Section 1 of the Sexual Offences (Amendment) Act 1992 applies in this case. No matter relating to any complainants shall be included in any publication during their lifetimes if it is likely to lead members of the public to identify them as the persons against whom offences were committed. Reporting restrictions therefore apply in this case.

This judgment is to be handed down by the judge remotely by circulation to the parties' advisers by email and release to the National Archives on Monday 22 July 2024.

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 2023002336/B1

[2024] EWCA Crim 834

Royal Courts of Justice
Strand
London
WC2A 2LL

22 July 2024

Before:

LORD JUSTICE FRASER
MR JUSTICE HOLGATE
MR JUSTICE BRIGHT

REX
V
B.H.B.

_____

JUDGMENT

_____

Hearing date: Friday 7 June 24

MR MATTHEW KIRK appeared on behalf of the Appellant,
Instructed by Macauley Smith Solicitors
MS SALLY HOBSON appeared on behalf of the Respondent

LORD JUSTICE FRASER:

1. Section 1 of the Sexual Offences (Amendment) Act 1992 applies in this case. No matter relating to the complainant shall be included in any publication during her lifetime if it is likely to lead members of the public to identify her as the person against whom offences were committed. Reporting restrictions therefore apply in this case. Due to the familial connection between the appellant and the victim, this case will be reported with the offender anonymised as BHB. In this case, His Majesty's Attorney General has previously sought leave to refer the sentences that were passed upon BHB to this court as unduly lenient, pursuant to section 36 of the Criminal Justice Act 1988. The judgment on that application is ***R v ATB*** [2023] EWCA Crim 1536. We shall also, as was adopted in that judgment, refer to the victim as C. Due to the risk of so-called "jigsaw identification" of C through the factual background to her family and other details, we also generalise some of the other factual details.

2. This is an appeal against conviction, leave to appeal on seven different grounds having been granted by the Single Judge. Three other grounds were refused leave by the Single Judge and the appellant does not seek to renew them. Accordingly it is not necessary to say anything more about them. The seven grounds are set out separately at [28] below.

The facts

3. On 25 March 2021 C, who was born in July 2008 and was at that stage 12 years old, alleged that she had been sexually abused by BHB when she was about 7 or 8 years old. The allegations came to light in the following way. C told some of her friends at school that the appellant had raped and abused her. She did so in confidence, but was very worried that notwithstanding this, they would tell other people. She told her brother of her concerns and what she had told them, and he told their parents. Her parents contacted the police. She was spoken to by officers who held what is called a "pre-assessment" interview. This precedes the ABE interview which was conducted with her later. This pre-assessment interview took place at her house on 26 March 2021.

4. At the time the abuse was said to have taken place, BHB would have been about 15 years old. There was a familial relationship between C and BHB as follows.

5. We shall refer to C's mother as H. C had two brothers, one of whom was born severely disabled and who needed a high degree of medical treatment, including in 2016 when he was admitted to a specialist children's hospital in London for emergency surgery. [It was the other brother to whom C reported the abuse in March 2021]. H and her family including C did not live in London but in Hertfordshire. H asked her stepmother (to whom we shall refer as S) for help whilst C's brother was in hospital, and also during his recovery. S was the appellant's mother. Therefore BHB is the stepbrother of H, and C's uncle through her mother. S and her family lived in London at the time that C's brother was hospitalised, and H had asked for help with her family.

6. S agreed to help and went to stay in Hertfordshire at the home of C and her mother H, so that C's mother could spend as much time as possible with her son in the hospital. BHB and his younger sister also went with their mother to stay at C's home. Tragically, the

brother receiving the treatment later died. However, it was during this period of family crisis that the abuse was said to have taken place. Once C's brother was discharged from hospital, S and her family moved from London and into a flat also in Hertfordshire that was near to where H and her family lived. This move was so that the S could continue to support her stepdaughter H. On a few occasions during the summer of 2016, C visited that flat. By this time she was aged eight. She alleged that different sexual abuse occurred when she did visit, such as the appellant performing oral sex on her by licking her vagina. On another occasion she said that he had touched her vagina and also caused her to masturbate him.

7. All seven of the counts on the trial indictment related to sexual offences of similar type that were said, by the prosecution in the way that the case was opened, to have occurred in Hertfordshire. One was a count of oral rape. The evidence to support the offences alleged was in summary only as follows.

8. On an occasion between February and April 2016, whilst staying at C's home, the appellant was said to have committed the offence of rape of C; this was count 3 on the indictment. C was then aged seven. She said that the appellant had pulled her into the bathroom at her home. Her mother was not there and her father was building a shed in the garden. BHB removed his clothing, he also removed C's lower clothing and tried to take her top off. He touched her vagina and put her hand on his penis. He then put her mouth onto his penis. He moved her head around by holding onto her ponytail. The incident came to an end when someone knocked on the bathroom door. They left the room and the appellant told her not to tell anyone or he would touch her sisters. She sent a video message to her mother from her father's phone in which she was crying and trying to say 'sorry'.

9. The other counts charged were all those of causing a child under 13 to engage in sexual activity. Count 4 was BHB putting his mouth on C's vagina in the bedroom. This was said to have occurred a few weeks or months after the offending in the shower.

10. Counts 5 and 6 were both said to have happened when C was staying at the appellant's family's flat in Hertfordshire after they have moved there from London. This move had occurred on 29 April 2016. Accordingly, due to the location that the alleged offending was said to have taken place, it must have taken place after that date. Count 5 related to him putting C's hand on his penis and causing her to masturbate him, and Count 6 to an occasion when he touched C's vagina. Once BHB reached his 16th birthday there were no further incidents and the abuse stopped. At about this time BHB started a relationship with a girl of his own age, which went on for some time and they had a child together.

