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IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202200646/B1-202201081/B

[2022] EWCA CRIM 1378

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 20 September 2022

Before:

LADY JUSTICE SIMLER DBE

MR JUSTICE PEPPERALL

MRS JUSTICE FARBEY DBE

R
V
KC

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MR N WORSLEY appeared on behalf of the Appellant.
MS K ROBINSON appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE SIMLER:

Introduction

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of the offences. To avoid jigsaw identification, we have found it necessary to anonymise to whom we refer, and the appellant himself. The prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. This is an appeal against conviction with leave of the single judge, who also referred the application for leave to appeal against sentence to this court. The appellant has been represented by Mr Worsley, defence trial counsel, who made comprehensive submissions on his behalf. We have also had the benefit of a Respondent's Notice, prepared and developed orally by Ms Katherine Robinson, who also appeared below to prosecute. We are grateful to both counsel for the considerable assistance they have provided to us.

3. On 1 February 2022 in the Crown Court at York before HHJ Hickey and a jury, the appellant was convicted of six offences of indecent assault contrary to section 14(1) of the Sexual Offences Act 1956 (counts 1 to 4 and 7 to 8 inclusive) and two offences of indecency with a child contrary to section 1(1) of the Indecency with Children Act 1960 (counts 5 and 6). On 10 March 2020, before the same court, he was sentenced to a total of nine years' imprisonment made up as follows: on counts 1 to 4, there was a total concurrent sentence of four years, made up of one year on count 1, two years on count 2, four years on count 3 and one year on count 4. On counts 5 and 6 there were sentences of two years concurrent on each, but count 5 to run consecutively to the sentence on count 3. On count 7 and 8 there were concurrent sentences of three years but with count 7 to run consecutively to the

sentences on counts 3 and 5.

The facts

4. The appellant was in a relationship with the victim's mother. We shall refer to the victim as "V". She was eight or nine years old when the relationship began in the mid-1990s. Her mother suffered mental health problems and alcohol addiction. She spent periods of time in a psychiatric hospital and ultimately and tragically took her own life in 2010. In June 2020 V (then in her early 30s) reported to police that she had been sexually abused by the appellant as a child.

5. The prosecution case at trial was that the appellant sexually abused V over a five year period when she was between nine and 14 years old, during a time when she saw little of her biological father and her mother was ill. She gave evidence about an occasion when she was wearing pyjamas, snuggled up next to the appellant while watching television and he put his hand up her top and touched her nipples and breasts (count 1).

6. On another occasion she was in the living room and not wearing a top when the appellant touched her breasts with his hands. He then licked and sucked her nipples. She did not think anyone else was present in the house and after that occurred, she went to her bedroom crying and put a rope around her neck (count 2).

7. A third incident she described was in the conservatory of the house. The appellant's children were going in and out of the same room. The appellant put his hand down her trousers and rubbed her vagina (count 3).

8. Another occasion described by her in evidence involved her straddling the appellant on the sofa. He put his hands down the back of her trousers and underwear and touched her bottom (count 4).

9. Count 5 was an occasion when she was naked in the shower. The appellant kissed her. He was also naked in the shower. His penis was erect and he made her touch it.

10. Count 6 was an occasion when she was in the marital bedroom with the appellant when he ejaculated. She remembered the ejaculate pooling on his lower stomach. She could not recall if she was touching his penis or if he was touching it himself. She jumped off the bed and crouched on the floor.

11. Count 7 was another occasion in the bedroom that he shared with her mother. The appellant was standing at the side of the bed and put on a condom. He got on top of her and was, as she described it "poking around" her vagina with his penis. A sound was heard in the house and he stopped.

12. Count 8 occurred when they were on holiday in Florida. She said that the appellant gave her a razor and instructed her to shave off her pubic hair. He then used his tongue on her vagina and labia.

