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IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Tuesday 14th May 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE POPPLEWELL

SIR KENNETH PARKER

R E G I N A

v

RICHARD COLIN DAY

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Mr Robert O'Sullivan QC appeared on behalf of the **Appellant**

Mr Ian Way appeared on behalf of the **Crown**

J U D G M E N T

(Approved)

1. **LORD JUSTICE HOLROYDE:** On 8th August 2018, in the Crown Court at Northampton, this appellant was convicted of offences of kidnapping and committing an offence with intent to commit a sexual offence. He was subsequently sentenced to concurrent extended determinate sentences, with a total custodial term of eight years and an extension period of eight years. He now appeals against his convictions by leave of the Single Judge.
2. The victim of these offences, to whom we shall refer as 'MW', is entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime no matter may be published if it is likely to lead members of the public to identify her as the victim of either of the offences.
3. MW was 13 years old when, on 7th August 2017, she was attacked by a man whom she did not know as she was crossing an isolated footbridge between two villages in Northamptonshire. The man grabbed her by the throat, struck her head against the metal railings at the side of the bridge and tried to drag her to a more secluded location. His clothing was in disarray, his trousers were undone and the top of his underpants was exposed. MW bravely struggled, and the man released her, apologised, and left the scene.
4. During this incident MW had made a call from her mobile phone. This was received by her mother, who could hear what was happening. The mother's evidence was that she received the call at 13:47. She called the police, as also did a man who, shortly afterwards, came upon MW, found her in a very distressed state and waited with her until the police arrived.

5. In her account to the police MW described her attacker as being aged in his mid-forties, 5'10 tall, of medium build, with a bald head and a scab above his right eye. She said that she would remember him again due to his scab and also to the impact the incident had had upon her.
6. Shortly after she had given her initial account, MW recalled that she had seen in the area a vehicle, which she later identified as a VW Beetle, which had distinctive writing on the side. The appellant's wife owned a VW Beetle which had distinctive writing on the side, and CCTV footage showed that it had been in the relevant area on the day of the offences.
7. The appellant was arrested on 12th August 2017. He accepted that he had been using the VW Beetle in the general area on 7th August but denied any involvement in the offences.
8. A video identification procedure ('the VIPER procedure') was held on 13th August 2017, at which MW identified the appellant.
9. In an interview under caution held that day, the appellant denied the offences. He said that at the material time he was using the VW Beetle to deliver flowers to a customer of his wife's florist business. Later that afternoon, he said, he had parked near to the scene of the crimes in order to urinate.
10. The appellant was charged with the two offences, the prosecution case being that he had kidnapped MW with a view to moving her to a more secluded location and there committing a sexual offence.
11. At trial it was not in dispute that someone had committed the offences charged. The

issue was as to the identification of the appellant as being the man who had done so. In that respect the prosecution relied on a number of strands of evidence.

12. First, the prosecution pointed to MW's description of the man who had attacked her.

When cross-examined about her initial account, she confirmed (as was implicit in the initial account) that her attacker had not been wearing glasses. She said he had a scab, which she described as being the size of a segment of a small orange, about 1 cm x 1.5 cms. Initially she had said that this was above his right eye. In cross-examination, however, she said that she did not know if she was mixing up his left and right. She said that it could have been "his left and my right", and after a pause she said that she thought it was over his left.

13. MW also said that, although the main thing she remembered about the man was his scab, she would probably also remember him from other facial aspects. She said that the hair of the man whose image she identified at the VIPER procedure was longer than she remembered from her attacker but she recognised the facial features. She said that she had been and remained "100% certain" that she had correctly identified her attacker at the VIPER procedure.

14. The prosecution relied, secondly, on that identification of the appellant at the VIPER procedure, the arrangements for which had been made by a civilian police employee, Ms Wilkinson. She gave evidence explaining to the jury how she had selected appropriate imagery for comparison purposes. She said that the appellant was wearing spectacles when he attended the police station. She had recorded video clips of him both with and without spectacles, and had used the clip in which he was not wearing spectacles. She explained that it would have been virtually impossible for her to find in

the database images of a sufficient number of men wearing glasses who sufficiently resembled the appellant. She accepted that neither the appellant nor anyone else whose image was used in the procedure was bald, but explained that she was trying to find images which as closely as possible matched the appearance of the appellant as she saw him when she was making the arrangements.