11. When he was interviewed under caution by the police, BHB denied that any abuse had taken place. In his first such interview, the questioning was done on the basis of C's pre-assessment interview, namely with the abuse having been said to have taken place both in London and Hertfordshire. A second interview under caution was held after C's ABE interview, and the questions were based on the contents of that, namely (in respect of location) that all of the offending had taken place in Hertfordshire.

12. Between 5 and 14 June 2023 the appellant stood trial in the Crown Court at Luton before Mr Recorder Mayall and a jury on an indictment that contained seven counts. Evidence from C was adduced through her ABE interview and she was cross-examined under the procedure in section 28 Youth Justice and Criminal Evidence Act 1999.

13. The judge withdrew three of the seven counts (namely, counts 1, 2 and 7) from the jury towards the end of the prosecution case, when it became clear that in respect of some of the counts, the way that C had referenced the dates (by reference to her brother's stay in hospital) and location (the flat in Hertfordshire to where BHB and his family had moved from London) could not be consistent with one another. This is because BHB had not moved to the flat in Hertfordshire until after the brother had come out of hospital. The judge acceded to a submission of no case to answer.

14. BHB gave evidence in his own defence and maintained his denials; his defence was that C was lying when she said that he had abused her in the way she described. At the conclusion of the trial, the appellant was convicted by majority verdict of the four remaining counts. These were one count of rape of a child under 13, contrary to section 5 of the Sexual Offences Act 2003 (which related to the oral rape that had occurred in the bathroom) and three counts of causing or inciting a child to engage in sexual activity, contrary to section 8 of the Sexual Offences Act 2003 (which related to the other instances which were all said to have taken place in Hertfordshire).

15. It is these circumstances relating to the withdrawal of the three counts from the jury, together with how the other counts were dealt with following that (including in directions to the jury) that lie at the heart of this appeal.

16. For completeness, we record that on 25 August 2023 the appellant was sentenced by the trial judge to 24 months' imprisonment suspended for two years in respect of the offence of rape of a child under 13 (which count 3), and 18 months' imprisonment suspended for two years in relation to each offence of causing or inciting a child to engage in sexual activity. All of those sentences were ordered to run concurrently. Requirements were attached to the orders suspending the sentences of imprisonment. These were attendance upon an accredited programme requirement to address sexual offending with up to 40 program sessions required; a rehabilitation activity requirement of up to 30 days; and an unpaid work requirement of 200 hours. A Sexual Harm Prevention Order was made, the duration of which was five years. The application made by the Attorney General to challenge these sentences as unduly lenient to which we have referred at [1] above was unsuccessful.

17. Other matters pertinent to the appeal against conviction are as follows, which we shall deal with in the chronological order in which they occurred. During her pre-assessment interview, C said that the abuse occurred both in London (at the flat where BHB lived, including in his bedroom there where she said that they had shared a bed) and in Hertfordshire. In her ABE interview, she said that all of the incidents occurred in Hertfordshire, including those at her house (such as the oral rape in the bathroom) and at the property into which BHB and his family moved.

18. Disclosure to the appellant's representatives of the pre-assessment notes taken by the police officer took place during the trial, just before the officer in the case was called to give evidence.

19. Towards the conclusion of the prosecution case, it became clear that because of the dates when C's brother had been in hospital, the abuse that formed the subject matter of counts 1 and 2 could not have happened on the dates and location that C had said it had. It could have happened on the approximate dates she said it had (those dates being given by reference to when her brother was in hospital), but not where she said it had; or it could have happened where she said it had, but not during the dates when her brother was in hospital. This was clear from other documentary sources, including the dates C's brother had been in hospital in London being treated, and the dates that BHB and his family had left London to live in Hertfordshire (which was established as being on 29 April 2016). It also became clear, from the disclosed notes of the pre-assessment interview, that originally C had said that some of the abuse had occurred in London. This, whether characterised as a previous inconsistent statement (which Mr Kirk did before the judge) or as a significant mistake on her part about a major factual element, would potentially go to the credibility of her account.

20. Initially, counsel both for the prosecution and the defence sought to have the jury discharged. This led to an extended discussion in open court between counsel for both parties and the learned Recorder, concerning "the way forward". Given that the prosecution had opened the case as *all* of the abuse having taken place in Hertfordshire, and given her statement in her ABE interview that "nothing happened in London" the judge was not prepared to allow the prosecution to change its case in terms of the abuse potentially having happened at the flat in which BHB lived in London, when her brother was in hospital. As he observed, the only evidence she could give about that would be that there was the opportunity for the abuse to have happened in London, but she could not (given her oral evidence in the ABE interview and section 28 cross-examination) give direct evidence that it had.

21. He therefore indicated that he was not minded to discharge the jury; but he effectively invited a submission of no case to answer on the counts affected. This led to counts 1 and 2 being withdrawn from the jury after a submission by Mr Kirk. Count 7 was also withdrawn because there was no evidence from C to support it. During the trial Mr Kirk also made a submission in respect of counts 5 and 6, but this was not successful.

22. Disclosure of the pre-assessment notes took place during the trial, just before the officer in the case was called to give evidence. The timing of that also forms part of both the first and last grounds of appeal.

The Jury Directions

23. These were distributed by the judge in draft and discussed with both counsel in the usual way. Counsel for BHB maintained his position regarding counts 5 and 6, namely that they ought to be withdrawn from the jury too. However, given he had already made such an

application and that had not succeeded, he may not have had much expectation of success, and in an email to the judge the night before the directions were delivered he said (in pertinent part) the following.