13. She described feeling that the appellant had groomed her. She described him talking about his "magic hands" and using that to take the opportunity to touch her. When she was 12 years old she tried to tell a school friend, A about what had happened. She told another friend, B when she was 16 years old. She recalled being on holiday with her father and his partner in 1998. She drew a picture of a whale's penis and she thought it prompted her father's partner to speak to her father. She said she spoke to her father about the abuse in 2011, when she was around 24 or 25. In 2003 or 2004 she told a teacher at school, that she had recently told her mother she had been abused by the appellant. He told her that he was not able to deal with that information. She said that she told her counsellor in 2011, and after that her boyfriend, about these matters. In 2016 she anonymously reported the matter to Crime Stoppers.

14. She was cross-examined at trial and denied that her mother had asked her to share a bed with the appellant when in Florida, or that she had taken off her top and jumped into a swimming pool on the occasion she described in Florida. She explained that she had not told anyone

about the touching as she felt she would be saying she had “done stuff with my mum's partner and I was ashamed”. She was aware her mother still loved the appellant and could not speak out to her. Having eventually told her mother, her mother told the police, but she had no recollection of the police attending. She said that she told her mother in 2004 but had not made any police complaint as by then the appellant had moved out of the house and had gone from their lives. She did not want the appellant back in their lives. She agreed she had not told other relatives as she was afraid her mother would relapse and was upset that the appellant was in a new relationship. She accepted once calling the appellant’s new partner “a witch” and that she was taken home immediately after that. She said that as a child she had mistakenly thought she and the appellant were having an affair. She did not realise there was any wrong with the relationship until they went to Florida. She felt ashamed about what had happened in Florida and realised she was able to get away by being out of the house with her friends. The appellant had been jealous about her having a boyfriend.

15. There was also evidence read from C a friend of V's mother, who had children at the same school as V. She said that on one occasion at the family home when V's mother had gone to bed, she saw V sit next to the appellant and complain about a stomach ache. The appellant said his “special hands” would make it better and he began rubbing V's stomach over her clothes. C described feeling uncomfortable and said she could not believe what she had seen. A few weeks later she saw V and the appellant walking down a street with their arms linked as if they were a couple. She was shocked by that. At some point later, V's mother told her that she and the appellant were splitting up. At around that time V telephoned her and, amongst other things, told her that the appellant had been abusing her. She advised V to tell her mother.

16. There was also evidence, given by a number of other individuals (seven in all) about

disclosures made to each of them by V, of sexual abuse by the appellant.

17. Finally, the prosecution relied on evidence from DD (V's father's partner) who gave evidence about some concerns she had over V's sexualised behaviour. She discussed her concerns with V's father but he did not do anything about it. DD was a police officer at the time and discussed matters with a friend who was a Child Protection Officer but that colleague dismissed her concerns. She wondered if something inappropriate was happening at home nonetheless.

18. The defence case was one of denial. The appellant gave evidence that he had been in a relationship with V's mother who suffered significant mental health and alcohol problems. At times V's mother attended psychiatric hospital but V would go to stay with her uncle or father at those times. He said he treated V kindly because of her mother's issues and her parents' divorce. V always wanted to be the centre of attention. She would walk around the house in her underwear and would have sex with her boyfriend in the house while the appellant's other children were in the house. The appellant accepted walking arm in arm with V. He was a tactile person and would often dance or link arms with all of his children.

19. When the family were on holiday in Florida, V had been disruptive on the flight and on the holiday. When they arrived at the apartment they were staying in, V did not want to sleep on her own and her mother asked the appellant to share a bed with her. On one occasion V took off her top and jumped in the pool.

20. So far as the allegation about putting on a condom is concerned, the appellant denied it. He said that he suffered from a skin allergy and experienced an extreme reaction on the only single occasion he had ever worn one. He did not mention this in police interview because he was nervous. He gave evidence that he ended the relationship with V's mother after she suffered a final relapse in her drinking. He left her but spent time sleeping on the sofa.

