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Although this judgment was handed down some time ago, there were reporting restrictions in place so as to avoid any prejudice to any retrial. There was a retrial in the case of *R v Provan*, which led to a conviction. Accordingly, the reporting restrictions have now been lifted.

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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202100993/B5

Neutral Citation Number: [2022] EWCA Crim 248

Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday 22 February 2022

LORD JUSTICE SINGH

MR JUSTICE FRASER

MR JUSTICE GOOSE

REGINA

V

ADAM PROVAN

REPORTING RESTRICTIONS APPLY:

s.4(2) of the Contempt of Court Act 1981

postponing publication of any report of these proceedings until the conclusion of the re-trial in order to avoid a substantial risk of prejudice to the administration of justice in those proceedings.

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MS J SMART QC appeared on behalf of the Appellant.

MR A METZER QC appeared on behalf of the Crown.

J U D G M E N T

LORD JUSTICE SINGH:

Introduction

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.
2. On 29 November 2018 in the Crown Court at Wood Green, the applicant (then aged 39) was convicted by a majority of 10:2 of two counts of rape. This trial was a retrial after the jury at the first trial had been unable to reach verdicts on the same counts earlier in 2018. On 30 November 2018 the applicant was sentenced by HHJ Greenberg QC to 9 years' imprisonment, concurrent on both counts. Other appropriate orders were made.
3. In the present proceedings he applies for an extension of time (832 days) in which to apply for leave to appeal against conviction following a referral to the Full Court by the Registrar. He also seeks leave, pursuant to section 23 of the Criminal Appeal Act 1968, to introduce fresh evidence regarding the conviction of Darryl White ("DW") for alleged offences against the same complainant, now deemed to have been unsafe by this Court.
4. New counsel, Ms Julia Smart QC, instructed by new solicitors, represents the applicant. We have also had the benefit of submissions from Mr Anthony Metzger QC on behalf of the Crown, who appeared in the court below. The applicant was originally advised in 2018 by trial counsel that there were no grounds of appeal. Fresh evidence regarding the safety of the conviction of DW formed the basis of the applicant's Amended Grounds. When the applicant's family became aware that DW was applying for leave to appeal (in October

2019) fresh counsel and solicitors were contacted. Matters were then delayed by the Covid-19 pandemic but fresh solicitors, it is submitted, acted expeditiously and an application was made as soon as possible thereafter in April 2021.

Factual Background

5. In 2016 the complainant ("C") went to the police to report unlawful sexual activity perpetrated against her from the age of 14. She alleged that she had been in a sexual relationship for over 2 years on-and-off with DW. He was the son of her father's partner (who was in his 20s at the time) and eventually became her stepbrother when their parents married. The police conducted an ABE interview. During that interview regarding DW, C made disclosures regarding an incident with this applicant when she was aged 16. The police conducted a separate ABE interview with her to obtain further details of the allegations against the applicant.
6. In the summer of 2010 the applicant (a serving police officer at the time) and C were introduced through a mutual acquaintance. They exchanged text messages and eventually agreed to go on a date. The prosecution case was that the applicant knew that C was much younger than him. He did not take C on a date as planned but took her to two outdoor areas where he raped her vaginally and orally. C said that she had told the applicant that she was 16 and that he had initially lied about his age, telling her that he was 22 when he was in fact 31.
7. The applicant went to C's home address in order to meet her father so he could give permission for them to go out. It transpired that the applicant already knew C's father as he was a close friend or colleague of the applicant's father. C's father had been reassured that he was the son of a good friend, he was a police officer and so the applicant and C left

together to go on their date. However, rather than take C to the cinema as planned, C alleged that the applicant drove her first to a wooded area. They walked into the woods and the applicant started aggressively kissing her neck and asking for sex. She told him that she did not want to have sex but he would not stop. He pulled his own trousers down and put on a condom. C froze in fear. He pushed her against a tree, forcibly pulled down her trousers and penetrated her vagina until he ejaculated (count 1). The applicant then took her to a McDonald's where he bought them both milkshakes. He researched a film plot on his phone and told C to tell her father that that was what they had seen. As they had not been out long enough for a film they drove to a park and walked in a children's play area. They sat on a bench and the applicant asked C if she wanted to "give him head". She refused but he again insisted. He took his penis out of his trousers and forced her head down, putting his penis in her mouth. He forced her to move her head until he ejaculated again (count 2).