15. In the course of the trial the jury were shown a recording of the whole of the VIPER procedure as it took place. They were thus able to see and hear exactly what happened when MW made her identification. At the request of counsel, we too have had the assistance of viewing the relevant section of the recording of the VIPER procedure.
16. MW had been accompanied by her father, who was acting as an appropriate adult in view of her age. In accordance with the normal procedure, she viewed all nine images twice without anything being said. She was then asked if she wished to view all or any part of the imagery again and she asked to view image number 9. That was in fact the image of the appellant. She asked Ms Wilkinson if any of the men shown in the imagery had had a scab removed. Ms Wilkinson said that she could not say. MW's father then said words to the effect that "they" would have removed or covered any scab in the interests of fairness. MW, in response to her father, said, "If they haven't removed anything, none of them have scabs so it is not him. If they have removed something, more than likely that would look like him."
17. She was instructed by Ms Wilkinson that she should consider the whole face of the person shown in the image and not simply focus on whether there was or was not a scab. She looked again at the image. She asked for it to be shown again at the point where it demonstrated a side view. She then said of image 9 that although the hair was longer

than the man who attacked her it was a face she recognised. Although there is no precise transcript of exactly what she said, Mr O'Sullivan QC on behalf of the appellant has very helpfully prepared a note which we regard as accurate. MW said:

"It is a face I recognise. It's the other little things but [the hair] wasn't as long as that. That is the eyes, nose, the rest of the mouth, ears. That is the face I recognise, but things like the hair I don't know how quickly it can grow back. It's the nose, the eyes, the eyebrows, the ears, the mouth, the face I recognise. I said his eyes were quite close together, they were blue and he had bushy eyebrows and the nose is an arch."

18. She was again given an opportunity to look further at the image but said that she had seen enough.

19. Application was made by Mr O'Sullivan on behalf of the appellant to exclude the evidence of the VIPER procedure on grounds of fairness pursuant to section 78 of the Police and Criminal Evidence Act 1984. That application was refused by the trial judge, Her Honour Judge Lucking QC. We shall say more about it shortly.

20. The prosecution further relied on the fact that the appellant, on the day of the offences, had been using a distinctive vehicle similar to that described by MW as being near the scene at the time of the assault upon her.

21. The prosecution called as a witness the customer to whom the appellant said he had delivered flowers. She timed the delivery to her home at about 13:50 to 14:00. Evidence was given by a police officer to the effect that it would take between eight and ten minutes to drive between that lady's home and the scene of the crimes.

22. The appellant's wife was tendered as a witness for the prosecution. In cross-examination

she said that the appellant usually wore black-rimmed glasses, as indeed, we observe, he had been wearing when he went to the police station for the VIPER procedure. She said that he had never been bald, and that on 7th August 2017 he did not have a visible injury on his face, though he had sustained an injury to his cheek about two weeks earlier. On the day of the offences she said that the appellant had dropped her off at work at about 13:35, gone off to make the delivery of the flowers, and had returned to her after about 25 minutes. Pausing there, it is an important part of the appellant's case that the overall evidence as to timings adduced by the prosecution pointed away from any conclusion that this appellant committed the offences.

23. Finally as part of the prosecution case, the prosecution were permitted to adduce evidence of bad character in respect of the appellant, to the effect that he had been convicted of an offence of rape in 1996. Counsel had resisted the application to adduce that evidence. The learned judge gave a ruling admitting it. Again, we shall return to the ruling shortly.
24. The appellant gave evidence to the jury in which he denied the offences. He put forward his alibi, saying that he had delivered the flowers at about 13:50 and had returned to his wife by about 14:00. He said that he wears glasses all of the time, having suffered an injury to one eye in an industrial accident in 2007, and he said he would have been wearing his glasses on 7th August. He agreed that on photographs which had been taken of him upon his arrest on 12th August it was possible to see marks on the left side of his face. He said that these had been caused about two-and-a-half weeks before his arrest, when he had tripped over whilst walking his dogs and had grazed his face. He said that on the day of the offences the appearance of those marks would have been the same as was shown in the photographs taken on arrest. He said that he had never shaved his

head or had a 'skinhead' hairstyle. He maintained that MW's identification of him was incorrect.

