



Neutral Citation Number: [2023] EWCA Crim 493

Case No: 202200619 B2/
202201461 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Crown Court at Kingston upon Thames
His Honour Judge Davis
T20200261

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 May 2023

Before :

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE JAY
and
HIS HONOUR JUDGE ANDREW LEES

Between :

PAUL SHINN
- and -
REX

Appellant

Respondent

Ms Rhiannon Crimmins KC (instructed by Darton Law Solicitors) for the **Appellant**
Ms Hanna Llewellyn-Waters (instructed by CPS) for the **Respondent**

Hearing date: 27 April 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice William Davis:

1. On 28 January 2022 in the Crown Court at Kingston upon Thames Paul Shinn was convicted of one count of sexual activity with a child under 13, two counts of sexual activity with a child and two counts of causing a child to watch a sexual act. On 11 April 2022 he was sentenced to an extended determinate sentence of 12 years, the custodial term being 10 years and the extended licence period being 2 years. This sentence was imposed on the count of sexual activity with a child under 13, that count being taken as the lead offence and the sentence being intended to reflect the overall criminality. Shorter concurrent determinate sentences were imposed on the other counts.
2. Paul Shinn now appeals against conviction and sentence with the leave of the single judge. The two grounds of appeal against conviction are linked. Both relate to the admission of evidence beyond that directly related to the facts of the alleged offences charged on the indictment. First, the judge admitted evidence of an incident in 2003 involving a child unconnected to those involved in the matters charged on the indictment. That incident had been the subject of a trial in 2004 at the conclusion of which the appellant was acquitted. His case is that the admission of this evidence rendered his trial unfair because material relating to the trial in 2004 no longer was available. Second, the judge admitted evidence of the appellant's alleged behaviour towards other children at around the time of the alleged offences charged on the indictment. The appellant's case is that the cumulative effect of the admission of the evidence of the behaviour was to create satellite litigation which took the jury's focus away from the matters alleged on the indictment. As a result the verdicts were unsafe.

The factual background

3. The appellant is a teacher. In 2003 he was employed at a primary school in Northolt. In June 2003 there was a school trip to Dorset which meant that the children stayed away from home for a few days. A number of teachers went on the trip. The appellant was one of those teachers. One of the pupils was a 9 year old boy to whom we shall refer as MR. One night he was homesick. He sought out the appellant. The appellant took MR back to the room he was sharing with other children. MR got into his bunk bed. He could not get to sleep. His evidence was that the appellant got into bed with him. He said that, when he appeared to have gone to sleep, the appellant lifted the waistband on MR's shorts and underpants and touched MR's penis. MR in fact was still awake. He pretended to snore and he turned over. The appellant got out of MR's bed and left the room.
4. MR told his friends on the trip that the appellant had touched him. He told his mother when he got home. His mother contacted the police. On 30 June 2003 they conducted an ABE interview of MR in which he set out his account of what the appellant had done.
5. On 4 July 2003 the appellant was arrested and interviewed under caution. He agreed that MR had come to him one night during the school trip because he was upset and homesick. The appellant said that he had gone to MR's room and sat on his bed. His account was that he had stroked MR's head and had done nothing more than that. He stated that he had no problems with MR himself.