8. After the two rapes the applicant took C home. She was not able to tell anyone what had happened immediately. She eventually told her stepmother in 2011 but it was not reported to the police at that time. She also told her stepbrother and some years later she told her now fiancée.
9. In June 2016 the applicant was arrested and interviewed. He answered questions and accepted that he knew C and her father. He agreed that he had gone to her home with the intention of taking her on a date but became uncomfortable with the idea when he realised that he knew her father and saw how young she looked. So as not to be impolite he took her for a walk but he denied that anything of a sexual nature had occurred. He denied rape.
10. At trial, in order to prove the case, the prosecution relied on the following evidence. First, the evidence of the complainant. Secondly, the evidence to C's father about the day the

applicant came to their house. Thirdly, the recent complaint evidence of her stepmother and stepbrother, both of whom C had told about the rapes in 2011. Fourthly, further recent complaint evidence from a friend of C who was at college at the relevant time with her. Fifthly, the evidence of her dance teacher at the time regarding a piece of work that C told her had stirred up difficult memories of an older man in a park and evidence from her now fiancée to whom she disclosed the rapes in 2013. Finally, there were Agreed Facts, in particular, Agreed Facts 5 and 6 which concerned DW. Agreed Fact 5 said that:

"In May 2018, [DW] was tried at Snaresbrook Crown Court on three counts on sexual activity with a child. The counts on the indictment covered the period from 14th August 2008 to 16th April 2010 when [C] was 14 years old and 15 years old. The counts alleged that sexual intercourse had taken place on at least 18 occasions when [DW] did not reasonably believe that [C] was aged 16 years or over. Consent or lack of consent is not relevant to the offence of sexual activity with a child as in law a child under 16 years cannot give consent to sexual intercourse. [DW] was found guilty of all three counts on the indictment and sentenced to a prison sentence."

11. Agreed Fact 6 said that:

"[C] was called as a Prosecution witness in the Darryl White trial. [JT] was called as a Defence witness. [ST] was not called as a witness during the trial."

12. The applicant gave evidence on his own behalf at the trial. In August 2010 he would have been 31 years old. He lived in Romford and did not have a regular girlfriend. He had been in the Police since 2003. He did own a car but as he was a police officer he had free access to public transport. He agreed that there must have been some messaging with C prior to their meeting up but he could not remember its content. He denied however that they had exchanged photo messages. He said that he had taken a bus to her house as it was only a short journey and he would have been intending to take her out in Romford. When C

answered the door his first reaction was that she was very young in appearance. He was shown through the house into the garden to meet her father. When he saw her father the applicant was surprised, realising that he knew him, although he had not seen him for more than 10 years. The applicant could not remember what had been planned save that he would meet C at her home. When he saw how young she was and realised that she was the daughter of a family friend, he felt awkward and did not feel comfortable dating her. Instead, he said he walked her to some nearby shops where they each bought a drink and then walked back towards her home. They parted ways at a junction near her home because he was headed back to the bus stop and she could find her own way back from there. He said they were together for no more than half-an-hour.

13. In cross-examination the applicant denied telling C that he was 22, or that she had told him she was 16. The applicant stated that he had learned of the case against DW since his interview and that C had wanted to use the applicant to make DW jealous. The applicant stated that he could not comment on the DW case and had no reason to suggest that she had not told the truth in that case but, as we shall see later in this judgment, that she was more than capable of telling lies. The defence also relied on character and other evidence from other witnesses.
14. At trial the issue for the jury was: did the applicant rape C vaginally and orally in the late summer of 2010; essentially was C telling the truth?
15. There are two further aspects of the evidence at the trial to which we should now refer. The first is the evidence-in-chief of C in the transcript for 22 November 2018 (page 37D-E). The question was asked by prosecution counsel:

"Q: Do you think, looking back on it, that the way you reacted to the sexual assaults by Adam upon the other rapes, was affected by what you were going

through with Daryl.

A: Yes.

Q: I think I am trying to ask you why you were so passive. Do you think that was connected?

A: Yes."

16. The second passage to which we draw attention at this stage is during the cross-examination of the applicant in the transcript for 26 November 2018 (page 62A-F).

The question was put by prosecution counsel:

"... You're not suggesting that she's doing anything other than telling the truth in relation to Daryl White, are you?

A. I can't comment on that.

Q. Well she gave evidence, the jury convicted, yes?

A. Well I can't comment on that. I wasn't present.

Q. You take no issue, and quite properly your barrister never suggested to her, quite rightly that she was doing anything other than telling the truth about Daryl White. So you agree with that?