21. In support of the appellant, the jury heard evidence from E (his then current wife). She too

gave evidence that they were a tactile family. She described marriage to the appellant for 17 happy years. She said he would hover his hands over people as "healing hands". She had a daughter (F) who was eight years old when she started the relationship with the appellant, and she confirmed the appellant did not use condoms because he was allergic to them. F gave evidence. She described the appellant as a loving father to her. The "healing hands" was a silly thing he would do.

22. The teacher at V's former school, to whom we have referred, gave evidence. He had no recollection of V and no recollection of her mentioning any abuse to him. Even at the time V was at the school, it was clear that any mention of abuse was to be passed to the safeguarding officer. In his long experience at the school (32 years in all) there had been only two female students who had approached him with allegations of sexual abuse. V was not one of them.

23. G, another of the appellant's stepdaughters, also gave evidence. She knew V and her mother many years earlier and never had any concerns over allegations of this kind.

The impugned documents

24. The judge gave the jury three documents to take with them into retirement. The documents were described by the judge as "advice" and variously as "a way in which the jury might like to approach the evidence without telling them how to think". The appellant's appeal is founded on an argument that these documents should not have been given to the jury and the resulting convictions are unsafe in consequence.

25. The three documents about which complaint is made can be described as follows. The first one read to the jury was headed "CONTEXT. WHY [V] DID NOT SPEAK OUT AT THE TIME" ("document 1"); the second was headed "GROOMING" ("document 2") and the third was headed "WHY" ("document 3") and dealt with V's motives or reasons for making the allegations against the appellant.

26. When he gave the jury the three documents the judge said this:

> "The first page -- and I've put 'A' in the top left-hand corner of each of these, and I've done that to remind you when you go to your jury room that these are not directions of law. These are simply my suggestion from this side of the bench as how you might like to approach the evidence, a common-sense approach I would say, but I'm in your territory. So, I am not telling you how to think. I am just putting these documents before you as perhaps a way you might like to look at the evidence."

27. Document 1 appears to have been an amalgamation of a similarly phrased direction taken from R v Miller [2010] EWCA Crim 1578, and the passage in the Crown Court Compendium which refers to that case. In Miller, this court considered comments made orally by a trial judge to similar effect to those contained in document 1, where the judge explained that the jury was entitled to consider why the allegations made against the defendant did not come to light earlier. The judge in Miller dealt in conventional terms with the possible prejudice to the defendant in that case caused by the delay (as did Judge Hickey in this case) and said the defence case was that it was because the allegations were false, a case that was set out briefly. Document 1 in this case was in similar terms and continued in similar vein as follows:

> "The prosecution say it is not as simple as that. When children are abused, and whether she was abused is what you have to decide, children are often confused about what is happening to them and why it is happening to them. Remember you are dealing with a child and that is something you should have at the forefront of your minds when you consider whether this young woman is telling you the truth. The child may have had some inkling of what is going on is wrong. Sometimes children even blame themselves when there is obviously no need for them to do so.
>
> A child can be inhibited for a variety of reasons from speaking out. They might be fearful they might not be believed, a child's word against a mature adult. They may be scared of the consequences or fearful of the effect upon relationships which they have come to know. The difficulties you may think are compounded in the family situation where they involve someone for whom the feelings of the child may be mixed. The child might not like the abuse but there may be other aspects of the abuser that causes the child to view them with some degree of affection. The fallout from disclosures can be unpredictable

> and sometimes far reaching. If children are abused, you may think they are subject to very mixed emotions and that can be the case particularly when there is an imposing adult in the household.
>
> Place [V's] evidence in the context -- in such context when you consider why it was she didn't speak out to her mother at the time or to the police when the defendant had left the home for good. Examine any reasons she may have given for not speaking out.
>
> And, ladies and gentlemen, I make it clear that I offer these matters to you -- I have put 'like the two earlier matters' but we're about to turn to those, the why question and grooming -- not by way of directions in law -- and I put that in bold to emphasise it -- but as things which in common sense and with your knowledge of the world and people you might like to consider when assessing whether you find there is a reason for the delay here and of course the honesty and truthfulness of [V]."