6. As we have already indicated, this allegation was the subject of a trial in 2004. It resulted in the appellant's acquittal. We shall consider the evidence which was available at the appellant's trial in 2022 in greater detail when we come to consider the ground of appeal in respect of the admission of the evidence of MR.
7. As a result of the allegation made by MR, the appellant ceased to work as a teacher at the school in Northolt. In September 2004 he took up employment as a teacher within the primary school section of the Sharjah English School in the United Arab Emirates. He lived within an area close to the school as did the families of many of the pupils.
8. One of the children taught by the appellant was a boy to whom we shall refer as C1. C1 was born in February 2002. The appellant began teaching C1 when C1 went into Year 4 at the school i.e. in about 2011. C1's mother lived close to the appellant. She was friends with the appellant.
9. As well as teaching at the school, the appellant tutored pupils at the school in a private capacity at his home. He offered to tutor C1 without any payment. C1's mother at the time was divorced and was short of money. The appellant also would buy C1 presents such as Lego and Dr Who related toys, the presents being bought at Christmas and Easter and whenever else an excuse to buy a present might arise.
10. In December 2011 C1's mother remarried. In January 2012 she moved from her home to Sharjah to Dubai. Although this was not a great distance, it meant that it was no longer easy for C1 to get to the appellant's home in Sharjah for tutoring sessions. In consequence, C1 on occasion would stay overnight at the appellant's house in Sharjah. On these occasions C1 would sleep in the appellant's bedroom. Having initially slept on an inflatable mattress, there came a point when C1 shared a bed with the appellant. The indictment (Count 1) alleged that, on at least three occasions between January 2012 and C1's 13th birthday in 2015, the appellant took the opportunity as he was in bed with C1 to touch C1 over his whole body including C1's penis and bottom. This touching was over C1's night clothing. When this occurred C1 would wake up. He would pretend to be still asleep.
11. The other count on the indictment relating to C1 (Count 3) alleged that the appellant at his home showed C1 pornographic films. This occurred at least twice between September 2011 and July 2013 when C1 was aged between 9 and 11. Whilst they were watching the films, the appellant would massage C1's feet and knees using cream.
12. When C1 was aged around 13, he stopped staying overnight at the appellant's house. His evidence was that he was concerned that his friends would find out that he was staying with the appellant and this would have been embarrassing.
13. The remaining counts on the indictment concerned a boy to whom we shall refer as C2. He was born in November 2004. He was also a pupil at Sharjah English School. The appellant was his teacher when he was in Year 4 i.e. 3 years after the appellant had taught C1. C2 had free extra tuition from the appellant when he was aged between 9 and 14. This tuition took place at the appellant's house. The appellant regularly gave presents to C2.

14. The first count on the indictment in relation to C2 (Count 4) alleged that, on at least 10 occasions between September 2017 and 3 April 2019 when C2 was at the appellant's home the appellant, without asking C2, would massage his head, shoulders and neck. The appellant was said then to have moved on to stroking C2's leg on at least 5 occasions (Count 5), the stroking latterly having involved the appellant moving his hand under C2's shorts and up to C2's groin albeit not as far as C2's penis. The final allegation in relation to C2 (Count 6) was that, at some point between September 2018 and 3 April 2019, C2 was using the appellant's computer in the context of extra tutoring. The appellant asked C2 if he wanted to see something. According to C2 the appellant showed him pornographic videos.
15. Evidence was called from other boys who attended Sharjah English School. B was a close friend of C1 and approximately the same age. B had been tutored at the appellant's home. His evidence was that the appellant gave C1 massages and that C1 had been in the appellant's bedroom whilst he (B) was being tutored at the appellant's home. In addition, pupils (including himself) would massage the appellant. C was C1's older brother. He had stayed overnight at the appellant's house on occasion. He had slept in a guest bedroom. C said that, when he was between 11 and 14, the appellant had shown him pornographic images on his computer. The appellant also had said to C that, were he to be scared for any reason, C could sleep in the appellant's bedroom. D was C1's younger brother. When he went to the appellant's house, the appellant had sat close to him. D said that the appellant had stroked and cuddled him and had told him that he could sleep with the appellant in the appellant's bedroom. E was a contemporary of C2. His evidence was that he had visited a water park with the appellant and the appellant's parents. Prior to doing so, the appellant had shown E pictures of naked women. E had stayed the night at the appellant's house after the trip to the water park. E's account was that he had spent the night in the appellant's bed. E also spoke of a different occasion in 2014 or 2015 when there had been a school trip to an adventure park. Whilst swimming the appellant told E that he had a "boner".
16. In March 2019 C1 told a counsellor (Dr Azlam) that he had been sexually abused by the appellant. Dr Azlam told C1's mother. The mother spoke to C1 about his allegations. He confirmed them to her. On 30 March 2019 C1's mother notified the school of the allegations. She met the head of the school the following day. On 3 April 2019 the head of the school dismissed the appellant from his position. Within a matter of days the appellant left Dubai and returned to the UK.
17. C2's father was a teacher at the Sharjah English School. As such, he came to learn of the allegations made by C1. C2's father asked C2 about the allegations. He concluded that something was not right. He asked the school counsellor, Danielle Hyland, to speak to C2. C2 told her about the incidents of touching of him by the appellant and about being shown pornography. C2 later repeated his complaints to his mother and his father. Danielle Hyland also spoke to E. E told her about the appellant showing him pornographic images. E later told his mother about this and about the incident with the "boner".
18. The appellant's computers were examined. Hundreds of images of feet were found on the computer including images of children's feet. There were 17 images of C2 (which had been deleted) and 48 images of other children including underwater images of C1.