A. I can't say either way, can I?

Q. Well you can in fairness, Mr Provan, you're not suggesting that in relation to Daryl White she did anything other than tell the truth? Do you agree?

A. Mr Metzger, what I do know is this individual is more than capable of telling lies and she's more than capable of seeing them all the way through to a court case. That is what I do know.

Q. I see. So are you suggesting in fact, contrary to what I had understood the position to be that she may have lied about Daryl White as well?

A. I can't comment because I don't know what happened between those two, but I do know what she's capable of. That's what I'm saying.

Q. Help me for the last time before we move on?

A. Okay.

Q. Do you have any reason or any suggestion before this court to suggest that her evidence in relation to Daryl White was anything other than the complete truth?

A. No."

Judgment of the Court of Appeal (Criminal Division) in the case of "DW".

17. The Court on that occasion comprised Singh LJ, Holgate J and Julian Knowles J. The Court gave judgment on 22 September 2021. The factual background can be seen from

paragraphs 3-5 in particular. In that case, on 1 June 2018 in the Crown Court at Snaresbrook, the appellant was convicted of three offences of sexual activity with a child, contrary to section 9(1) of the Sexual Offences Act 2003. The case concerned allegations of sexual offending against the same complainant C who was born in April 1994. In two ABE interviews dated 19 May 2016 the complainant stated that in August 2008 she lived with her father JT and recalled that the appellant was on leave from the Army and came home to visit his mother. He stayed in the spare room in the property. The complainant said that on 14 August 2008 she went to a Nando's restaurant in Romford to celebrate a friend's birthday. The appellant subsequently picked her up from the restaurant and took her home. They returned to their respective bedrooms but soon started sending text messages to each other. She said that the appellant told her that she was beautiful, asked her questions about her sex life and asked whether she was using any contraception. Once he was aware that the other family members had gone to bed the complainant said that the appellant sent a further message inviting her to his bedroom. She went to that bedroom, got into bed with him and cuddled him. The appellant subsequently took off her clothes, performed oral sex on her and then had vaginal sexual intercourse with her until he ejaculated. At the time the complainant was 14 years old and the appellant was 25.

18. As appears from paragraph 9 of the judgment, it was common ground in that case that the appellant did have a consensual relationship with the complainant but he insisted that that had only begun after she had reached the age of 16 in around May 2010.
19. In the light of fresh evidence which came before this Court in that appeal, the Court concluded that the convictions of DW were unsafe and they were quashed. The first ground of appeal which was upheld by the Court (see paragraph 39 of the judgment) was that there had been a deficiency in the good character direction given by the trial judge.

This Court said that by itself that deficiency might not have been sufficient to render the convictions unsafe but, when taken in combination with the fresh evidence, it did lead the Court to conclude that the convictions were unsafe. The Court said:

"In particular, we must bear in mind that at the heart of this trial was the issue of credibility. Furthermore, this was a relatively unusual case for a historical sex offence case because in many such cases, for understandable reasons, the persons concerned are often unable to be precise about particular dates or periods in the past, but nevertheless give clear evidence that the offending did take place."

20. At paragraph 40 this Court continued:

"In this case ... there was a real issue of alibi, namely where was the appellant on 14 August 2008. That date was important because the complainant herself was adamant that that had been the date of the first sexual activity because it was the day of her friend's birthday and they had gone to Nando's to celebrate. In this case therefore, we have reached the conclusion that the photographic evidence, in particular the photograph timed at 14.18 hours on 14 August 2008 is of crucial importance."

21. Suffice it to say for present purposes that there was photographic and other evidence which demonstrated that there was real substance to the alibi defence of the appellant DW.

Grounds of Appeal

22. New counsel instructed in the present case lodged Perfected Grounds of Appeal in October 2021 further to the judgment of this Court in DW's appeal. No criticism is or can properly be made of the trial judge's summing-up or her directions of law. The first ground is that the fresh evidence in DW's case and subsequent quashing of his convictions undermines C's credibility. In particular it is submitted that the photographic evidence which gave DW an alibi is supportive of the submission that C fabricated on count 1 against DW. This

should be coupled with the fresh evidence that DW did not have access to a car at the material time. This new evidence would have an impact, it is submitted, upon C's propensity to fabricate sexual allegations as against this applicant too.

