prosecution has made you sure of his guilt."

Grounds of appeal

35. The grounds are two-fold, namely:

    i) The prejudice suffered to the appellant in his defence could not fairly be rectified by the directions given to the jury;

    ii) Proceedings should have been stayed as an abuse of process.

36. The original grounds of appeal drafted by trial counsel relied on the refusal of Ms Kennedy to engage in the investigation, the agreed inaccuracy of the Sussex police log, the absence of the 2010 interview tapes of the appellant in Brighton and of any evidence relating to an examination of E's mobile phone. The primary submission contained in the written grounds of appeal was that the case centred upon the credibility of the complainant, proper examination of issues of credibility as to the 2009 part of the case was wilfully obstructed by the police in the person of Ms Kennedy. Reliance was placed on the evidence of DC Osborne as to the difficulties that created

37. Mr Taylor, counsel now acting on behalf of the appellant, has amplified the detail of the original grounds. The judge's direction on delay and missing material is described as being at best economical. Identified is the fact that the judge directed the jury that they could not know the reason why Ms Kennedy doubted the truthfulness of the complainant; omitted from the direction was the fact that it was also the social worker, Paula Pettit, who was involved in the initial complaint, who shared the adverse view as to the truthfulness of the allegation. Two professionals had reason to doubt the complainant, only one was included in the legal directions. The jury were not told of any attempts by the prosecution to find Paula Pettit. The role of Paula Pettit and her independent review of the truthfulness of E and her motivation were important given the criticism of Ms Kennedy and her professionalism. Ms Kennedy was described as being wilfully obstructive. Doubts as to her professional

competence could affect the jury's view as to any opinion she gave as to the truthfulness of E. Paula Pettit was untainted by such criticism and thus her independent assessment was of importance and should have been included in the legal direction. The judge failed to grapple with the absence of Paula Pettit.

38. It is said that the full effect of the missing ABE interview of E and the appellant's 2010 interview was not explained to the jury. The loss of both creates serious prejudice. For example if the appellant's interview transcript had been available the jury could have seen how the complainant's account had been recorded and put to the appellant at the interview.

39. An ABE interview is taken over a long period of time, considerable detail is given. It would have shown E in a video, her demeanour could be observed. The interview would have disclosed any relevant background areas in respect of which E could have been cross-examined. Her evidence would have been given in a specific way and would have been fresh in her mind. The prejudice to the appellant was that he did not have the opportunity to see or comment upon such evidence, if E was right that the ABE interview did take place. The loss of the appellant's 2010 interview together with the delay in this case meant that the appellant had no detailed record of his contemporaneous response to the allegations.

40. Asked by the court in what respects the legal directions were deficient, Mr Taylor identified three: the limited reference to the loss of E's ABE interview in Bristol, the absence of any reference to Paula Pettit, and the limited reference to the loss of the appellant's 2010 interview.

41. It was in February 2010 that the appellant was informed that no action would be taken. It was not until five to seven years later that he was told that there were further allegations and that the original complaints were being pursued. The earlier evidence was relevant as to E's general credibility, it directly impacted upon her credibility in respect of the Bristol allegations.

42. Social services files from Sussex over and above those which had been disclosed could have been of considerable assistance. They may have identified what occurred in respect of the original ABE interview, whether in fact the complainant had taken a drug overdose, and the real reason for the same, e.g. E was not telling the truth, she was concerned as to what could be found on her mobile phone, it being suggested by the appellant that E was associating with much older boys and had candid photographs and messages on her phone.

43. It is said that the absence of the phone was relevant in three respects in that missing were:

    i) Any communications between the appellant and E; the build up to the allegations; and the correctness of them;

    ii) Information from E commenting on her friends and family and a wish to find her way out from the family home;

iii) Evidence which is accepted would contravene section 41 of the Youth Justice and Criminal Evidence Act 1999 ("section 41"), namely her behaviour with other males.

The material on her phone could have provided an insight as to E's behaviour at the material time. The jury were not reminded about how potentially important these matters might prove to be and how the appellant was left in an impossible position in respect of this and other matters.

44. Missing medical files were another area which could have caused prejudice to the appellant. It was said that the complainant had a troubled childhood even before she was reunited with her mother. School records and medical records may have given indications of sexualised behaviour prior to the time she stated that the appellant had begun abusing her.

45. The judge did little to point out the effect that delay may have on the appellant's ability to call witnesses, e.g. a man called Remi, effectively became E's guardian and his girlfriend and Chelsea, E's friend of the same age, with whom E lived for some time in Bristol. E's mother was willing to be called on behalf of the defence, for reasons which are not identified, this course was not taken.