There were nearly 13,000 still images of one kind or another on the computer as well as nearly 2,000 videos.

The course of the proceedings

19. A full ABE interview of C1 was conducted on 22 July 2019. The ABE interview of C2 took place on 24 July 2019. In due course the cross-examination of each witness was recorded prior to the trial pursuant to Section 28 of the Youth Justice and Criminal Evidence Act 1999.
20. The appellant was arrested on 24 May 2019. He was interviewed on that day and again in November 2019. He denied any sexual touching of or inappropriate behaviour with any pupil at the school. In relation to C1 he accepted that he had tutored C1. On occasion C1 had stayed overnight in the guest bedroom. On two occasions he had woken to find C1 in his bed. He had not invited C1 into his bed. He had not shown pornography to C1. The appellant said that C1 had become aware of the appellant's sexuality, the appellant being gay. This sexuality was highly problematic in the United Arab Emirates. At the time C1 had intimidated the appellant. The appellant believed that C1 now was escalating the matter. In relation to C2 the appellant denied any inappropriate or sexual behaviour. He could not offer any explanation of why C2 now was making the allegations.
21. The appellant was charged on 14 May 2020. He was sent for trial at the Crown Court on 26 June 2020.
22. In December 2020 the judge then managing the case considered an application by the prosecution to admit the evidence of B and E. The prosecution accepted that the evidence amounted to bad character evidence. Thus, it could only be admissible via one of the gateways in Section 101(1) of the Criminal Justice Act 2003. The prosecution case was that the evidence was capable of demonstrating the appellant's interest in young boys and, as such, was relevant to an important issue in the case. On behalf of the appellant it was argued that the evidence of E was irrelevant to that issue. In relation to the evidence of B it was said that admission of the evidence would lead to satellite litigation such as to render the trial process unfair. The judge concluded that all of the evidence was relevant and that it would not create unfairness for it to be admitted.
23. In the light of the ruling in relation to B and E, no argument was raised by the appellant in respect of the evidence of C and D. That evidence was admitted by agreement on the basis that counsel could not distinguish the nature of the evidence from that which had been admitted in December 2020.
24. The trial initially was fixed to commence on 15 March 2021. By early February 2021 it became apparent that the court would not be able to accommodate the trial on that date. The case was re-fixed to commence on 15 November 2021.
25. Before the case commenced before the jury, the trial judge (who was not the same judge as the judge who had been managing the case in December 2020) was required to consider the admissibility of (a) the images of C2 recovered from the appellant's computer and (b) the evidence of MR and the other evidence relating to the allegation he made which resulted in the appellant's acquittal.