HHJ Hickey continued:

> "You have heard explanations given by [V] and it is entirely a matter for you what you made of [V] when she said, 'It may sound stupid but I felt I couldn't say to my mum, 'I've been doing stuff with your boyfriend' or I was ashamed. It was hard to be a child in a second relationship. I tried so hard to be good and after the defendant left, she [referring to her mother] had given him up. He had gone from our lives. I didn't go to the police. I didn't want to bring him back. Or, looking back, I thought mistakenly we'd had an affair and I am still living with the outcome. Shame. I still think I've done something wrong. He was an adult. I was a child. I couldn't turn to anyone. They were so happy to have him around. I was a girl with absent parents. He is powerful and he is scary. He still scares me.'
>
> Examine those explanations, ladies and gentlemen. They are for you to assess along with any evidence in the case."

A direction in similar terms, albeit without the evidential context in the final paragraph which we have quoted, was criticised in Miller as being longer than might have been expected but in the context of a summing-up that extended to 94 pages was not regarded as too long.

28. Document 2 set out the prosecution case that before the appellant sexually assaulted V, he groomed her. It set out what that meant on the prosecution case, namely doing things that would normally be regarded as innocent, such as cuddling up together on a sofa or watching TV together, before moving on to more sexualised conduct:

> "That means D won [V's] trust by doing things that would normally be innocent, such cuddling up together on the sofa, watching TV in the conservatory, before placing his hand, & later his mouth, on [V's] breast area. Then, over time, the D would take a shower with [V], be in the bedroom that he shared with the girl's mother, before going on to touch [V's] private area, before finally, in Florida, on holiday, D invited the girl to shave her private area before performing oral sex upon her. That is to say, D 'incrementally' moved 'up the scale' in his behaviours toward [V].
>
> In this situation, a child is unlikely to realise that she is at any risk at all. And when the behaviour changes from something 'innocent' to something that is sexual, the child may not realise there is anything wrong. The child may accept the sexual touching without any feeling of discomfort or dislike, & the child might not make any complaint about it or resist or protest when it happens again. In these circumstances a child is unlikely to be able to say when behaviour that was 'innocent' changed to something that was sexual.
>
> In explaining this I am not suggesting what you should decide did, or did not, happen. I am simply making sure you understand a potential difficulty a child in such a situation could face. It is for you to decide whether or not [V] faced this situation."

29. Document 3 explained that the jury might properly consider why V made the allegations when she did and whether she had an improper reason or motive for doing so. It said those were proper questions for the jury to consider and that they might be thinking, having asked themselves this question and having found she had no improper motive or any other reason to say these things, that that meant the allegations must be true. It continued:

> "Here, the [defendant] suggests that [V] did have an improper motive to make these allegations up:- namely that she was angry that the [defendant] had left her to cope with a drunken Mother.
>
> Remember what I told you about the burden and standard of proof? The Prosecution must prove their case. The defendant does not have to prove anything. He does not have to make you sure that there is some improper motive. Even if you reject [defendant's] suggestion for [V] having had an improper motive, that in itself proves nothing. The Prosecution have to make you sure that, first, there is no improper motive for making such allegations and, secondly, the allegations are truthful and accurate."

30. The judge split his summing-up by giving his legal directions before closing speeches from

counsel on the Friday of the week in which the evidence had been given. He gave the jury appropriate written assistance on questions of delay by V in reporting these allegations and the prejudice that that might have caused to the appellant, and on the subject of V's distress. Those directions were all the subject of advance discussion with counsel on both sides. The prosecution made their closing speech immediately afterwards and the trial adjourned at lunchtime that day. In the absence of the jury there was then a discussion about timing and attendance the following week. Having dealt with those matters the judge explained that he normally gave directions about aspects of the evidence, including the WHY question, grooming and difficulties for a child in speaking out. He canvassed in broad terms the scope of the directions he would normally give and said he would try to send counsel a copy over the weekend. There was, understandably, no objection from counsel at that stage and the case adjourned until Monday.