46. No application was made pursuant to section 41. The judge made no ruling on what, or to what extent, questions and evidence could or should have been considered permissible pursuant to section 41. In the "Admissions" it is stated that "she had made a number of advances towards his friends and older males, some of which he believed she had been sexually active with". Reference was made to E being on contraception in the ABE interview, in the summing up it was noted that "it was accepted that E was on and off contraception at the time". There was an issue as to whether this was due to endometriosis. There was cross-examination as to whether there had been an argument between E and the appellant in respect of E having gone off with older males. Defence trial counsel had been asked why no application was made pursuant to section 41, his reply was that it had been a tactical decision not to pursue such an application.

The absence of Ms Kennedy

47. On 18 January 2018 the Crown applied for a witness summons for Ms Kennedy. It referred to her reports in the police log and stated that she would:

> "…be able to provide evidence that:
>
> (i) On 08/12/09 the defendant's mum informed her that the defendant had admitted he had touched the complainant's boobs and bum but denied digital penetration, and,
>
> (ii) On 26/01/10 during interview under caution the defendant claims the complainant 'came onto him'."

It further stated:

> "Had Josie Kennedy provided a witness statement the Crown could have applied to adduce her evidence under the Hearsay

> Rules but as she has refused the Crown's only option is to summons her at court to give oral evidence stating what she was told on the above dates. The court can then determine whether the evidence can be adduced by the Crown pursuant to the Hearsay Rules."

In response, on 22 January 2018 the judge in an email stated:

> "Please provide answers to these questions:
>
> • Why has the prosecution not made a hearsay application in relation to the entries on the police report?
>
> • Why is there no other record of the defendant's interview under caution in January 2010? Presumably it was tape-recorded.
>
> • Why is the defendant's mother not giving evidence? Was she asked to make a statement? With what response?"

48. At the appeal hearing neither the appellant nor the Crown were represented by trial counsel, however, each had spoken to the original counsel. Trial counsel for the Crown was described by original defence counsel as being very experienced, his attitude throughout the trial being one of "consummate fairness".

49. It would appear that the questions raised by the judge in his email were not dealt with by the CPS. On Friday 26 January 2018, the trial being listed to commence on Monday 29 January, counsel then acting on behalf of the Crown spoke to defence counsel on the telephone. He said that the Crown were discontinuing the prosecution, it was understood to be due to the weaknesses and inconsistencies within the material together with the prejudice to the defendant. Within a short time of the first phone call both counsel again spoke. Prosecuting counsel said that his decision had been overruled within the CPS and the case was continuing. There had not been time to inform the appellant of the first decision.

50. The court log records the following:

    i) On the first day of the trial an application to stay the indictment was made. Original prosecuting counsel has confirmed that it was during this legal argument that discussion took place upon the issue of to what extent, if at all, the opinions of Ms Kennedy and Paula Pettit should go before the jury.

    ii) The judge gave a short ruling refusing the application.

    iii) In more detailed reasons given on 30 January, the judge asserted that he was satisfied that the Appellant could have a fair trial, adding "The material from the log of the earlier investigation, insofar as it is admissible, can be placed before the jury".

    iv) On 1 February 2018, prior to the officer in the case, DC Osborne being called, defence counsel asked the judge "In the light of Your Honour's ruling, is it appropriate to ask the officer to confirm that views were expressed as to the

truthfulness of the complainant in this case?". Following discussion it was agreed that prosecution counsel would "lead" this evidence when DC Osborne was called.

v) On the morning of 2 February 2018, the second application for a stay was made. In his ruling, the judge stated he remained of the view that the difficulties outlined by the defence were capable of being dealt with by the trial process with "proper comment" and "appropriate legal directions".

vi) The judge sent draft legal directions by email to both counsel. Submissions were made in relation to the proposed legal directions on the morning of 2 February. Written and oral legal directions were given to the jury on 2 February in the first part of the judge's "split" summing up.

51. In his summing up of the evidence the judge reminded the jury of information that was drawn from the log. He referred to the fact that Ms Kennedy had wilfully refused to help the investigation, that her intransigence meant that she had given no help in interpreting entries in the case log which as a result could not be regarded as reliable. The entry by DC Kennedy on 26 January 2010 that both she and Paula Pettit had doubts about the truthfulness of the allegations and motivations of both mother and daughter was included in the summing up but was not in the agreed "Admissions". The judge stated that the officer's opinions were irrelevant but DC Osborne did not know the basis for DC Kennedy's doubts which could no longer be investigated or explored.