25. In cross-examination he said that he could not function without his glasses. He agreed that when interviewed under caution he had said that the delivery of the flowers was at about 14:00, but said he was now certain that it had in fact been earlier at 13:50.
26. As to his previous conviction, he expressed his profound regret for that crime, which he had committed when he was aged 29 and his victim was aged 23. He described his unhappy personal and family circumstances around that time. He said that having been in the company of the victim at a social occasion on the night in question, he had subsequently tried to kiss her, and when she refused he had grabbed her round the throat, pushed her backwards and raped her. He said he had subsequently apologised to the victim after the offence.
27. The grounds of appeal against conviction advanced by Mr O'Sullivan and resisted by Mr Way on behalf of the respondent challenge the rulings of the judge admitting the evidence of the identification of the appellant at the VIPER procedure and the evidence of the appellant's previous conviction. Both counsel appeared at trial. We are grateful to them both for the assistance which their submissions have given us.
28. We consider first the decision of the judge refusing to exclude the evidence of the identification of the appellant at the VIPER procedure. Initially a submission was made by Mr O'Sullivan based upon one of the provisions of the Code of Practice, made pursuant to the Police and Criminal Evidence Act 1984, which governs video identification procedures. Mr O'Sullivan helpfully tells us today that he no longer

pursues that particular submission, his argument not depending upon establishing breach of any of the specific provisions of the Code of Practice. It is therefore unnecessary for us to say any more about the precise terms of that code.

29. It was submitted to the judge on behalf of the appellant that, in addition to the suggested breach of the code, the procedure which had been adopted was unfair for two reasons. First, it was submitted that MW should have been shown nine images of males all of whom were wearing spectacles so as to match the appellant's appearance at the police station rather than to match the appearance of the attacker who was said not to be wearing glasses. It was further submitted that the procedure was rendered unfair by the intervention, well meaning though it no doubt was, of MW's father.

30. Rejecting the submissions, the judge noted that MW had established her wish to see image 9 again before her father had made any intervention. She did not refer to any other image at any stage of the procedure and the interjection by her father had not caused her to change her observation or her identification. Whilst it would have been possible for the witness to be shown images of men wearing glasses, it was not, in the judge's view, necessary that that should be done. Her conclusion was that MW had viewed "what was in my judgment a very good selection of comparable volunteers and was able to concentrate on the facial features".

31. In challenging that ruling before this Court, Mr O'Sullivan submits that none of the images shown during the VIPER procedure fairly reflected either the description of the attacker given by MW or the appellant's normal appearance as observed by Ms Wilkinson. MW had described a bald man, with a scab, and without glasses. Less than a week after the incident the appellant had a full head of hair, had no scab on his

face, and was wearing prominent and distinctive glasses. Mr O'Sullivan submits that for the appellant the glasses are an habitual and intrinsic part of his appearance and are not to be regarded as a mere item of apparel or an accessory which would frequently be added or removed. He goes on to submit that even if it be correct that there was a practical difficulty about finding in the police database a sufficient number of images of men wearing glasses, that could not justify changing the ordinary appearance of the appellant.

32. In the second limb of his submission, Mr O'Sullivan goes on to argue that the interjection by MW's father irrevocably tainted her identification of the appellant. He told his daughter, incorrectly, that scabs had been removed from persons shown in the VIPER procedure - an error which was not corrected by the supervising officer, Ms Wilkinson. Although Mr O'Sullivan makes no criticism of Ms Wilkinson, and although he acknowledges that MW's father was no doubt trying to assist, he submits that the result was that MW was wrongly reassured by her father that the facial feature which she was describing could have been present on the faces of one or more of the men shown in the images. It was therefore more likely that the attacker's image was amongst them.

33. Both of these matters, submits Mr O'Sullivan, were incapable of being cured by any judicial direction or by any other aspect of the trial process. He submits that the evidence of the identification of the appellant at the VIPER procedure should, accordingly, have been excluded. Without it, there was no other sufficient evidence capable of identifying the appellant as the offender. Accordingly, the judge's decision to admit this evidence renders the convictions unsafe.

34. For the respondent, Mr Way answers this ground of appeal by pointing out that, although the appellant was not bald at the time of his arrest, his hair, as can be seen in the

photograph taken on that day, was very short. He argues that the fact that the appellant habitually wears glasses does not mean that he can never remove them, and accordingly MW's description of an offender who was not wearing glasses did not exclude the appellant. Similarly, since a scab is part of a healing process, the fact that no scab was visible on the appellant's face on 12th August does not assist with his appearance at the time of the offences on 7th August. Moreover, Mr Way submits it is important to have regard to MW's description of her attacker in its totality, rather than focusing upon individual aspects of her first account to the police. MW had described her attacker as having a scab above one eye, and in cross-examination she said that she may have mixed up his left and his right. The appellant accepted that, as at the date of his arrest, there was on the left side of his face the visible mark of an injury which he had sustained about two-and-a-half weeks earlier. It follows, submits Mr Way, that about one-and-a-half weeks before the offence the appellant had suffered an injury to the side of his left eye. The fact that there was no scab visible on 12th August does not mean that MW could not have seen the appellant with a scab or similar mark on 7th August.