"The direction about counts 1 and 2 (and perhaps 5 and 6) must make clear that the jury are no longer considering those counts. You have withdrawn them, as you have explained, because no jury could properly be sure of those counts on the evidence in the case. They have still heard evidence about those counts: from HM, what HM has said to others (complaint), D in evidence and through his interview, and from other witnesses about the circumstances at the material time. The jury will ask what they are to do with that material? The answer is that the only significance of that material is in assessing HM's credibility. If 5 and 6 are before the jury then in addition that evidence is material to their consideration of whether 5 and 6 happened "similarly" to 1 and 2. Either way, they MUST NOT follow any line of reasoning that involves concluding that they are sure that cts 1 and 2 happened - that would be contrary to your direction and their verdict.
You need somewhere to direct the jury that any consideration of Rotherhithe would be entirely speculative and wrong and they must not embark upon it. That should be explained sufficiently so as not to beg questions and invite speculation. It would be inappropriate for that to be the final direction - perhaps good character after it?
To crystallise: it remains my clear position that the only route by which the account of cts 1 and 2 can found conviction on 5 and 6 is through her indication of similarity. I renew half-time submission on the ground that that is too torturous a path for any property directed jury to be sure. If you are against me and inclined to leave it to the jury that the account of 1 and 2 adjusted solely as to date can be left to the jury, then I submit (similarly to my earlier submission on cts 1 and 2) that given that the location and timing are both fundamental to that account and are irreconcilable, no properly directed jury could convict upon it."
(underlining present in original)

24. The directions were then given to the jury in writing, and read out in the usual way, prior to the evidence being summed up to them. In respect of Count 5, which was said to have taken place in the flat where BHB and his family lived, they were directed as follows:

"31. You will note that the particulars of this offence refer to it having occurred on an occasion other than in count 1. You have already found, on my direction, the defendant not guilty on count 1. As I explained to you, count 1 related to a specific incident which occurred in the flat at [Hertfordshire] whilst [her brother] was in hospital. Again, as I explained at the time, that was not possible because they did not move to the [Hertfordshire] flat until well after [her brother] came out of hospital. You no longer have to consider counts 1 and 2. You could only convict on this count (Count 5) if you are sure that the offence took place, and that you are sure that it took place after 29 April 2016, when the defendant and his family moved to the flat in [Hertfordshire].

32. I will give you further directions as to the use you can make of the evidence given by [C] in relation to the former counts 1 and 2 later in this document."

25. Later in the written directions, the following directions were given about the two withdrawn counts.

"Counts 1 and 2

68. It is clear that the incident described which made up counts 1 and 2 could not have taken place in [Hertfordshire] for the reasons I have already given. That is why those counts were withdrawn from you. What use can you make of her evidence about this incident however?

69. Firstly the defence are entitled to ask you to consider this evidence when assessing her credibility. They are entitled to ask you to conclude that, because she has purported to tell you an account which cannot be true in relation to the incident described as the first incident, you cannot properly rely on her evidence in relation to the other alleged incidents. Whether you accept that, or not, is, of course, a matter for you.

70. What you cannot do, however, is to take into account this evidence, summarised above, when considering counts 5 and 6 (save for the limited purpose set out below). That is because that evidence relates to a "first" incident which is said to have occurred whilst [her brother] was in hospital, and counts 5 and 6 relate to later offences (said to have occurred after the incidents in counts 3 and 4) and well after [her brother] came out of hospital. The evidence relating to counts 5 and 6 is only that given by [C] in her ABE when being asked about any later incidents. I will summarise that evidence for you when giving my summary of the facts.

71. [C] did, however, say in her video evidence that, in relation to the incidents making up counts 5 and 6, the defendant carried out acts similar to those described in the "first" incident. You can, therefore, use her evidence as to the acts she described in the "first" incident i.e. making her touch his penis and touching her vagina, in considering whether you are sure that similar acts occurred in relation to counts 5 and 6."

26. In the summing up of the evidence which then following (the "summary of the facts" that was referred to in paragraph 70 of the written directions, from which we have quoted above) the judge reminded the jury of what C had said in her ABE interview in respect of this description of what occurred, including both the questions put to her and her answers:

"So you think there may be another three times?"
C: "Yes."
"That something had happened? You said that the other times were the same and they happened at the flat. So all the other times happened at the flat as well?"
C: "Yes."
"And where in the flat did the other times happen?"
C: "Probably in his bedroom, I can't really remember."
"You can't remember where. And you say that they were the same, but obviously you've described, you know, three different things that have happened."
C: "I think they were like the same as like the first time, I can't remember much."
"So you just remember him doing things that were similar to before?"

C: "Yes."
"But you can't remember what?"
C: "Yes."
"Whether it was, excuse me, him touching your vagina, whether it was you putting your mouth on his penis or whether it was him putting his mouth on your vagina?"
C: "Yes, he was just doing similar stuff like that."

27. The difficulty, if it is a difficulty, arises in these circumstances. Count 1 and 2 had been withdrawn from the jury for the reasons explained at [19] and [20] above. They had already heard all the evidence regarding counts 1 and 2, and had the reasons for the withdrawal of those counts explained to them. However, the descriptive acts of what C said had occurred to her was described by her in her ABE interview by reference to those first acts – "like the same as like the first time" and "doing similar stuff". The physical descriptions of what had occurred were given by her by reference to what she said had previously occurred. Also, the defence wished to rely upon the circumstances of the withdrawal of counts 1 and 2 as it assisted their attack on C's credibility. We return to this below at [47] when dealing with grounds 4 to 6.