ABE interview of the complainant in 2009/2010

52. The position of the Crown as to whether or not this interview took place is less than straightforward. At trial, within the "Admissions", it is stated that: "The prosecution and defence agree the following". Extracts from the police log of enquiry include:

> "On 9.12.2009, [E] was admitted to hospital having taken an overdose. Therefore, the ABE did not take place."

During the course of oral submissions, the Crown identified E as a witness of truth, relying upon the detail of her account as to where the interview took place, there appeared to be acceptance that such an interview had taken place. At the appeal hearing the ground had shifted. The Crown were no longer satisfied that the ABE interview had taken place.

53. At trial, the defence position was that no interview had taken place. The point is now taken that if this is correct E's account of the interview and its location was an intricate lie by her which required a specific direction as to how it undermined her evidence. It is of note that no such direction was sought at trial by defence counsel. However, the primary submission now made is based upon the premise that the interview did take place and thus the defence were deprived of the opportunity of seeing and hearing E's account in the missing ABE interview.

54. In the summing up the judge referred to the fact that according to the log the ABE interview did not take place. He also reminded the jury that in her evidence E said she had been interviewed and gave factual details as to where it took place (namely at

what looked like a house), the length of the interview, factors which he said were consistent with the interview taking place. The judge said "She seemed sure, didn't she, that she was formally interviewed in that way? If she was, we don't have it. We don't have a record of it and the Defence therefore can't compare what she said then with what she says now, and I've already given you a direction about that".

The Crown's response to the grounds of appeal

55. The Crown accepts that it is regrettable that Ms Kennedy was not present at the trial. However, her absence resulted in evidence going before the jury which was powerful, namely the views of the former police officer and the social worker that they did not believe the complainant. This evidence would not of itself have been admissible as it represented the personal views of the police officer and the social worker but it was admitted because it was not known why either professional had come to the view that she had. Their views were clearly set out in evidence, DC Osborne stated that had he spoken with Ms Kennedy he would have wanted to know why she formed the view she did and would have required more detail about it.

56. As to whether the appellant had been disadvantaged by the absence of the police officer, Mr Connolly submitted that the appellant could not have done any better. In fact he had done better, in that he was able to adduce evidence that the police officer and the social worker did not believe the complainant which ordinarily would not have been before the jury. No serious prejudice had been suffered, quite the reverse. Had Ms Kennedy attended and had a *voir dire* been held the reasons for her doubts could have been explored, much is likely to have related to her personal judgment which would not have been admissible.

57. Mr Connolly accepted that within the legal directions it would have been better had the jury been reminded that it was not only the police officer but also the social worker who had doubts about the truthfulness of E, particularly as the judge had stated that the police officer had wilfully obstructed the investigation. However, although not dealt with in the legal directions, reference was made to Paula Pettit's evidence in the summing up.

58. As to the entry in the log that E had made similar allegations in the past against her father which were not proven to be true, DC Osborne told the court that this was not something he had found in the unused material. He did not know where Ms Kennedy had obtained that information. It was the Crown's contention that applying section 41 this evidence would not have been admissible because it was not sufficiently proved as a lie. Its admission could only have benefited the appellant as it sowed the seeds of E's untruthfulness.

59. The reference in the log to the fact that both E and her mother may have some mental health problems which might need to be explored further was placed before the jury by DC Osborne who said he would have liked to ask Ms Kennedy why she had come to that view. There was reference to that entry in the log in the summing up.

60. The absence of the appellant's interview was before the jury, as was the summary which was contained in the admissions.

61. The absence of the phone was a limited point, as there was only one reference to it by E, accepted by the appellant, namely the text by her telling him that if he did not report the incident to her mother she would. Thus, its content was limited and unlikely to make a material difference to the evidence at trial. If an analysis had been carried out which had indicated that E had contact with other males, such evidence would have fallen foul of section 41 and would not have been admissible.

62. The jury were alive to the potential significance of the missing evidence and were correctly directed not to hold that against the appellant. The absence of the 2010 interview with the appellant was balanced by the fact that a summary was available. It contained a flat denial accompanied by the police officer's comments that the appellant was plausible.