35. Mr Way goes on to submit that Ms Wilkinson's decision to use the video clip which showed the appellant not wearing glasses did not amount to a fundamental alteration of his appearance and was entirely appropriate given that MW had described an attack by a man who was not wearing glasses. He submits that the interjection by MW's father did not render the identification process unfair or unreliable. In particular, Mr Way emphasises that, having viewed the images from start to end twice, MW had asked to see image 9 again before either her father or Ms Wilkinson had said anything.

36. Turning to the second ground of appeal, the judge in her ruling referred to the familiar

decision of this Court in Hanson [2005] EWCA Crim 824, [2005] 2 Cr App R 21, and she followed the structured approach indicated by that decision. She noted four unusual features which could be found in both the 1996 offence and in the present offences. They were that both complainants had been attacked in a semi-secluded public location, both had been seized by the neck, both had been subdued by the use of significant physical force involving forced removal from one place to another, and both received an apology immediately after the incident. The judge noted that there were dissimilarities in the ages of the two complainants, in the fact that MW (unlike the 1996 complainant) was not known to the appellant, and in the fact that the present offences did not appear to have involved the consumption of alcohol. She concluded, however, that those dissimilarities did not undermine the probative value of the evidence.

37. As to whether the fact that the previous conviction had been recorded many years ago, and whether that undermined the existence of a propensity, the judge indicated that "It is the experience of this court that a propensity to commit sexual offences may emerge many years apart". She concluded that the 1996 conviction was capable of demonstrating a propensity to commit sexual offences of the kind charged in the present case. She went on to conclude that the jury would be entitled to find, if they were sure of that propensity, that it was probative in relation to the question of whether the appellant had committed these offences. It was, she said, a relatively unusual propensity with a substantial probative value:

"The admission of this evidence permits the jury to properly consider the unlikelihood that MW coincidentally identified as her attacker a man who has a previous conviction for an attack with four significant and unusual similarities."

38. The judge rejected a submission that the prosecution case was weak without the bolstering of the bad character evidence. She further rejected a submission that admitting evidence of the 1996 conviction would be, in Mr O'Sullivan's phrase, "a wrecking ball" preventing the jury from giving fair consideration to the more nuanced features of the case. The judge was satisfied that the jury could properly consider the totality of the evidence and could and would be appropriately directed.

39. Mr O'Sullivan submits today that the threshold test for admissibility of evidence of the previous conviction was not satisfied and that, in the alternative, the evidence should have been excluded because its admission would have an adverse effect on the fairness of the trial. For this latter part of his submission Mr O'Sullivan relies both on section 101(3) of the Criminal Justice Act 2003 and on section 78 of the Police and Criminal Evidence Act 1984. Mr O'Sullivan refers to the decision of this Court in Hanson. He relies particularly on the later decision in M [2006] EWCA Crim 3408, and he points to the case of Burdess [2014] EWCA Crim 270 as an example of the application of the relevant principles to factual circumstances somewhat similar to the present case.

40. In Hanson the Court held that, when considering the admission of bad character evidence as being relevant to an important matter in issue between the defendant and the prosecution pursuant to section 101(1)(d) of the 2003 Act, namely whether the defendant has a propensity to commit offences of the kind with which he is charged, there is no minimum number of events necessary to demonstrate such a propensity. However, the fewer the number of previous convictions, the weaker is likely to be the evidence of propensity. At paragraph 9 the Court said:

"A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged. ... Circumstances demonstrating probative force are not confined to those sharing striking similarity. So, a single conviction for shoplifting will not, without more, be admissible to show propensity to steal. But if the *modus operandi* has significant features shared by the offence charged it may show propensity."