The Grounds of Appeal

28. These are as follows:

1. The judge erred in refusing the joint application to discharge the jury. The combined effect of the late disclosure of fundamental material and the belated decision of the Crown as to how they wished to put their case (that the first incident, counts 1 and 2, may have happened in London and not Hertfordshire) meant that both parties needed time for proper preparation and presentation of their cases. Further, the matter could not proceed in any form without material unfairness to one party or the other.
2. The judge was wrong to refuse the submission that there was no case to answer on counts 3 to 6.
3. The judge was wrong to exclude the evidence of S that there was no occasion on which C had stayed in the London flat during her brother's time in the London hospital, or her son's then partner's evidence to like effect.
4. The judge was wrong not to give a direction to the jury that there was no material on which it could properly be suggested that counts 1 and 2 (no longer before them) occurred at the London flat and any consideration of that possibility would be speculation and improper.
5. The judge was particularly wrong [not] to give that direction when he had promised to do so and the defence had acted to their apparent detriment in reliance on the legitimate expectation of that clear promise.
6. Those grounds, individually and cumulatively, give rise to a very substantial risk that the jury speculated upon counts 1 and 2 having occurred at the London address.
7. The Crown's disclosure failures render the conviction unsafe. The defence was disadvantaged in that proper points were not put to C in section 28 cross-examination because the material was not available. Further, the defence were not given all the material relevant to deciding whether to challenge the admissibility of the ABE interview.

29. These grounds were carefully and helpfully explained and amplified by Mr Kirk orally at

the hearing before us. We also had the benefit of a Respondent's Notice and oral submissions from Ms Hobson for the prosecution. We are grateful for their assistance.

30. Ground 1. This is that the judge was wrong to refuse what is described as a joint application to discharge the jury. Although it is correct to say that when the defence applied to have the jury discharged on 7 June 2023, the prosecution stated that they "did not oppose it", that position by the prosecution shifted during a constructive discussion which then unfolded with the court. The judge was rightly concerned, as he put it, that the appellant was a young man who had had these criminal charges hanging over his head for some time. Criminal trials cannot routinely be stopped, and then re-started with a fresh jury, simply because (as here) some counts in a multi-count indictment cannot proceed. Although any jury in such a situation will almost always have heard at least some evidence going to counts which are withdrawn from them, that can be corrected by careful directions to them which will undoubtedly need to be framed in accordance with the specific facts of the case.

31. Here, the position was reached that counts 1 and 2 could not have occurred in the specific location *and* at the time that C had said in evidence they had. She had also said in her ABE interview that nothing had happened in London. She was 12 years old when her complaints were referred to the police, and only 7 years old when the acts which she had described had taken place (on her case in her ABE interview). No criticism is intended by observing that such witnesses and complainants could easily be mistaken over certain details. It might also be observed that a 12 year old girl recalling events of the nature she said had happened to her when she was seven years old, some five years earlier, might not be expected to recall every detail, such as location, with the same force that they could recall the central acts themselves. Equally, however, all defendants are entitled to know the case against them, and to have a fair trial, and as the evidence unfolded, it became clear that on the dates when her brother was having specialist medical treatment in London, BHB and his family were still living in London and had not moved to their flat in Hertfordshire. Accordingly, the alleged abuse could not have happened when she said it had, where she said it had, and in the way in which the prosecution had opened the case.

32. The learned judge was not prepared to permit the prosecution to start the trial again in front of a fresh jury at a later date, opening it on a different basis to how it had been opened in this trial, which the prosecution explained that they intended to do. It was as a result of this that two things occurred. Firstly, the judge made it clear that the existing trial would proceed, as long as that could be done without unfairness; secondly, that his general view was that the case presented on counts 1 and 2 was not viable and he was contemplating withdrawing those counts from the jury, directing that verdicts of not guilty be returned on both. Count 7 was a count that was not supported by any evidence from C, although the factual contradiction inherent in counts 1 and 2 was not present. That count too was therefore withdrawn.

33. Mr Kirk for the appellant submits that continuing with the trial in these circumstances was unfair, and that the jury should have been discharged for "both parties to take stock and properly prepare and present their cases". Part of the way through a criminal trial is not the time for any party, prosecution or defence, to decide that the time has come properly to

prepare. If the judge does discharge the jury, as is well known, the accused is not acquitted but may be retried on the same indictment before a fresh jury. There is well established authority that the court ought not to discharge the jury at the instance of the prosecution in order to enable a stronger case to be put; ***R v Charlesworth*** (1861) 1 B&S 460. The age of that still relevant authority demonstrates the importance of that long standing rule.

34. It is accepted that a jury should not be discharged unless an "evident necessity" for it has arisen, a term used in many of the cases. In ***Winsor v R*** (1866) LR 1 QB 390, Erle CJ gave some further guidance on the subject, which may be summarised as follows:
    (a) a jury should not be discharged unless a high degree of need for it arises;
    (b) whether to discharge is purely a matter for the judge's discretion.

35. The judge has a discretion to discharge the whole jury from giving a verdict, but the power to do so is one that must be used sparingly. The importance of continuing with criminal trials if that can be done fairly is even more acute at a time when resources are under pressure.

36. Here, the purpose behind the prosecution initially supporting the application to discharge the jury, was that the case could be reconsidered and reframed as the first two offences having taken place in London. The judge was entirely correct to question and explore this in the way he did. We are not persuaded that this was a situation in which there was an "evident necessity" that the jury be discharged, or even a situation where that stage was on the horizon. We commend the judge's sensible approach, and his commitment in keeping the trial on track, achieving fairness by disposing of the counts that could not be supported on the way that the prosecution had opened the case, and continuing with the others. His approach to counts 1 and 2 meant that these two counts were resolved with not guilty verdicts being returned, and therefore resolved in the appellant's favour.

37. In his ruling on the submission of no case to answer, the judge said the following:
    "On reflection, it seems to me that no jury, properly directed, could properly convict on the basis that it happened in [Hertfordshire], given the evidence as to the timing. It is conceivable, I suppose, that the jury might conclude that [C] had made a mistake about the timing, but in the circumstances, when it has been tied so clearly to the February/March period when [her brother] was in hospital, it seems to me that the evidence is simply not strong enough and it - the properly convicted jury could not reach that conclusion. That does not of course mean to say that the jury could not be satisfied that an incident, as she described it, could not have happened again at a later occasion, and indeed Counts 5 and 6 I think of the indictment refer to causing to masturbate and causing to touch the vagina, occurring on other occasions, other than that on Count 1."