23. Ground 2 is that the quashing of DW's convictions fundamentally affects the safety of this applicant's convictions. At the applicant's trial, it is submitted, there was considerable reliance placed upon the circumstances of C's allegations against DW: his conviction, the prison sentence and the trial (see Agreed Fact 5). Attention is also drawn to the references to DW in the summing-up by the judge at page 46H and following.
24. It is submitted that the jury must have taken into account the agreed evidence to the effect that C was a victim of sexual offences at the time when she met this applicant, that she had given a truthful account at DW's trial and that, since the allegations against the applicant had emerged within her account against DW, those allegations were also likely to be true. Now that DW's convictions have been quashed, substantially because of fresh evidence undermining the credibility of C's account, it is submitted that this applicant's convictions are also rendered unsafe.
25. Ground 3 is that in any event the evidence of DW's conviction, trial and sentence were inadmissible in this applicant's case.
26. Ground 4 is expressly conceded not to be a stand-alone ground but is advanced in conjunction with the other grounds to support the submission that these convictions are unsafe. We will return to grounds 3 and 4 in more detail later in this judgment.

The Respondent's Submissions

27. On behalf of the respondent it is submitted by Mr Metzger that the case of DW was wholly

dissimilar. DW admitted consensual sexual intercourse had taken place and the only issue had been when it had started, in particular: was it before C's 16th birthday? It is submitted that the convictions of DW were quashed first, because the good character direction in that case was deficient but that point has no relevance in the present case. Significantly it is submitted that the Court made no adverse, at least expressly, credibility findings against C, implicitly accepting that she might well have been mistaken about the date of her first sexual intercourse with DW. Next, it is noted that the facts concerning the DW case were admitted with the agreement of the defence as it was consistent with the defence case that C wanted to make DW jealous and win him back by making up the sexual allegations against this applicant. Furthermore, the applicant gave evidence at his trial and when cross-examined said that C was more than capable of telling lies and on seeing it through to a court case. Accordingly, the suggestion that DW was not in fact guilty was squarely put before the jury by this applicant himself. The jury had the opportunity to assess that evidence and did not believe him.

28. It is submitted that the two questions put to C in chief have no relevance to the safety of the conviction as the answers were equally explicable about her feelings of having a crush on DW as they were of having sexual intercourse with him. It is therefore, submits Mr Metzger, a *non sequitur* and does not follow that the jury would have considered that C was a victim of sexual offences, especially given the consensual nature of their admitted subsequent relationship or that this played any significant part in their deliberations in a case where there was a very strong evidential case against this applicant. Moreover, the suggestion that the applicant had to accept that C was a truthful witness in DW's case, designed artificially to bolster C's credibility, is simply not right. As the applicant himself maintained this was a fact clearly beyond his knowledge.

29. In relation to ground 3, Mr Metzger submits that the facts relating to DW's conviction, trial and sentence were properly admitted at the present trial and indeed had been subject of agreement by the defence.
30. In relation to ground 4, he submits that this did not feature in any significant way at the trial. It is not even suggested on behalf of the applicant that this evidence was inadmissible as such.

Application for Extension of Time

31. We grant the extension of time required. Trial counsel advised at the time that there were no realistic grounds of appeal against conviction. The amended grounds could only be formulated once it was clear that there was going to be an appeal in the case of DW. Although there was some further delay after a new legal team was instructed, we accept that they proceeded with reasonable expedition in view of the continuing difficulties caused by the Covid-19 pandemic.

Application to Adduce Fresh Evidence

32. For reasons that will become apparent when we address the merits of grounds 1 and 2, we grant the application to adduce fresh evidence under section 23 of the Criminal Appeal Act 1968. So far as material that provides:

"(1) For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice—

...

(c) receive any evidence which was not adduced in the proceedings from which the appeal lies...

(2) The Court of Appeal shall, in considering whether to receive any

evidence, have regard in particular to—

- (a) whether the evidence appears to the Court to be capable of belief;
- (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
- (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
- (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings... "

33. The essence of grounds 1 and 2 depends upon the fact that the convictions of DW were quashed by this Court in September 2021. The fresh evidence all relates to that decision and the evidence which led to it. This evidence was not reasonably available previously.

Grounds 3 and 4

34. At paragraph 39 of the Amended Grounds of Appeal, ground 3 is formulated as follows:

"It is submitted that what was admissible in the Applicant's case was that DW accepted he had sex twice with [C] when she had turned 16 and in fact the Defence would be entitled to rely upon it to support the evidence given by [ST] for the Crown that [C] said she went on the date to make DW jealous. However, it is submitted that there was no basis for DW's conviction, fact of prison sentence and evidence of witnesses at trial to be admitted at then Applicant's trial. It is further submitted that Mr Metzger QC's cross examination of the Applicant on the lines that he the Applicant must accept that [C] was a truthful witness in DW's case (a fact which was clearly beyond the Applicant's knowledge) was designed artificially to bolster [C's] credibility and was thereby inadmissible."