31. On the Sunday evening, the judge circulated the three documents to both counsel but without at that stage making clear that he intended to provide the jury with copies to take with them into the jury room for use during the course of their deliberations.

32. On the Monday morning at 10.33am and before the jury had returned to court, the judge told counsel that he would put the documents before the jury in writing. He asked Mr Worsley if he was ready to proceed. Following an affirmative response the jury returned and Mr Worsley made his closing speech. After the closing speech from Mr Worsley and in the course of his summary of the evidence (the second part of his summing-up) the judge handed the jury copies of all three documents and read each one into the record of the summing-up.

33. In addition to the criticism Mr Worsley made of the fact that the three documents were provided to the jury to keep during their deliberations, Mr Worsley was critical of the fact that the judge did not make absolutely plain, well in advance, that this is what he intended to do. Although this intention was mentioned in passing on the Monday before the defence

closing speech, he submitted that it afforded insufficient opportunity for him to consider the appropriateness of that course and whether, as written documents, they were properly phrased and sufficiently fair and balanced so far as both sides were concerned.

34. A concern was raised with the judge after the documents had been given to the jury but before the short adjournment and in the absence of the jury. In consequence, when the jury returned after lunch, the judge said this:

> "And the second matter, ladies and gentlemen, as I hope I made clear, indeed it is on the face of the documents, when I opened my remarks about the evidence in this case, I gave you three documents with a letter A in the top left corner. They are not directions of law, as I told you. They are simply ways I invite you perhaps to approach the case. How you approach the case is entirely for you. You are the jury, I am not. It is simply for assistance whereas the other documents that you had earlier in the case on law, they are to be followed, as you appreciate.
> I can see you nodding. I am sure you got the point. Thank you very much."

<u>The appeal</u>

35. Mr Worsley submitted that this was a straightforward case. There was nothing complex about it and it certainly did not require written directions of this kind, such as might be contemplated by the relevant Criminal Procedure Rules 2020 and associated Practice Direction. The evidence took four days. There was no danger of the jury forgetting it and they needed no written reminder of it in the context of the issues.

36. In terms of each document, document 2 was uncontroversial on its own but added to the weight of his argument when seen with the other documents. His criticism of it focussed on the chronology that reflected the prosecution's case without setting out, at the same time, the appellant's own version of events. He accepted that was dealt with in the judge's summing-up in oral terms but the risk of having it in writing meant that there was undue focus put on the prosecution chronology.

37. So far as the document 3 is concerned, he criticised the sentence:

> "Here, the [defendant] suggests that [V] did have an improper motive to make these allegations up:- namely that she was angry that the [defendant] had left her to cope with a drunken Mother."

as an inadequate summary. The appellant's case on "WHY" was more nuanced than that reflected by the judge. His case was that V's mother was an alcoholic, and her condition varied over time. V blamed him for her mother's distress and for the decline in her condition that occurred after he left her and ultimately led her to commit suicide. For V, there may have been a mixture of anger about the leaving and the breaking up of a family unit and concern at the reaction of her mother to that breakup and to the decline in her health.

38. So far as the document 1 is concerned, the real gravamen of Mr Worsley's complaint relates to the final 10 lines, where the judge went through a list of statements made by V in the course of evidence, about how she felt and why she had not spoken out at the time, without balancing that against the appellant's own case.

39. Mr Worsley accepted that the judge ended document 1 with the direction that it was for the jury to assess those matters along with all evidence in the case, but submitted that was inadequate.