38. That reasoning is sound and cannot be faulted. However, as the judge stated, his decision on counts 1 and 2 did not mean that there was no case to answer on the other remaining counts. It was not "materially unfair" for the trial to proceed on those other counts, which did not suffer from the same factual inconsistency. The decision not to discharge the whole jury was a matter of the judge's discretion, which was correctly exercised. We dismiss this ground. That takes consideration of the matter on to Ground 2.

39. Ground 2. This is that the judge was wrong to have refused the submission that there was no case to answer on counts 3 to 6. Whether taken as an adjunct to Ground 1, or as a separate and free-standing ground alone, there is very little basis for this ground in our judgment. The relevant test on an application of no case to answer is whether a jury, properly directed in law, could properly convict upon the prosecution evidence. This was the test correctly applied by the judge in his ruling on the submission of no case to answer on counts 1 and 2, and is the test that must also be considered under this ground. Here, so far as the other counts were concerned, there was a considerable amount of prosecution evidence. In our judgment, this was more than sufficient for the case on those charges to be allowed to proceed and remain before the jury. The central and primary evidence of what had happened to C at the hands of BHB was that of C herself, both in her ABE interview and her answers to questioning under the section 28 procedure. Obviously she was a child when this was said to have happened, and her interviews were a number of years later, as often happens in cases such as this where the person said to be abused cannot bring themselves to tell anyone what has happened. Notwithstanding that, it is undoubtedly evidence. The days when the sole evidence of a young child as to what has happened to them is seen as being of no, or very limited, evidential weight are rightly long gone.

40. Nor can it sensibly be said that the contradiction in her recollection of dates and locations undermined this to such an appreciable degree that the case could or should not be allowed to be put before the jury for verdicts to be considered. There are two important points to bear in mind. Firstly, the correct test upon a submission of no case to answer is to consider the prosecution evidence, taken at its highest. Considering C's evidence at its highest would mean considering it to be true. Secondly, the fact that it had emerged that what she had first said in her pre-assessment interview in terms of location and dates conflicted, on two of the counts only, with her ABE interview does not undermine that conclusion. Memory is fallible, as is well known. The crux of her evidence was that BHB had, on different occasions when nobody was in the immediate vicinity, done things to her of a sexually intimate nature, and made her do things to him. It is the central elements of these acts that were of primary importance. Of course, pinning such occasions down to dates and places has its important part, not least in ensuring that any defendant can defend themselves. It is one way of demonstrating that such things simply did not happen if a person was, for example, not living in a particular place. But an inability to match dates and places accurately does not mean that in this case C's evidence became of such a character that the case could not safely proceed on the other counts. It is a point that goes to the credibility of her account, but it does not undermine it to such an extent that all of the counts should have been withdrawn from the jury on a submission of no case.

41. Further, in addition to her primary evidence, there was other evidence that had been called by the prosecution too. Her school friend to whom she had first made the disclosure gave evidence of what she had been told, and how C had reacted at the time and seemed when this disclosure was made; her brother gave similar evidence; and her mother H also gave evidence too. Further, there was some limited evidence contained in a video message she had sent to her mother when the abuse first happened, sent on her father's phone. Her evidence was that she did that in order to say sorry for what had happened, because she felt

she had done something wrong; whereas the defence case was that the video message did not do that. The message was used as a means of potentially dating the first and/or second incident, as C had explained when in the pattern of alleged offending she had recorded and sent it. The location/timing issue on counts 1 and 2 did not go to the oral rape count at all in any event. Her account was consistent on that both in the pre-assessment interview and the ABE interview. However, regardless of that, taking the prosecution evidence as a whole, and at its highest, we do not accept that it can be said to have been wrong for the trial judge, who had also had the advantage of seeing the witnesses, to have concluded that there was sufficient evidence to permit the case to continue on the other counts. We therefore dismiss this ground.

42. Ground 3. This is that the judge was wrong to exclude the evidence of S that there was no occasion on which C had stayed in the London flat during C's brother's time in the London hospital, or her son's then partner's evidence to like effect. This arose in the following way. S was originally intended to be a witness called for the prosecution, but she was abandoned as such on Day 1 of the trial. Instead she was called as a witness for the defence.

43. This evidence went to the potential issue of whether there had been any opportunity for BHB to have abused C in the flat in London. In his ruling, the judge said the following, concerning the evidence as to whether any abuse had happened in London:
"In her ABE interview [C] was quite clear that she was not saying that was the case, she was quite clear that she was describing an incident which happened in [Hertfordshire], in the flat in [Hertfordshire]. That is clear from the fact she said it was in [Hertfordshire], she said initially "I think", but then she said, "No, nothing happened in London", and she was obviously describing a one bedroom flat rather than a two bedroom flat, which was the flat in [London]. So that was clear what she was saying in her ABE, that this incident, which had been described as the first incident, happened in [Hertfordshire], in the flat in [Hertfordshire]."

44. Later in the ruling he said the following: "There is a perhaps complication in that it is no doubt open to the defence to deploy in support of undermining [C's] credibility overall that she initially described a scenario which could not possibly have happened, i.e. [London] and [her brother's] hospitalisation. That does not mean that the jury are considering that possibility, i.e. [the flat in London] during hospitalisation, or [the flat in London] at any time.
There is, on the basis of the ABE, no evidence that any offence happened in [London] at all, indeed it was [C's] evidence in her ABE that she didn't think it did, and the jury will be directed on that, quite firmly if necessary. That would not, in my judgment, prevent the defence from deploying it as material in support of undermining her credibility. In those circumstances perhaps the questioning of [BHB] as to the opportunity for it to have happened in [London] was unnecessary, but, in any event, his evidence on that is really immaterial, in that he can't really remember whether the kids, including [C], did visit [London] during the period of the hospitalisation. It is now wanted to, as it seems to me, double down on evidence that it wasn't in [London] by getting his mother to give evidence, quite what evidence she's going to give I'm not entirely sure, but presumably to suggest that the kids weren't in [London], and I'm told that if that is done then the Crown will seek

to undermine that. That would be going down a route which has no, in my judgment, potential possible relevance to the issues which this jury has to decide. They're not going to be considering whether an offence occurred in [London], and it is not going to be open to the prosecution to suggest that an offence occurred in [London] during the hospitalisation period. As I say, there has been some exploration of that with [BHB] but, in my judgment, it would be wrong for there to be any other exploration at all of opportunities for it to happen in [London], or indeed what happened in [London] at all, and it would be wrong to seek to adduce from S…. when that is not an issue before the jury."