35. It is submitted that this ground is further strengthened by the fact that DW's conviction has now been quashed.
36. At the oral hearing before us Ms Smart accepted that on reflection ground 3 was not a freestanding ground in its own right but should rather have been regarded as a sub-ground which supports grounds 1 and 2. We take the view that she was right to make that

concession.

37. So far as ground 3 is concerned, taken on its own merits, we would refuse leave to appeal on that ground. The applicant was represented at all material times. The Agreed Facts relating to DW's conviction, trial and sentence were all placed before the jury with the agreement of this applicant's then legal representatives. As Ms Smart fairly acknowledged, the trial judge cannot be criticised for having allowed this evidence to go before the jury. No doubt there were tactical considerations which played their part. This evidence could be regarded as helping both sides of the case at the trial in one way or the other. In circumstances which prevailed at the time, we consider that this was a wholly unsurprising course of events.

38. At paragraph 40 of the Amended Grounds, ground 4 is formulated as follows:

"It is submitted that the fact that the Applicant embarked upon a relationship with a 19 year old when he was in his thirties was not capable of rebutting his assertion in evidence that [C] (who was 16) was too young for him. It was unfortunate that having allowed this line of questioning it assumed some further importance when it was used to try and further undermine the Applicant that she was not a police officer at the time. This would not be a stand-alone ground but it is submitted when viewed in conjunction with the above it lends support to the lack of safety of the Applicant's conviction."

39. As we have mentioned, it is conceded that ground 4 is not a stand-alone ground. This has nothing to do with the subsequent events in DW's appeal. In any event, in our judgment, this ground is not reasonably arguable. While other judges might have taken a different view about whether to admit the evidence about the applicant's relationship with another person on the basis that she was aged 19, this was a matter which fell within the discretion afforded to a trial judge. In our judgment, there is no arguable basis on which this Court could properly interfere with the exercise of that discretion. Accordingly, we refuse leave

to appeal against conviction on grounds 3 and 4.

Grounds 1 and 2

40. Grounds 1 and 2 can be taken together. In substance, they raise the main point in this appeal. Given that the case for the prosecution rested to a large extent on the credibility of the complainant, does the fact that DW's convictions have been quashed undermine the safety of this applicant's convictions as well? In our judgment, grounds 1 and 2 are plainly arguable. We grant leave on grounds 1 and 2 and proceed to consider the appeal on those grounds.
41. In our judgment, the fact that DW's convictions have been quashed does not necessarily entail the conclusion that this applicant is not guilty of the offences alleged against him. It does not necessarily lead to the conclusion that the complainant was not to be believed in the present case. The fact that DW did not commit the offences alleged against him does not inevitably mean that this applicant did not commit the separate and different offences alleged against him. The fact that the complainant was the same in both cases does not logically require that conclusion.
42. The fact that DW's convictions have been quashed does however have a material impact on the safety of these convictions. If the timetable had been different, so that by the time of the trial in the present case it had been known that DW's appeal had been allowed and his convictions quashed, that would have formed a very significant difference in the backdrop against which the allegations in the present case had to be judged. What was put into the Agreed Facts would obviously have been different. Furthermore, the way in which the complainant was cross-examined would have been different. It could have been put to her that she was not to be believed. The way in which this applicant was cross-examined

would also have been different. To take one example: when this applicant was cross-examined and he suggested that the complainant had lied in the trial of DW, that had to be assessed by the jury against the backdrop that DW had been convicted and was therefore guilty, whatever this applicant might suggest. Now the backdrop would be very different; the jury would have to assess this applicant's suggestion against the backdrop that DW was in fact not guilty because that is the effect of his convictions being quashed. We do not know what the outcome would have been in such circumstances but it is not the role of this Court to speculate. What we can say is that it could have had a material impact on the jury's assessment of the evidence before them.