63. Mr Connolly said it is probable that in fact no ABE interview took place in 2009/early 2010. There was only a short time window before E indicated to the police that she did not wish to proceed, E's giving evidence that she had been interviewed assisted the appellant, not least because it contradicted what was contained in the police log, i.e. that she had not. Mr Connolly could not say there was no potential prejudice, but it is no more than that.

64. As to third-party material, this was retrieved, inspected and disclosure was made. There was no complaint at trial as to the disclosure process, no section 8 application was made. It was Crown counsel who himself examined the material with a reviewing lawyer to ensure that proper disclosure had been made.

65. As to absent witnesses, they could all have been called by the defence. The issue of the missing evidence was at the forefront of the jury's mind, consistent with the legal directions.

Discussion

Applications to stay

66. The judge in considering each application was provided with the relevant authorities, namely *R (Ebrahim) v Feltham Magistrates' Court* [2001] 2 Cr App R 23, *R v S* [2006] 2 Cr App R 23, *Warren v Attorney General of Jersey* [2011] 2 Cr App R 29 (p411). He applied the law as evidenced by the fact he referred in his ruling to the test set out in *Ebrahim* and *S*. He assessed and concluded that there was no serious prejudice to the defence given his power to regulate the admissibility of evidence within the trial process itself which would ensure that all relevant factual issues arising from delay, loss of material and police conduct would be placed before the jury for their consideration in accordance with appropriate directions from him. In order for the judge to have acceded to the defence application to stay the indictment the appellant needed to establish "serious prejudice to the defence so that no fair trial can be held" (*R v S*, at [21]). The appellant's case was that he had suffered prejudice, but he did not identify serious prejudice. In our judgment, the judge correctly applied the law to the facts as they were before him. He was aware of the difficulties caused, in particular by the absence of Ms Kennedy and the appellant's 2010 interview. He was mindful of the absence of that evidence and referred to the same in his legal directions. His rulings were correct.

Prejudice to the appellant/legal directions

67. This was a short trial. The evidence occupied only two court days. On Tuesday 30 January 2018 the case was opened to the jury and the ABE interviews of the complainant were played. The court was unable to sit on 31 January due to the ill-health of a juror. On the morning of 1 February the complainant was cross-examined. Her evidence was followed by that of DC Osborne. During the afternoon the appellant gave evidence in chief and was cross-examined. On Friday 2 February the judge gave his legal directions, these were followed by speeches from the Crown and the defence. On Monday 5 February the judge summed up the facts of the case, the jury retired at 11:37 and returned unanimous verdicts later that afternoon at 16:36.

68. We have read the transcripts of the complainant's ABE interviews. In our view they contain considerable and compelling detail of her complaints both as to the events in Brighton and Bristol.

69. It is clear that at trial, the absence of Ms Kennedy created a problem for the Crown and the defence. A course which could have been taken would have been to witness summons the former officer. A *voir dire* could then have taken place to enable questions to be asked of Ms Kennedy in the absence of the jury as to the reasons for her stated views regarding the credibility of the complainant and the motivation of both the complainant and her mother. This was not done. The course that was adopted, namely the calling of DC Osborne, was discussed between the judge and both counsel. As a result the content of the Sussex police log was read into the evidence by the officer and, contained within it, the views both of the then DC Kennedy and Paula Pettit as to the credibility and motivation of the complainant. It is of note that defence counsel did not cross-examine the officer as to the absence of Ms Pettit and what, if any, effort had been made to obtain her presence at trial. It is accepted by all that the view which the police officer and the social worker independently formed as to the credibility of the complainant would of itself have been inadmissible. However, absent from the log was the reasoning which led to those views.

70. The credibility of the complainant was a core issue at the trial. We accept that within the legal directions there should have been reference to the absence of Paula Pettit as well as DC Kennedy, given the admitted evidence of her view as to the credibility of the complainant and the motivation of the complainant and her mother. However, no issue was taken by defence counsel upon this omission from the directions. He was better placed than any in the appeal hearing to have a sense of the evidence at trial and its relevance in the context of the legal directions. Although the direction was silent as to Paula Pettit, her views had been adduced before the jury and in his summing up the judge repeated the specific entry made by DC Kennedy, namely that "both myself and Social Services Department, Paula Pettit, have doubts about the truthfulness of the allegations and motivations of both mother and daughter".