45. He therefore refused to admit evidence which the defence had intended to adduce, namely that of BHB's mother S, which went to the lack of opportunity on the part of BHB to abuse C at the flat where she, BHB and their family lived in together in London.

46. This evidence was not relevant and was correctly excluded. Evidence must be relevant to be admissible, and this evidence did not go to any of the issues that were before the jury. That evidence would have been relevant had counts 1 and 2 still been extant. However, counts 1 and 2 had been withdrawn from the jury (and had in any event been opened by the prosecution as having taken place in Hertfordshire). Whether BHB did, or did not, have any opportunity alone with C in the flat in London did not go to any of the issues on the other counts at all. None of the remaining counts were said to have occurred in London, therefore lack of opportunity there for BHB to have done anything to C in London simply did not arise. The jury in any event knew that nothing was said to have happened in London (C's evidence in her ABE interview was to this effect) even though in her pre-assessment interview she had originally said that it had (this was admitted as an Agreed Fact). Admitting the evidence would have been wholly distracting and of no evidential value, and would have created a side-issue on a point that was not in issue. We therefore dismiss this ground.

47. Grounds 4 and 5. These can be considered together. They arise as a result of how the trial proceeded after the three counts had been dismissed on the basis of no case to answer, counts 1 and 2 being the ones that were dismissed for the reasons explained due to timing and location.

48. These relate to the directions that were in fact given to the jury. It is said that the judge was wrong not to have given a direction to the jury that there was no material on which it could properly be suggested that counts 1 and 2 (which were no longer before them) occurred at the London flat and that any consideration of that possibility would be speculation and improper (this is Ground 4). It is also said that the judge was particularly wrong not to give that direction when he had promised to do so and the defence had acted to their apparent detriment in reliance on the legitimate expectation of that clear promise (which is Ground 5).

49. Here, the parties and the judge agreed that jury could not, in the factual circumstances of this case, be told wholly to ignore everything in relation to counts 1 and 2. C had described the physical act of the abuse which she said BHB had done to her by referring back to what she had already described in detail, by saying he did "the same as like the first time" and

"similar stuff like that".

50. Therefore, it would have been wholly artificial to have told the jury in this specific case, given the terminology and description used by C in her ABE interview, to put any reference to counts 1 and 2 out of their minds. Taken at its most literal, they would have had no description in the evidence of the acts said by C to have been performed upon her by BHB.

51. Accordingly, it was important that a specifically crafted direction to deal with this situation was drafted and agreed. This is what was done. At the hearing of this appeal, the email exchange with the judge was produced in which Mr Kirk for the defendant made submissions to the judge on what the directions should include. He sought in that email to have counts 5 and 6 again withdrawn from the jury, but realistically accepted that this may not happen. We repeat the pertinent part of the email from Mr Kirk:
"The direction about counts 1 and 2 (and perhaps 5 and 6) must make clear that the jury are no longer considering those counts. You have withdrawn them, as you have explained, because no jury could properly be sure of those counts on the evidence in the case. [He summarised this evidence, such as that of C and also BHB]….. The jury will ask what they are to do with that material? The answer is that the only significance of that material is in assessing [C's] credibility. <u>If 5 and 6 are before the jury then in addition that evidence is material to their consideration of whether 5 and 6 happened "similarly" to 1 and 2.</u> Either way, they MUST NOT follow any line of reasoning that involves concluding that they are sure that cts 1 and 2 happened - that would be contrary to your direction and their verdict. You need somewhere to direct the jury that any consideration of [London] would be entirely speculative and wrong and they must not embark upon it. That should be explained sufficiently so as not to beg questions and invite speculation. It would be inappropriate for that to be the final direction - perhaps good character after it?"
(emphasis added)

52. He then went on to renew his failed earlier submission of no case to answer on the other counts.

53. We have the following observations on these submissions as to the directions. The directions as given did, almost exactly, provide for what Mr Kirk was seeking. The jury were directed that the evidence in terms of counts 1 and 2 went to C's credibility, and that the defence relied upon them for that. They were also told that they should ignore counts 1 and 2, other than for a specific limited purpose. That limited purpose was explained to them in the following way:
"You can, therefore, use her evidence as to <u>the acts she described in the "first" incident</u> i.e. making her touch his penis and touching her vagina, in considering whether you are sure that similar acts occurred in relation to counts 5 and 6."
(emphasis again added)

54. In other words, the descriptive aspect of her evidence in terms of the discontinued counts could be considered by the jury. We do not consider that these directions would either have encouraged or permitted the jury to embark upon an exercise of speculation that counts 1 and 2 had, either jointly or separately, in fact happened, but in London and not

Hertfordshire. They had been told that these two counts were withdrawn specifically because these acts could not have happened in the place described and on the dates described by C. They were told that the defence were relying upon this as to her credibility, and it was up to them to decide what they made of that.