40. He accepted that not all of these points were points made at the time. He had been broadly content with document 2. He had expressed reservations about document 3: the phraseology adopted by the judge appeared to preclude there being other reasons why V might have made these allegations up. These were not matters within the knowledge of the defence. She may have had a myriad of reasons. She may have convinced herself that the allegations were true. She may have had underlying mental health reasons that led to her making the allegations. To express the position in the way he had was to foreclose those other points. The judge did not accept those criticisms and made clear that the emphasis here was on the prosecution having the burden of proof, even if there was no improper motive for making such allegations. Finally, so far as document 1 is concerned, the

criticism made at the time by Mr Worsley was to an additional line in the document which was in fact, removed by the judge.

41. The fact that the criticisms now made were not made at the time does not preclude Mr Worsley from raising them on appeal but it is an indicator of the strength of the points he makes.

42. More broadly, Mr Worsley submitted that the provision of these written directions gave the prosecution an evidential advantage because they were selective in the facts included by the judge. The danger was that the jury was encouraged to give more weight to those facts or events included in the documents and to downplay or ignore matters left out. Overall they gave rise to the danger that the jury would give disproportionate weight to those parts of the evidence set out in writing. What made matters worse was the failure to discuss the documents in advance with counsel on the express footing that they were to be provided to the jury in writing. They rendered the trial unfair and the convictions unsafe.

43. Ms Robinson resisted the appeal. She submitted that the documents contained standard assistance on how to approach elements of the evidence which were raised by counsel in their speeches. They reminded the jury of the defence arguments and repeated that the prosecution was required to prove all elements of the case. The fact that they were to be given in writing was made sufficiently clear before the defence speech albeit more fulsome discussion would have been better, as she conceded. At the defence request the judge repeated that these documents were not directions.

44. In any event, Ms Robinson submitted that the judge dealt with the evidence accurately and fairly. Document 2 was a standard document in which the judge contextualised the direction by setting out the facts of this particular case. There was no counter balancing evidence to provide because the defendant's case was one of denial. None of the events occurred. Document 3 was provided to the jury in order to warn them about the fact that

the prosecution had the burden of proof. It was provided to assist the defence and although she accepted that the defence case as to V's motives for advancing the allegations was more nuanced than that reflected in the document, it did not adversely affect the case or lead to the convictions being unsafe because the real purpose was to warn the jury about the risk of simply accepting V's word once they found she had no improper motive and to remind them of the prosecution burden. Finally, so far as document 1 is concerned, this was a standard direction. The evidential material included was designed to contextualise the direction which would not have made sense otherwise. The matters set out were in any event accurate and the appellant did not have a positive case on the question why V did not speak out. Those matters revolved around what was in V's mind. None of these matters concerned conflicting evidence that required a balance between the evidence advanced by the prosecution and that advanced by the defence and the judge adequately balanced the interests of the appellant in any event.

45. Moreover, this was a strong prosecution case. The evidence of V was extremely compelling. It was supported by consistent complaints made close to the time and subsequently and whatever criticism there might be and however those directions could have been improved, nothing in the summing-up or the trial process rendered the convictions unsafe.

Our Analysis

46. Rule 25.14(1) of the Criminal Procedure Rules 2020 requires a judge to give the jury directions about the relevant law. Subparagraph 3(a) requires judges to "summarise for the jury, to the extent as is necessary, the evidence relevant to the issues they must decide." Rule 25.14(4) permits a judge to provide the jury with assistance in writing. The Practice Directions amplifies this by providing examples of the written materials contemplated:

> "Written materials that may assist the jury in relation to a complex direction,

or where the case involves a complex chronology, competing expert evidence or differing descriptions of a suspect."

The Practice Direction makes clear that it can be done at any time which will assist jurors to evaluate the evidence. That, of course, is right and it is well established practice that judges should submit such documents to counsel for consideration in good time before their closing speeches and should discuss and seek agreement on the content with counsel in the absence of the jury.