41. The Court went on to say at paragraph 10 that, when considering what was just in accordance with section 103(3) of the 2003 Act and in considering the fairness of the proceedings in accordance with section 101(3), the judge may, among other factors, take into consideration the degree of similarity between the previous conviction and the offence charged. That did not, however, mean that what used to be referred to as 'striking similarity' must be shown before convictions could be admissible.
42. In M, the Court referred to what had been said in Hanson when concluding that a trial judge had been wrong, on the trial of a defendant for offences of possession of a firearm with intent to cause fear of violence and criminal damage, to admit evidence of a conviction 20 years earlier for an offence of possession of a firearm, namely a sawn-off shotgun, without a certificate. Although the offences for which the defendant in that case had been standing trial involved the use of a sawn-off shotgun, the Court found it impossible to accept that one isolated instance of possession of such a weapon when the appellant was aged 28 was capable of establishing a propensity on his part to commit firearms offences when he was aged 48. In a passage at paragraph 16 on which Mr O'Sullivan particularly relies, the Court said:

"There may be cases where the factual circumstances of just one conviction, even as long ago as 20 years earlier, might be relevant to showing propensity, but we would expect such cases to be rare and to be ones where the earlier convictions showed some very special and distinctive feature, such as a predilection on the part of the defendant for a highly unusual form of sexual activity, or some arcane or highly specialised knowledge relevant to the present offence. In cases with less distinctive features in common, one would require some evidence of the propensity manifesting itself during the intervening period in order to render the earlier evidence admissible as evidence of a continuing propensity."

43. Mr O'Sullivan points out that in the present case there is no allegation of any evidence demonstrating a continuing propensity. He submits that there was no very special and distinctive feature which could properly enable the judge to be satisfied that the single previous conviction was capable of showing a relevant propensity. He points to a number of features of difference between the 1996 crime and the present offences: the very different ages of the complainants; the social background to the 1996 offence; the fact that MW, unlike the previous victim, had no prior knowledge of her attacker; the fact that the 1996 offence was committed at night rather than in the middle of the day; and the fact that whoever attacked MW had not pursued the assault when she resisted. Even if the offering of an apology immediately afterwards be an unusual feature of sexual offending, Mr O'Sullivan submits it is not sufficient to amount to a very special and distinctive feature.

44. For the respondent Mr Way largely accepts the principles of law on which the appellant relies. In particular he accepts that on the authority of M, in the absence of evidence of a continuing propensity, the admission of a single previous conviction in this context

requires some very special and distinctive feature. But, he argues, that does not mean it is necessary to identify an identical manner of offending on each of the relevant occasions. He submits that in the present case the unusual and distinctive features identified by the judge did exist, and he urges this Court to view both the previous conviction and the present offences in the round. He argues that such features of dissimilarity as can be identified are not significant, given the important similarities which do exist. For example, he suggests the fact that MW did not know her attacker is not a significant point when one recalls that the appellant had been convicted of the 1996 offence in part because he was known to his victim. Although the interval of time between the relevant incidents is a lengthy one, Mr Way submits that the judge was entitled to find that the evidence was nonetheless admissible. He submits, in summary, that it is beyond coincidence that MW describes an attack by a man she had never seen before, who had grabbed her by the neck in an attempt to pull her to a more secluded location and had then apologised, and she had then identified a man who had behaved in a similar fashion in the past, albeit many years ago. He submits that this is not a case of using bad character evidence to bolster a weak prosecution and that the judge properly directed the jury so as to ensure that they did not allow themselves to be unfairly prejudiced against the appellant.

45. We have reflected upon these submissions. We note that no criticism is or indeed could be made of the way in which the judge directed the jury about these two aspects of the evidence. The challenge to the safety of the convictions therefore turns upon the submission that neither aspect of the evidence should have been before the jury. Mr O'Sullivan emphasises that he relies on his two grounds of appeal, both individually and collectively.

46. We begin by reminding ourselves that the Code of Practice in relation to video identification requires that the images chosen to be shown with images of the suspect must, so far as possible, resemble the suspect in age, general appearance and position in life. Thus the first responsibility of the identification officer is to assemble images which as closely as possible resemble the suspect.
47. We accept Mr Way's submission that, provided that is done, it is then permissible for the identification officer to arrange for the imagery either to include or not to include some non-permanent feature of clothing or accessories in order as closely as possible to match the description of the offender. Given that MW described her attacker as not wearing glasses, Ms Wilkinson was, in our judgment, correct to use images which showed the appellant and others not wearing glasses. However strong the evidence might be that the appellant always wears glasses, we do not see that the fact that he was asked to remove them for the purposes of this procedure affects the fairness of the procedure. It may, of course, affect the weight the jury give to any identification made at the procedure, but it does not render the VIPER procedure unfair. The position is, in our view, analogous to a case in which the offender is described as wearing a woollen hat and the suspect and others whose images are to be used for the VIPER procedure are asked to wear such a hat for the purposes of the procedure. The VIPER procedure is not thereby rendered unfair, even if it be the suspect's contention that he has never owned or worn such a hat at any time.
48. Mr O'Sullivan realistically acknowledges that questions of fact and degree are involved in this context. We agree. But we do not agree with his submission that in the present case the habitual wearing of glasses by the appellant meant that it was inappropriate and

unfair to show the witness a clip of him not wearing spectacles.