55. We are not persuaded that by the judge giving these directions he had misdirected them in some way, or that he should in addition have directed them that there was no material upon which it could properly be suggested that counts 1 and 2 (which were no longer before them) occurred at the London flat. Such a suggestion was not available or in issue at all. The jury were told entirely to ignore counts 1 and 2, other than for the purposes of her credibility (contended for by the defence) and for the limited descriptive purpose we have explained. The prosecution had not been permitted to advance any case that counts 1 and 2 had happened in London, and indeed had been prevented from continuing with any case in relation to counts 1 and 2 at all. By far the best approach was to deal with counts 1 and 2 in the way suggested and agreed at the time by the appellant's own counsel and directed by the judge which was as we have explained above.

56. Additionally, when summing up the evidence in the case for the jury, the judge said this in relation to counts 1 and 2, firstly in relation to C's evidence:
"But the first part of the - excuse me - ABE interview was largely taken up by her saying to the officer what happened in what she termed the first incident. Now, as I told you in my legal directions, you're not concerned with that first incident because those counts have been removed. But you are concerned with what she said, only to the extent, as I set out, in my legal directions that if what she said is inconsistent, or, as we know, couldn't have happened in that way, then the defence are entitled to rely on that to try and undermine her credibility. And again, whether you think it does undermine her credibility is entirely a matter for you. But I summarised what she said in relation to the first incident in the written directions I gave you this morning. So I'm not going to go over again what she said about that first incident in the ABE interview."

57. The judge also said this when he was summing up the evidence of her mother H:
"So she gave evidence. Again, she was asked an awful lot of questions about counts 1 and 2, which we don't need to go into, you can ignore all of that. She was asked questions about whether there was any opportunity for him to have committed any offences in [London], you don't need to go into that because that isn't a count which is on any indictment in front of you."

58. We consider the legal directions, supplemented by what was said during the summing up of the evidence, to have been more than sufficient in terms of how the jury should approach counts 1 and 2. Further, it is difficult to see how the judge can have led the defence to act in some way to the detriment of the appellant in reliance on the promise of a direction which did not emerge, which is something contained in the grounds of appeal. Once the pre-assessment interview notes had become available and were disclosed (as to which, see further on the analysis of Ground 7 below) the judge made clear his views when the matter was ventilated before him when the edits of the defendant's interviews were brought before him because the parties could not agree. The judge did this in two respects. Firstly, that he

was of the view that counts 1 and 2 had significant evidential difficulties and he was not minded to permit the prosecution to change tack on those counts, given they had opened the case on the basis that these acts had occurred in Hertfordshire, that was the evidence of C in her ABE interview, and she had said nothing had happened in London. Secondly, that C could be recalled to be cross-examined by the defence on her change of account from one location to the other. In the event, Mr Kirk did, after some discussion, decide that the latter course was not one which he wished to occur and he explained that did not wish to cross-examine C on the subject. He was therefore permitted to make submissions as to her credibility without having to put those points directly to her, and her previous inconsistent account was put before the jury by way of Agreed Facts. This was a course of action that was favourable to the appellant.

59. We do not doubt that there were different ways in which the necessary legal direction to the jury could have been drafted. However, one of the benefits of the circulation of draft written directions is that both the prosecution and defence have the chance to comment, and hopefully arrive at an agreed (or broadly agreed) direction. What these grounds really amount to is that instead of the jury being told not to speculate, they were instead told what was in the written legal directions together with what was said in the summing up of the evidence. In that latter part, they were told a variety of the following phrases "you're not concerned with that first incident"; "those counts have been removed"; "she was asked an awful lot of questions about counts 1 and 2, which we don't need to go into, you can ignore all of that"; "she was asked questions about whether there was any opportunity for him to have committed any offences in [London], you don't need to go into that because that isn't a count which is on any indictment in front of you." The word "speculation" does not appear but the instruction to them was clear. We do not consider that the lack of the use of the word "speculation" invited the jury to speculate; they were expressly told to ignore counts 1 and 2, and on a number of occasions. We do not consider that the lack of the word "speculate" renders the conviction unsafe. There was no misdirection and the reference back for descriptive purposes of the physical acts – the "limited purpose" – was agreed.

60. Ground 6. It is said that those grounds, individually and cumulatively, give rise to a very substantial risk that the jury speculated upon counts 1 and 2 having occurred at the London address.

61. It is of course not possible to know what was in a jury's collective mind, nor is it necessary for the court to speculate. The court has to consider in objective terms whether such a risk would be present, given the circumstances of what happened and what forms the substance of each of Grounds 1 to 5, both separately and cumulatively. We are satisfied that there was no substantial risk as submitted by Mr Kirk for the appellant. There is no basis for concluding that the jury would be speculating upon counts 1 and 2 at all, still less whether those offences had occurred at the London address, and the suggestion that they might do so does not seem to us to be logical given the number of times they were told to ignore them. The jury were expressly told those counts had been withdrawn; and they were expressly told to ignore the evidence relating to counts 1 and 2 save for credibility (which was the contention advanced by the defence), and the agreed limited purpose (which was the descriptive term). Sometimes, when some (but not all) counts on an indictment are

withdrawn from the jury during a trial, the subject matter of those counts may have nothing whatsoever to do with the remaining ones. However, that is not invariable, and this is not one of those cases for the reasons explained. The descriptive terms in the ABE interview had been used by C by reference back to what she said had happened "the first time".

62. Ground 7 is a separate ground relating to late disclosure. It is said on behalf of the appellant that "The Crown's disclosure failures render the conviction unsafe. The defence was disadvantaged in that proper points were not put to C in section 28 cross-examination because the material was not available. Further, the defence were not given all the material relevant to deciding whether to challenge the admissibility of the ABE interview."