47. We do not consider that any of the issues addressed by the judge in the three documents in this case can properly be described as complex or clearly calling for a written exposition. These were common sense points about human behaviour and how aspects of the evidence might best be approached. To some extent each document necessarily contained contexualisation of the common sense point being made by the judge by reference to the relevant evidence. Any objection to the content of a document of this kind as a matter of principle, seems to us to be misplaced. The documents concern matters of common knowledge and warned the jury of the recognised danger of coming to unjustified conclusions by reference to stereotyped views about the reaction a child in a situation of grooming or who does not speak out at the time, might have. The broad thrust of each document fell well within the boundaries identified in Miller. Moreover, in broad terms, the documents reflected the standard suggested directions on these issues.

48. However, we do see force in the more general criticisms made by Mr Worsley about the fact that these particular directions were reduced to writing and were given to the jury in the course of the judge's summary of the evidence.

49. We take the view that a judge should exercise extreme caution before putting a document before the jury as part of his or her summary of the evidence, where the document includes an account of the evidence that has been given. The facts in a criminal trial are for the jury and the judge should not be seen to constrain or usurp their function.

50. Where a judge decides that written assistance is necessary on any of the issues addressed by the three documents in this case, we consider that this is best done by inclusion in the written legal directions, perhaps under a general heading "Evidence". A carefully focused, balanced written direction about the way to approach the evidence where, for example, delay is raised to undermine the credibility of a child complainant or there is a danger of stereotypical assumptions being made about the absence of contemporaneous complaint, could not have been criticised, provided the comments were themselves uncontroversial and followed appropriate discussion with counsel. The touchstone with any such written assistance to a jury is fairness and balance. Moreover, a judge should not seek or be seen to be seeking to constrain in any way the ambit of factual considerations that the jury might wish to consider. There should be adequate opportunity for discussion and agreement with counsel in advance of any written assistance provided.

51. We have no doubt that this judge was conscientiously doing his best to assist the jury in what he must have regarded as complex aspects of the evidence that required particular assistance. Nevertheless we do not consider that this is a course he should have adopted without making clear well in advance that he proposed to provide the jury with such written assistance and without first discussing it with counsel.

52. Having reached that conclusion, the question remains whether the judge's deployment of these three documents renders the jury's verdicts unsafe in this case. We have considered whether any of the documents contained any errors or misstatements. None were identified by Mr Worsley and we are satisfied that the documents did not contain errors or misstatements.

53. We consider there is force in the point advanced by Mr Worsley that document 3 understated the case advanced by the appellant as to why V might have had an improper motive to make these allegations up. However, the purpose of the document is clear. It was a warning to

the jury not to regard the rejection of any suggestion of V having had an improper motive as proving the case itself. They would still have to consider whether her allegations were truthful and accurate, and it was for the prosecution to make them sure that was so. Thus, whilst the document could have been fuller, we do not consider in itself that it was unfair.

54. So far as document 2 is concerned, we do not accept that this document set out a transcript of V's evidence as Mr Worsley suggested. Our conclusion is to similar effect in relation to document 1. The judge was plainly not setting out a transcript in either case, whether by way of chronology in document 2 or by setting out what V said about why she did not speak out at the time in document 1. What he did simply contextualised the points he was making by reference to the evidence, and in both cases there was no positive case to set out on behalf of the defence in circumstances where the defence case was that none of these incidents occurred. It would have been better had the judge made that clear in writing. But there is nothing in the content of those documents which renders the convictions unsafe.

55. Nor did the documents prevent the jury from considering other material in the case. This was a point emphasised by the judge to the jury after the short adjournment on the Monday. He gave a clear warning about the status of these documents, both in writing in document 1 itself, and in the passages of his summing-up which we have set out. The judge also gave a clear direction at the outset and in his legal directions that all questions of fact were for the jury. He expressly warned the jury that any opinions he expressed should be ignored because the facts were exclusively their territory. Thus to the extent that the documents created any potential imbalance as between prosecution and defence, the other directions given by the judge, both in his legal directions and in the course of his summary of the evidence, substantially cured any problem that might otherwise have arisen.