43. Before this Court Mr Metzger has submitted that nevertheless the safety of these convictions is not in doubt because there was such strong evidence otherwise and independent of the complainant as to lead to convictions in any event. Having been given the opportunity to consider the matter further, he made in particular these submissions. Mr Metzger pointed to the issue about the applicant's age at his trial: had he said that he was aged only 22 when in fact he was 31? C herself was not the only witness to mention this point at the trial. The difficulty however, in our judgment, is that she was ultimately the source of that evidence. This was not, in truth, independent evidence. It is true that her father JT was able to do the mathematical calculations for himself and work out that he must have been much older than 22 because of the time that he had known him. But, as we have said, the suggestion that the applicant had asserted that he was in fact only 22 was not something that emerged from JT himself. The ultimate source of that information was the complainant. Similarly, in relation to whether the applicant had sought to give a false surname or not. Certainly so far as JT is concerned, because he recognised the applicant, so by that time at least he would not have given a false surname.

44. The next witness to which Mr Metzger has drawn our attention is the complainant's stepmother who to some extent gave evidence, it is submitted, contrary to her own interests because of her relationship with DW. She was one of the witnesses who gave evidence about earlier complaint by the complainant back in 2011. The difficulty with this submission, in our judgment, is that, again, ultimately this depends upon information whose source was the complainant and is truly not independent of her evidence.
45. The third piece of evidence to which Mr Metzger drew our attention was from the dance teacher and in particular about a piece of artwork which made the complainant become very tearful and emotional which depicted a swing in a park. Again, we have come to the judgment that this cannot be said to be truly independent evidence. In similar vein, Mr Metzger drew attention to the evidence of the complainant's boyfriend who said that she would become tearful when she reflected on the incident. Again with respect, that is not truly independent evidence of the complainant herself.
46. Finally, we should mention two other pieces of evidence. One relates to whether the applicant had arrived at the family's home by car. JT gave evidence that he did see the headlights of a car but he did not give evidence before the jury that he had seen a car itself - he had simply made an assumption that the applicant had use of a car on that occasion.
47. Lastly, our attention was drawn to the issue at the trial about how long the complainant and the applicant had been away from the house. Was it only about half-an-hour, as he asserted? The evidence of JT was that it was dusk by the time that the complainant got back home; it had been daylight earlier. But with respect, the applicant on his evidence had said that he had left the complainant at the end of her road. It is not clear on the evidence that we have seen what she could have been doing or was not doing in the

intervening period if the applicant's assertion was indeed correct. Certainly, when taken together and individually, these items of evidence do not lead us to conclude that there was a strong evidential case against this applicant independent of the complainant.

48. The reality of this case is best summarised by reference to two aspects of the trial process. The first is the written directions of law which the trial judge gave to the jury. At direction No 15 she said, so far as material:

"In this case there is no evidence independent of [C's] evidence which corroborates her account of being raped..."

49. Quite properly the trial judge drew this to the attention of the jury because she was pointing out that, as a matter of law, there does not have to be independent evidence by way of corroboration. Those days are long gone. But the nature of the evidence before the jury is aptly summarised in that written direction.
50. Finally, we would draw attention to the way in which the issue at trial was summarised for the jury in the closing speech for the prosecution itself. In the transcript for 27 November 2018 (page 18E-F):

"... members of the jury, this is a straight issue for you. One of [C] or Adam Provan, the defendant, is lying. There is no room for anything other than the fact that one of them is lying to you and the other one is telling the truth. That is the stark reality, as Her Honour will make clear in due course..."

51. In our judgment, it is clear that the central issue in this trial was the credibility of the complainant. For reasons we have explained earlier, we have come to the conclusion that the matters relied upon in grounds 1 and 2 do have a material impact on the safety of the convictions given that the central issue was one of credibility. Accordingly, this appeal

must be allowed.

Conclusions

52. For the reasons we have given, we have reached the following conclusions:

1. The extension of time required is granted.
2. The application to adduce fresh evidence is granted.
3. Leave to appeal against conviction is refused on grounds 3 and 4 but granted on grounds 1 and 2.
4. The appeal against conviction is allowed on grounds 1 and 2 and these convictions are quashed.

53. MR METZER: Thank you my Lord.

54. The Crown's position is that, and remains, that there should therefore be a retrial in relation to these matters. We recognise of course the appellant has served a considerable period of time but has not served enough time yet to have reached the stage where he is eligible for parole or indeed to be released on licence.

55. They are very serious matters. Of course for the purposes of this appeal the Crown understands very much the reasons the Court has come to it and concede the question of credibility is going to be at the forefront of any future jury mind. Of course no doubt the defence will seek to deploy what happened in relation to Mr White and the conviction that was quashed in that regard.