63. The disclosure in question for consideration under this ground relates to the notes of the pre-assessment interview of C. When DC Graydon, who had conducted this interview, and also went on to interview the appellant under caution, was called to give evidence – which was not something originally intended by the prosecution – there was no witness statement available from the officer. In the course of the officer preparing that document, which was done in the morning at court, it emerged that notes of the pre-assessment interview existed, and that these had not been disclosed. This was in error. Those notes ought to have been disclosed well before that. They were also specifically sought at paragraph 20(f) of the Defence Statement, which asked for "Notes of [C's] initial account to police".

64. Mr Kirk maintains that these failures caused real prejudice to the appellant. Neither the ABE interview of C dealt with the differences from what the officer had been told by C in the pre-assessment interview, nor could the section 28 cross-examination do so either, because that had been conducted prior to the disclosure of the notes. His approach was along the lines that this inconsistent first account was entirely new and became clear during the trial.

65. The notes were clearly disclosable and there is no sensible explanation of why this did not occur. Under section 3(1)(a) of the Criminal Procedure and Investigations Act 1996 "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." These notes clearly fell within that category, and Ms Hobson accepts that they were marked "not disclosable" in error. However, whether any specific non-disclosure is something that goes to the safety of a conviction is something that must be assessed on a case-by-case basis. Much depends on the nature of the material, and its relevance to the issues in the particular case. This is the approach in the cases, including for example ***R v Gohil*** [2018] EWCA Crim 140. That concerning money laundering, fraud upon a state in the Federal Republic of Nigeria and the sale of shares in a mobile phone company in Nigeria. The nature of the disclosure failures in that case were described as "grave" by the Court of Appeal, (Gross LJ, Davis and Garnham JJ), the terminology used by the prosecution itself being "inaccurate, incomplete and misleading". That case was in the context of arguments regarding abuse but the same approach applies. At [148] the court posed the question "but what of these disclosure failures?" If there has been a failure of disclosure, that question must be addressed. The impact of non-disclosure must be assessed

in the light of the case as a whole.

66. In ***R v Akle and another*** [2021] EWCA Crim 1879, a recent case on non-disclosure, the Court of Appeal (VPCACD, Jeremy Baker and Jay JJ) quashed the convictions of the appellant for reasons of non-disclosure. The approach is set out at [92] to [108], but the fundamental reason was set out at [108] thus: "he was prevented from presenting his case in its best light". That case was very different in that it was a complex SFO prosecution concerning conspiracy to give corrupt payments contrary to section 1 of the Prevention of Corruption Act 1906 in relation to public officials in Iraq following the fall of Saddam Hussein. The non-disclosure was wide-ranging, inexplicable and the trial had lasted 66 days. The non-disclosed documents also related to how the SFO investigation had been conducted.

67. Here, there were other features of the ABE interview that Mr Kirk submitted were not in accordance with good practice, and of which complaint was made at the trial. C had arrived with notes, and did not give a "free recall" account; rather the officer read the notes to her and she agreed. The point relied upon by Mr Kirk is that in her pre-assessment interview, when she had no notes, she gave what is described as a "markedly different account" in terms of the location and timing of counts 1 and 2. This would have been something additional which could, potentially, he submits have founded an application at trial to exclude the ABE interview altogether.

68. However, notwithstanding the non-disclosure, Ms Hobson points out two features which she relies upon as significant. Firstly, that the pre-assessment explanation of C in terms of location was put to the appellant directly in his first interview under caution, the record of which was properly disclosed; and that when the non-disclosure was remedied (which led to the dismissal of counts 1 and 2) the judge raised the point of C being recalled as a witness so that the original account could be put to her in cross examination in some way. The prosecution were in the process of investigating C's willingness and availability to do so, when the defence indicated that they did not wish to cross-examine her. We would also point out that as a result of this indication by the defence, the question of suitable special measures or how that cross-examination would in fact be carried out was not, and did not need to be, addressed.

69. In those circumstances, it is difficult to see how it could be said that the appellant was under any disadvantage. The points had been put to him in his first interview on the basis of the original account regarding location. The defence knew that C had said something had happened in London, and he was asked about the physical layout of the flat there, and whether she had ever shared his bed or spent time in his bedroom. The different account in the ABE was put to him in the second interview. The inconsistency was not put to C in the section 28 procedure, but having C for further cross-examination was expressly ventilated and Mr Kirk did not wish to do this. The inconsistency was therefore put before the jury by way of Agreed Facts, and the jury directed as to credibility. We also do not consider that, even if the pre-assessment notes (and therefore knowledge of the first account giving a different location) had been available to the defence before the trial, this would have led to the ABE interview being excluded. It would undoubtedly have been something that

would have featured in the section 28 cross-examination of C, but that was effectively remedied by the arrangements being made to have C recalled, or would have been had Mr Kirk wished to cross-examine her. We repeat what we have said at [31] above. A young witness might have been wrong about location, or timing, or both, when asked five years after the alleged acts took place. The central issue here was whether C was telling the truth, and all the material available and necessary for the jury to consider and determine that was before them, including the significant differences in her original account.

70. We are not persuaded that these points taken separately or together can be said to have prevented the appellant from presenting his case in its best light, or to have put him at a disadvantage. Indeed, it might be said to have been possibly more favourable to the appellant to have the inconsistency put before the jury in the way that it was, without having to be put to C directly. We emphasise that the non-disclosure should not have happened. Yet not all non-disclosure will be such that it will lead to a successful appeal against conviction. It must be assessed in the light of its impact in each particular case. Given the way that matters unfolded, including the way that the judge was prepared to have C recalled, no doubt is cast upon the safety of the conviction as a result.

Conclusion

71. We have considered all the different grounds separately, and also their cumulate effect as a whole. We are not persuaded that any of them individually, or all of them taken collectively, lead to doubts regarding the safety of the convictions. We are not persuaded that the trial was materially unfair as matters unfolded, or that the convictions on any of the counts are unsafe as a result of the matters that make up the different grounds, for the reasons that we have explained above. We therefore dismiss the appeal.