71. We accept the force of the argument that as Ms Kennedy had been criticised by the judge and described as wilfully obstructive, this could have affected the jury's view of her opinion and any assessment she made of the complainant, which in turn could have influenced any like assessment made by Paula Pettit. However, given the short duration of this trial, we are in no doubt that this jury would have had in mind the fact that in 2010 another independent professional, Paula Pettit, had doubts about the

credibility of the complainant. The jury had been directed upon the disadvantage the defence faced in not being able to explore the reasons for DC Kennedy's adverse view of E's credibility, it would logically follow that the same reasoning applied to Paula Pettit. Whatever the basis for those doubts, the jury had the advantage of seeing and hearing the complainant and making their own assessment of her credibility. Given the fact that Paula Pettit's view was before the jury in evidence, and that the jury were reminded of that evidence in the summing up, we are unable to conclude that the absence of any reference to her in the legal directions is sufficient to undermine the safety of these convictions.

72. At trial the defence stance was that no ABE interview of the complainant had taken place in Brighton. In this appeal there has been a shift in the position of the appellant in that it is now submitted that the absence of the video of the ABE interview caused prejudice to the appellant as it deprived trial counsel of the opportunity to cross-examine E upon her account and demeanour in the original interview. Of itself, we regard the shift as undermining the appellant's present submission. The fact that both the Crown and the appellant have shifted their position, as between trial and appeal, regarding the issue of whether the ABE interview took place highlights the difficulty of the evidence. However, it was evidence which was before the jury and dealt with in the summing up. To find that a conviction is unsafe upon the basis of prejudice resulting from the loss of the video of the complainant's ABE interview, when in fact the appellant's case at trial was that no such interview had taken place, does not appear to this court to be an approach which fairly reflects what took place at the original trial; nor does it reflect the defence case as it was before the jury. Put shortly, this submission fails.

73. We accept that the loss of the appellant's original 2010 interview caused some prejudice to him. However, it was undisputed that the interview took place and that the appellant had been consistent in his denials throughout. The judge dealt with this in summing up. The written summary of the interview was contained in the "Admissions", as was DC Kennedy's opinion that the appellant's account was plausible. The jury were aware of the absence of the interview and the problem that it caused for the appellant. We are unable to find that there is any deficiency in the directions as to the absence of the transcript of this interview which could begin to undermine the safety of the convictions.

74. The absence of evidence relating to the complainant's phone and any analysis of its content is limited. Insofar as this trial was concerned there was only one reference to it by E, accepted by the appellant, namely the text by her telling him that if he did not report the abuse to her mother she would. Had an analysis of the phone been carried out which indicated that E had contact with other males, such evidence would have contravened section 41 and would not have been admissible. The judge did remind the jury that any information from the phone and any analysis of it was not available. In our view this was a sufficient direction. Moreover, Mr Taylor's submissions as to what information it could have contained can be no more than speculation.

75. We have found some difficulty in understanding the appellant's section 41 submission. Evidence was before the jury, as contained in the original police log, of the appellant's interview which referred to sexual interest/activity on the part of E with other males. This evidence which was included within the "Admissions" could only have assisted the defence. The evidence contravened section 41. It is not

difficult to understand the tactical reasoning of the defence in making no section 41 application, as it was the defence case that the previous sexual abuse of E by her father, or her interest in and possible activity with older men, demonstrated that she had sexualised thinking and experience more than a girl of her age normally would. In our view there is no merit in this submission.

76. At trial no issue was taken by the defence as to non-disclosure of any records, social services, medical or education. At the appeal hearing the court was informed that experienced prosecuting counsel had himself checked the disclosure process, the counsel described as demonstrating consummate fairness throughout the trial. In our view speculation now as to what such files may have contained cannot take this appeal any further. If there were concerns about disclosure they could and should have been raised at the original trial.

77. Missing witnesses could have been called by both the prosecution and the defence. The defence would have known in advance of trial which witnesses were to be called. If they had concerns as to the absence of any relevant witnesses they could have been seen and statements obtained from them. The absence of such witnesses cannot be placed solely at the door of the Crown.

78. The judge was well aware of the prejudice emanating from delay, he directed the jury fully and in appropriate terms upon this issue.

Conclusion

79. We have found this a troubling case given the delay, the absence of Ms Kennedy, the issue of the complainant's Brighton ABE interview and the absence of the transcript of the appellant's 2010 interview. We have been particularly assisted by the written and oral submissions of Mr Taylor and Mr Connolly. In reaching our conclusion we have carefully considered the separate submissions but we have also looked at the totality of the trial process including the evidence, the rulings made, the directions given, together with the accurate factual summing up of the judge. Having done so, and for the reasons given, we are unable to conclude that the appellant's convictions are unsafe.

80. Accordingly, the appeal is dismissed.