26. On 16 November 2021 the judge admitted the evidence of the images. He did so either because the evidence had to do with the alleged facts of the offences involving C2 or because it was relevant bad character evidence. Whatever route of admissibility was appropriate, he determined that admission of the evidence would not have an adverse effect on the fairness of the proceedings.
27. On 17 November 2021 the judge admitted the evidence relating to the incident involving MR which allegedly occurred in 2003 and which was the subject of the trial in 2004. The prosecution argued that the evidence of MR was admissible to rebut the suggestion that C1 had deliberately fabricated allegations against the appellant given that there was no possibility that C1 had known about MR's allegations or vice versa. On behalf of the appellant it was argued that, whatever the potential relevance of the evidence of MR, it would be impossible for the appellant properly to deal with that allegation 16 years after the event given what now was available to him. We shall have to deal in greater detail with these issues when addressing the first ground of appeal.
28. The case began before the jury on 18 November 2021. The prosecution case occupied approximately 14 working days. The appellant then gave evidence concluding on 15 December 2021. His evidence spread over 4 working days. On one narrow issue the prosecution were permitted to call rebuttal evidence to which the appellant then was allowed to call evidence in response.
29. The court did not then sit from 18 December 2021 to 5 January 2022. This was to allow a juror to take a pre-booked holiday. At the start of the trial it had been anticipated that the case would conclude within 4 weeks in which event the juror's holiday would not have interfered with the progress of the trial. The court then sat again on 5 January 2022 but only for the purpose of the formal closing of the evidence. There followed a further break until 17 January 2022 due to another pre-booked holiday.
30. Because of these breaks in sitting, the jury being asked to consider their verdicts over a month after the end of the evidence, the judge summed up the facts of the case at considerable length. No point is taken on the gap between the close of the evidence and the retirement of the jury. The summing up was scrupulously fair. It gave the jury a comprehensive view of the evidence they had to consider. The jury retired on Tuesday 25 January 2022. They returned verdicts on Friday 28 January 2022.

The grounds of appeal

31. The first ground relates to the admission of the evidence of MR and the incident in 2003. On behalf of the appellant it was not expressly conceded that the evidence was relevant to the issues in the trial which commenced in November 2021. However, no specific argument was put which suggested that the evidence was not relevant. The complaint was that, because important material relating to the trial in 2004 was missing, the appellant could not properly meet the evidence given by MR. The prosecution were able to provide the witness statements and exhibits together with at least some of the unused material and the schedule of that material. This came from the police file rather than the court file. For whatever reason, the court file was not available. Therefore, no applications pursuant to Section 8 of the Criminal Procedure and Investigations Act 1996 were available. Nor were any skeleton arguments filed in

the course of the trial in 2004. More significantly, there were no transcripts of that trial. There was no way of knowing what the evidence actually given at the trial was or which witnesses were called.

32. An important part of the appellant's case in relation to MR was that there was a motive for MR making a false allegation arising from the animus between MR's mother and sister and the appellant. The appellant alleged that there had been a meeting between MR and his sister at a service area when MR was en route on his school trip. The sister also was going on a school trip albeit not the same trip as her brother's. The two groups stopped at the service area at the same time. It was the appellant's case that this meeting had been the genesis of the allegation subsequently made by MR. The appellant said that, at the trial in 2004, MR accepted that such a meeting had taken place. By the time he gave evidence in 2021 MR could not remember whether there had been such a meeting or, if there had been, what happened between him and his sister. Further, the evidence of recent complaint came from MR's mother in which she said that MR had said that the appellant had played with his "stick". In his evidence in 2021 MR said that he had no recollection of what word he had used to describe his penis when he told his mother about what had happened. The appellant's case was that "stick" was a word used by MR's sister. The lack of any transcript of the evidence in 2004 meant that it was impossible to know what MR had said at the original trial in relation to these matters.
33. It is said that, in his ruling, the judge did not grapple with the effect of the absence of transcripts on the fairness of the trial. Having rehearsed the appellant's arguments on the issue, the judge said this:

"In my judgment, the admission of the MR evidence does not put the defendant at risk of being convicted of another offence. And as such, the position may be distinguished from the circumstances of a retrial. As such, the absence of transcripts is not fatal to the fairness of this trial. The question for the jury will be whether they are sure of the truth of MR's evidence in the context of this case as it is now."
34. It was submitted that this failed to meet the gravamen of the appellant's complaint. Reliance was placed on what was said in (and the circumstances of) *Hajdarmataj* [2019] EWCA Crim 303. We shall turn to the principle (if any) established by that authority shortly.
35. On behalf of the respondent it was submitted that sufficient material was available to permit a fair trial. The evidence served in relation to the events in 2003 consisted of: the contemporaneous ABE interview of MR (which was played to the jury in 2021); the witness statements of the other teachers on the school trip; the ABE interviews of the other boys in the room in which MR alleged he had been sexually assaulted; the witness statement of MR's mother dealing with his recent complaint; the appellant's full police interview which was very detailed and which covered around 60 pages of typescript; the unused material; relevant medical records.
36. The prosecution had available the evidence of a teaching assistant who had voiced concerns about the behaviour of the appellant. No attempt was made to adduce this evidence before the jury. Whilst MR did not recall any meeting at a service area, he

did not say that it did not occur. The prosecution did not suggest that it had not happened when the appellant gave his evidence on the issue.

37. The respondent's argument was that the agreed facts placed before the jury in relation to the evidence other than that of MR himself assisted the appellant in his overall case. Insofar as the appellant was disadvantaged by the lack of transcripts, the judge directed the jury in appropriate terms. Moreover, the appellant via his counsel was able to address the jury on the particular issues in relation to which he was prejudiced. Looked at in the round the admission of MR's evidence did not affect the fairness of the trial.
38. The second ground of appeal is that the admission by the judge of the evidence of B and E (and by implication the evidence of C and D) and of the photographs on the appellant's computer did not take account of the cumulative effect of the admission of the different strands of evidence. Although the facts of this case were far removed from the situation in *O'Dowd* [2009] EWCA Crim 905, the principles set out in *O'Dowd* were relevant. The three issues to be considered were: whether admission of the evidence would result in unnecessary and undesirable complexity; the trial of collateral issues taking away the focus from the real issues in the case; the risk of a plethora of collateral issues giving rise to a false indication of propensity. Since all of the evidence of the collateral witnesses was in dispute, significant factual issues would have to be explored in relation to each piece of evidence. The judge did not get to grips with the cumulative effect of admitting the collateral evidence.

The material relating to the 2003 incident and the trial in 2004 available to the jury

39. MR gave evidence to the jury in that his ABE interview from 2003 was played as his evidence in chief and he was then cross-examined. As we have indicated, MR said that he had no recollection of a meeting with his mother and sister at a service area en route to Dorset. He also had no recollection of the word he had used to describe his penis when he had told his mother about the incident involving the appellant. His evidence was that he had a clear memory of the appellant touching him in the way he had described it in his ABE interview. He remembered that "as clear as day".
40. All of the other evidence relating to the trip to Dorset was reduced to agreed facts. The jury had a document which consisted of 16 closely typed pages. In substantial measure it consisted of extracts from contemporaneous statements made by witnesses. We shall summarise the material whilst emphasising that the jury were provided with a large amount of detail.
 - i) The evidence of two of the boys who had slept in the same room as MR. One said that MR had told him that late at night the appellant had come into the room, had stood or kneeled on a chair and had played with MR's privates. MR had used the term "willy winkle". This boy said that he did not believe MR. The other boy said that MR had told him that he had been crying in the night when the appellant had come into the room and lain on MR's bed. The appellant had pulled down MR's trousers and pants and had started doing this thing. This boy said that he did not believe MR at first.
 - ii) The evidence of MR's mother about what MR had said to her after he had returned home. He said that the appellant "put his hand in my pants and

played with my stick”. This complaint was only made after MR had been at home for some hours.