56. Nonetheless, in our respectful submission - and we have taken instructions in advance - the complainant would wish there to be a retrial if the Court were so minded and there is, as I tried to say it, conclusion (my words). There is a level of disquiet particularly given the

wider nature - I do not think it is necessary for present purposes to say it too widely - but this did involve a then serving police officer and a very young alleged victim/complainant and of course, as the Court knows, the trial was some considerable time after the alleged incidents and given the very serious nature of this case and the background to which the Court is fully familiar, the Crown would ask for this matter to be subject to a retrial.

57. MS SMART: My Lord, I would seek to resist that application. As my Lordships know the test is whether it would be *in the interests of justice* for there to be a retrial. The trial at which this appellant was convicted was itself a retrial, the first jury having failed to reach a verdict. In relation to sentence, this appellant has served more than two-thirds of the sentence that he would serve in custody, namely he has already served 3 years and 3 months of a sentence with a custodial part of four-and-a-half years. His earliest date of release otherwise would have been 30 May 2023. He has already served over two-thirds of the custodial element of his case.

58. LORD JUSTICE SINGH: Thank you. Are there any further questions. Do you want to say anything in reply?

59. MR METZER: Nothing further.

60. LORD JUSTICE SINGH: Very well, we will rise to consider our decision.

(Short Adjournment)

61. LORD JUSTICE SINGH: There are a few procedural issues in fact we think it right that we should raise with counsel. First, before I come to the application of a retrial, in relation to a representation order; do you need any order from this Court given what has happened?

62. MS SMART: I do not. Thank you.

63. LORD JUSTICE SINGH: Very good.

64. In relation to the application by the Crown for a retrial, we have come to the conclusion

that it would be in the interests of justice to order a retrial. It will be on both of the counts which have been quashed. We direct that a fresh indictment should be served in accordance with section 8(1) and the Criminal Procedure Rules 10.8(2) which requires that the prosecutor must serve a draft indictment on the Crown Court Officer not more than 28 days after this order. We direct that the appellant be re-arraigned on the fresh indictment within 2 months. We direct that the venue for retrial should be determined by the presiding judge for the circuit where the original trial took place which is the South Eastern circuit.

65. We have to consider the question of bail. Have counsel given any thought to that or any bail conditions?
66. MS SMART: My Lord, only that of course this appellant was on bail before throughout all proceedings.
67. LORD JUSTICE SINGH: Was that up to the point of conviction?
68. MS SMART: Up to the point of conviction. I think the sentence then proceeded the following day. I have not checked whether he was remanded overnight.
69. MR JUSTICE GOOSE: Was that unconditional or conditional?
80. MS SMART: I believe it was conditional; and I can check the system. It certainly would have had a non-contact. **(Pause)**
71. MR JUSTICE GOOSE: He had a reporting condition, did he not?
72. MR METZER: Yes, there was.
73. MR JUSTICE GOOSE: Police station Bury St Edmunds, one of them.
74. MR METZER: I think also from memory - I can check - also a condition of residence as well.
75. MS SMART: There was an address in Suffolk that I have, reporting to Bury St Edmunds,

non-contact directly or indirectly with the complainant and a variation whilst the trial was ongoing.

76. MR JUSTICE GOOSE: In the DCS at V7, pages V10 to 11, an order was made conditional, an address at Pickerage Farm Cottages, report to Bury St Edmunds and non-contact, not to enter London Borough of Waltham Forest or Barking and Dagenham.
77. MS SMART: My Lord, yes. I think that was subsequently varied. For example at the last variation I think before trial I think at V24. And the very last in fact was one of 21 November; it must have been just before trial.
78. LORD JUSTICE SINGH: Can I ask you this Mr Metzger, what is the Crown's position on bail as such?
79. MR METZER: We would certainly want there to be conditions put in place suitable and appropriate conditions. I think in light of the overturning of the conviction, it would be difficult for the Crown to say that he should not have bail on principle, on the basis that he remains now obviously essentially a man of good character again, so I do not think I can actively oppose bail in principle but we would be very troubled particularly in relation to the complexities that the Court is aware in relation to the family relationships, that very careful strict conditions not just in relation to the complainant but also the wider family, given the reasons my Lord knows. I do not have formal instructions I have to say and if the Court wants me to get formal instructions on the question of bail otherwise I can do that. Whether I can get effective instructions this afternoon I simply do not know. But I think consistent with my duty to the Court I do not think I can oppose bail in principle subject of course to having formal instructions.
80. LORD JUSTICE SINGH: Yes. I understand.
81. MR JUSTICE FRASER: There was a residential condition. There might be a different

residence now depending whose property it was etc because he has been in prison since 2018.