56. In the result accordingly, although there is some force in the criticisms made by Mr Worsley in relation to the judge's approach to these three documents, we are entirely satisfied that

these verdicts are safe. The prosecution case was strong. V's evidence was plainly compelling, and the appellant was disbelieved. For all these reasons, we dismiss the appeal against conviction.

The sentence application

57. We turn to the application for leave to appeal sentence. The appellant received a total sentence of nine years' imprisonment. The indecent assaults (with modern equivalents in section 7 of the 2003 Act (counts 1 to 4)) were assessed as category 2, high culpability A by reference to the Sentencing Council Sexual Assault of a Child under 13 guideline, with a starting point of four years. Count 3 was regarded as the most serious and involved rubbing V's naked vagina when she was 11 or 12. The sentence imposed on that count was four years with the shorter concurrent sentences on the other counts to which we have referred. Counts 5 and 6 (with modern equivalents in section 9 of the 2003 Act, namely sexual activity with a child under 13) were assessed as 2A in the Guideline, with a three year starting point and a range of up to six years. The judge justifiably regarded these as more serious but expressly because of totality, fixed notional internally concurrent two and a half year sentences on each count to run consecutively to the four year sentence. The indecent assault in count 7 (section 3 of the 2003 Act being the modern equivalent, with a two year starting point and a range of up to four years) happened when V was 13. It involved him lying on top of her, having put a condom on, but he was disturbed before anything more serious (including penetration) could occur. The indecent assault in count 8 occurred when she was 14 and involved getting her to shave her pubic hair and then performing oral sex on her. The judge identified internally concurrent notional sentences of three and a half and three years for each of these offences but, as we have said, the sentence on count 7 to run consecutively to the earlier consecutive sentences. The judge then stood back and reduced the total by one year, by reducing the sentences on counts 5 and 7 by six months each.

58. The appellant was a 61-year-old man at trial. He had no previous convictions.

59. Mr Worsley submits on his behalf that the starting point for these historic sex offences was too high in all the circumstances of the case. Moreover, there were factual inaccuracies in the judge's sentencing remarks. He referred to masturbation by V rather than the appellant having masturbated himself, and there was a discrepancy in his reference to the ejaculate. He submitted that there is a material difference between causing masturbation and causing a child to watch it. These discrepancies led to the judge fixing too high a starting point overall and too long a sentence in all the circumstances of this case, particularly since there was a single victim and the abuse stopped voluntarily at a time when V still lived with the appellant. The sentence did not reflect the mitigation available to the appellant and made inadequate account for totality.

60. The judge presided over the trial and was in the best position to assess the culpability and harm involved in the series of offences for which the appellant was sentenced. The offences were properly categorised by the judge. He made measured reference to the relevant Sentencing Council Guidelines but with proper regard to the maximum sentence in force at the time of each offence. Throughout there was a significant disparity in age between the appellant and V, who was nine at the start and only 14 at the end of the offending period. There was a gross abuse of trust. There was grooming and there was an escalation in the offending over time, including masturbation to ejaculation in her presence, touching her vagina with his penis and the condom incident, which was interrupted but would otherwise have (in all likelihood) been much more serious. V was vulnerable both by virtue of her age and by virtue of her mother's mental health difficulties, ultimately leading to her mother's suicide. V suffered significant psychological harm.

61. We are quite sure that there were no material inaccuracies that affected the length of sentence in this case.

62. Moreover, in the context of serious offending of this kind the judge had proper regard for the appellant's otherwise good character, age and other personal mitigation. Totality was expressly catered for by the passing of several concurrent sentences, by the passing of shorter sentences on counts 5 and 6 than would otherwise have been justified had those offences been sentenced on their own, and by standing back at the end of a process that led to a longer notional sentence and making a further reduction of one year to reflect totality. We have concluded accordingly that the judge made no error of principle and that the overall sentence passed on the appellant in this case was not arguably manifestly excessive.

63. Accordingly and notwithstanding the cogent submissions made by Mr Worsley, the application for leave to appeal against sentence is refused. The result is that the appeal is dismissed and the application is refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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