- iii) Various extracts from statements of other teachers on the school trip, all of whom spoke very highly of the appellant’s contribution to the trip. None of the other teachers had any concerns in relation to the appellant’s behaviour towards MR or any other child.
 - iv) The evidence of the headmistress of the school about a conversation she had had with the appellant on the second day of the trip in which he had reported that several boys had been homesick and that MR had been particularly affected, MR having got the appellant up in the night.
 - v) The headmistress’s evidence about the visit she made to Dorset for one day later in the week of the trip when she had spoken to those who had been homesick (including MR). MR had been very cheerful and was enjoying himself. Other staff took the opportunity to speak to the headmistress about the appellant. They were effusive in their praise of his contribution.
 - vi) Extracts from the interview under caution of the appellant conducted by the police in 2003 in which he said that nothing inappropriate had occurred in relation to MR. He also said that his only explanation for the allegation was that MR’s mother must have put him up to it because of bad feeling between the mother and the appellant in relation to his response to allegations of bullying of MR’s sister.
 - vii) Lengthy extracts from a report written by the headmistress in relation to those bullying allegations. The report contained no criticism of the appellant. It did suggest that MR’s mother appeared to be seeking some kind of revenge for what she perceived to be some kind of injustice.
41. The judge delivered his summing up in two parts. The first part dealt with his directions of law. These were reduced to writing. In relation to MR the judge directed the jury as follows:

“Let us get back to where we were under the journey relating to the previous acquittal in respect of the MR allegation. I will start again. The fact that a defendant is acquitted on a charge means that he has been found not guilty and that is an end of the case, in the sense that you will not revisit the decision made by that earlier jury as to Mr Shinn's guilt or innocence on that charge. You will not be required to announce any finding in respect of it and you are not retrying that case. However, the fact of an acquittal does not mean that the evidence which gave rise to that earlier allegation is somehow inadmissible or that it cannot be relied upon in any subsequent proceedings where it is relevant. The Prosecution say that the previous case was tried with one eight year old complainant and at that time there were no other complainants. Given that two others have now emerged, the Prosecution invite you to consider whether it can possibly be the case that three people have over time invented

similar allegations against the same man. They ask you to consider the overall picture when deciding on the guilt or innocence of the defendant in respect to the allegations in this case. And you are entitled to consider whether the evidence from that earlier case helps you in respect of this one. The Prosecution point to the similarities in what MR and the two new complainants, C1 and C2, say about Mr Shinn's conduct, their reaction to it and, indeed, Mr Shinn's reaction to it, saying that he was then and is now coincidentally the victim of malicious invention. You should consider how likely it is that MR and C1 and C2 18 years and thousands of miles apart and having had no contact, would make allegations that are similar, but untrue. In doing so, you must not second-guess or speculate about the Isleworth jury's verdict. The question is what you make of the evidence of MR now in the context of the case you are trying.

The Defence argue that the fact that this allegation was the subject of a trial 18 years ago should be borne in mind when you assess what weight, if any, you give to this evidence and you will appreciate that the passage of time has a potentially significant effect on memory and may render it less reliable and, as we know, memory can play tricks. Neither side is able to recreate the previous trial, and the Defence, in particular, cannot, for example, cross-examine the mother about why she allowed MR to go on the trip. They cannot cross-examine her about the use by him of the word 'stick' to describe his private parts. You know that the truthfulness of MR's allegation is challenged entirely.

Neither side is, in fact, required to call any other witnesses in respect of the MR allegation and the Defence had no choice but to respond in the way they did by summarising other witnesses who were involved in the original case in your Agreed Facts. And, as you know, no transcripts are available of what was actually said by the witnesses back in 2004. Clearly, if taking all that into account you concluded that you were not sure of the truth of MR's allegation, you will disregard it as any possible support for the evidence of C1 and C2. If you choose to disregard it, that does not mean, as a consequence, you automatically then reach any conclusion about the truthfulness and accuracy of C1's and C2's evidence, it means only that you have rejected as support for their evidence the evidence of MR. If you are sure that what MR said back in 2003 and said to you in evidence here is true, then that may provide support to the complaints of C1 and C2 when you look at the overall picture created. Obviously being satisfied so that you are sure of MR's allegation, which I make plain you are entitled to do despite Mr Shinn having been acquitted of the offence back in 2004, that is

but one part of the jigsaw that, as I say, provides support for the allegations made by C1 and C2.