82. MS SMART: I can certainly take instructions from my instructing solicitor who has been in contact with the defendant's mother throughout proceedings and including today, so that would take me no more than 5 minutes to ascertain a suitable address.
83. LORD JUSTICE SINGH: Yes. Would it help if we rise for a few minutes?
84. MS SMART: It would; it will not take very long.
85. LORD JUSTICE SINGH: The alternative is to leave it until tomorrow and ask both parties to take instructions and put to us agreed conditions if possible. If we can make progress this afternoon then we should.
86. MS SMART: I am confident there will be an address for him.
87. LORD JUSTICE SINGH: I am slightly more concerned about the other conditions because if we ordered bail and there are conditions that need to be attached in the public interest which we have not attached then that would not be a good thing.
88. MR METZER: The reality is I think the officer in the case, she has left this section so it will no longer be the same officer in the case. I can only obviously take instructions from the CPS lawyer instructing me to attend today. How much hands-on information she would have, I simply do not know. I certainly will take the opportunity to make a phone call. I think I am going to leave it and rely upon the Court's good sense in relation to the best way to progress. I will certainly try. I could not give a promise.
89. LORD JUSTICE SINGH: In principle would there be any objection to there being the same conditions as there were up to the point of conviction below?
90. MR METZER: I cannot think of a reason why.
91. MS SMART: I do not think so.

92. LORD JUSTICE SINGH: That seems in principle to be the right way.
93. MR JUSTICE FRASER: I agree subject just to you checking the residence. One assumes that residence is perhaps still available but you will need to check that.
94. LORD JUSTICE SINGH: Exactly. That you say could take a few minutes which is good. Obviously if on reflection, if tomorrow or in a few days' time somebody wants to apply to vary the bail conditions, that can be done. It does seem to me at least in principle that what should happen before we all leave today is that bail is granted but on the same conditions as there were below, subject to the address being checked.
95. MR METZER: It is certainly right to say that I have heard nothing to suggest there has been any difficulty since the defendant has been in custody, so I certainly do not say there is anything new which is troubling the Crown.
96. MR JUSTICE GOOSE: If there were to be any change of address or requirement for different police station, I dare say that could be agreed and then submitted for approval, administratively rather than through a hearing?
97. MS SMART: Yes. Indeed.
98. LORD JUSTICE SINGH: We also need to make an order under section 4(2) of the Contempt of Court Act 1981 in relation to reporting restrictions.
99. MR METZER: I would ask for that.
100. LORD JUSTICE SINGH: We make a restriction on reporting until after the conclusion of the retrial, if it does take place. Do I need to say more than that?
101. MR METZER: The only observation that I have is the judgment of course is available, and I wonder if it is of some assistance to anonymise all the names of potential witnesses because it maybe that the complainant is identifiable by reference to other witnesses.
102. LORD JUSTICE SINGH: Yes. Certainly before the judgment is finalised we will do that

any way but we can make that clear for the record in these open proceedings.

103. MR METZER: I do not think there is anything else I am asking for.
104. LORD JUSTICE SINGH: Very good. Ms Smart, is there anything else from your point of view?
105. MS SMART: No my Lord.
106. LORD JUSTICE SINGH: May I check with my Lords. **(Pause)**
107. It sounds as if as long as the same conditions are replicated as they were below, we do not need in fact to come back into Court today. If the address does have to be different from what it was below I think you agree that can be resolved administratively.
108. MS SMART: Yes, I can probably give an address.
109. MR JUSTICE GOOSE: I am sure if Mr Metzger would want to confirm that it was suitable from the prosecution's point of view, but once that is agreed it is likely then that it does not need a Court to resit; it can be submitted to the Court as an agreed variation; the prosecution have accepted that.
110. MR METZER: Of course.
111. MS SMART: I need to take very brief instructions in relation to that address as to whether it is still available.
112. MR METZER: I will wait and take instructions but I cannot anticipate there will be any difficulty.
113. LORD JUSTICE SINGH: If the Associate does need to contact me, obviously I will be in this building for some time.
114. MR METZER: My Lord, can I just establish what date you wanted the fresh indictment to be prepared for?
115. LORD JUSTICE SINGH: The normal order, which is what we have made, is 2 months.

Serve a draft indictment on the Crown Court Officer within 28 days and then be re-arraigned within 2 months.

116. MR METZER: Thank you my Lord.

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

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