49. As to the remark made by MW's father, we remind ourselves that he had been instructed, as any appropriate adult would be in such circumstances, that he should not say anything unless it were necessary for him to do so because the young witness appeared not to be understanding an instruction. It would therefore have been better if MW's father had not spoken at all. We do not, however, regard his interjection as having the significance which Mr O'Sullivan seeks to attach to it. As the judge noted, MW had already asked to look again at image 9 before her father had said anything at all. Whether her father was right or wrong in what he said, MW's response to it was no more than an assertion that her attacker had a scab, whereas none of the faces shown on the imagery had a scab. She went on to confirm, in the terms which we have quoted, that in making her identification she was taking into account features other than the scab.
50. Having seen the recording of the VIPER procedure, we are bound to say that the young witness showed evident care in taking her time to consider the imagery before her. In those circumstances we do not accept that her father's intervention in any way compromised or undermined the identification made by his daughter. For those reasons, we are satisfied that the judge was correct in her decision refusing to exclude the evidence that MW had identified the appellant in the VIPER procedure.
51. Turning to the second ground of appeal, the judge correctly approached the prosecution's application to adduce evidence of bad character in the manner indicated by Hanson. We agree with Mr O'Sullivan that this is not a case in which any allegation was or could have been made that the appellant had demonstrated a continuing propensity between 1996 and 2017. The admissibility of the evidence of his previous conviction therefore fell to be

decided on the basis that it was a single previous conviction many years ago and so could not have sufficient probative value unless it had some very special and distinctive feature.

52. In M, where the issue was as to the identity of the man who had discharged a sawn-off shotgun, the prosecution relied on a conviction for possession of such a weapon some 20 years earlier but were unable to give any further details of that earlier offence. In the present case, in contrast, significant details of the 1996 rape were available. It is, in our judgment, necessary to consider those details collectively and not to analyse them in isolation, the one from the other. In this regard we accept Mr Way's submission that the requirement of some very special and distinctive feature does not make it necessary in every case for the court to find what would previously have been regarded as a striking similarity.

53. Whilst there were undoubtedly features of dissimilarity between the 1996 rape and the attack on MW, the judge was, in our view, correct in her analysis that the four features of similarity which she identified collectively amounted to a very special and distinctive feature. We accept Mr Way's submission that it is important to focus upon the cumulative effect of those four features being added, the one to another.

54. It follows that, in our judgment, the evidence was properly capable of establishing a relevant propensity, and it was then for the jury to decide whether it in fact did so. We reject the submission that the judge was in error in considering the significance of the long passage of time since the 1996 rape. Although the judge expressed herself in terms of the experience of the courts - a matter about which Mr O'Sullivan submits the jury could have no knowledge - it seems to us that the core point which the judge had to consider was a simple one. Whilst the passage of many years was clearly a very

important consideration, the question for the judge was whether it meant that similar offending many years earlier was incapable of showing a propensity to commit such offences.

55. We have anxiously considered this point. We accept, as we have said, Mr Way's submission as to the probative force of the cumulative features of similarity. Although the bad character evidence was an important part of the prosecution case, we do not accept that it was bolstering a weak case and we do not accept that it would have overwhelmed the jury and prevented their proper consideration of the details of the evidence. These were matters primarily for the assessment of the trial judge, and we see no basis for challenging the decisions which were made. It follows, in our judgment, that the judge was correct in her conclusion that the evidence of the previous conviction did show a very special and distinctive feature such that the jury could properly conclude that it showed a relevant propensity. The judge was therefore entitled to decide that the evidence should be admitted and entitled to reject the argument that it should be excluded on the grounds of fairness.

56. We have considered the grounds of appeal both individually and together. We are satisfied, notwithstanding the skill with which they have been argued by Mr O'Sullivan, that they do not undermine the safety of these convictions. The appeal accordingly fails and is dismissed.

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