Propensity – there is another potential consequence only if you are sure that what MR says happened did happen. The Prosecution say that this action by the defendant, the touching of a boy in bed at night, shows that Paul Shinn has a propensity or a tendency – another word for it – to commit offences of the type alleged in this case and so, it is argued, it is more likely that Paul Shinn did sexually assault C1 and C2.

The Defence say that, firstly, you cannot be sure that MR has told the truth or that his evidence then or now is reliable; and, secondly, that something that many years ago with nothing in between cannot establish any tendency to behave in any particular way or support the suggestion that Paul Shinn is a man with a sexual interest in children. You have to decide whether this previous conduct, if you are sure it happened, shows that Paul Shinn has or had a tendency to behave in this way. If you are not sure that this previous conduct does show that Paul Shinn has or had such a tendency, then you must ignore this evidence for this purpose, but if you are sure that it does show such a tendency, then this may support the Prosecution case and it is for you to say whether it does and, if so, to what extent. You must not convict Paul Shinn wholly or mainly because of this. The fact that someone has behaved in this way in the past should not prove that he did so on this occasion. The fact of touching MR may only be used as some support for the Prosecution case if, having assessed the evidence, you are satisfied that it is right so to do.”

42. When directing the jury the judge used the full names of the relevant witnesses. We have anonymised the witnesses in line with the scheme adopted throughout. The direction in relation to propensity was given at the invitation of counsel for the appellant. She very sensibly concluded that the jury would require assistance on this issue. Without a proper direction there was a risk that the jury might take an impermissible approach to this issue.
43. After the directions of law had been given in full, counsel addressed the jury. Counsel for the appellant inter alia commented on the difficulties faced by the defence due to the lack of any transcripts of the trial in 2004 or any other note of the evidence given at that trial. The absence of transcripts meant that it was impossible to know what evidence had been given at the trial, in particular on the issue of motive and the involvement of MR’s mother and sister.
44. When the judge continued his summing up with a review of the evidence in the case, he began with a consideration of the evidence of MR. His summing up of MR’s evidence was full and fair.

The legal framework

45. The admissibility of evidence given by a complainant in respect of whom a jury previously has acquitted the defendant was established in *Z* [2000] 2 AC 483. The House of Lords overturned what hitherto had been understood to be the position. The position as determined in *Z* is summarised helpfully in the short speech delivered by Lord Hobhouse:

The correct answer to be given in this case is clear. It is a case of similar facts. Similar facts are admissible because they are relevant to the proof of the defendant's guilt. The evidence relating to one incident taken in isolation may be unconvincing. It may depend upon a straight conflict of evidence between two people. It may leave open seemingly plausible explanations. The guilt of the defendant may not be proved beyond reasonable doubt. But, when evidence is given of a number of similar incidents, the position may be changed. The evidence of the defendant's guilt may become overwhelming. The fact that a number of witnesses come forward and without collusion give a similar account of the defendant's behaviour may give credit to the evidence of each of them and discredit the denials of the defendant. Evidence of system may negative a defence of accident. This is the simple truth upon which similar fact evidence is admitted: it has probative value and is not merely prejudicial. It follows from this that on the first such occasion and, maybe, some subsequent occasions as well, the defendant will not have been prosecuted or, if prosecuted and tried, may have been acquitted. There will not have been enough evidence to convince a jury of his guilt. This is proper. But there will come a time when the accumulating evidence does suffice and a jury which can hear all the evidence now available should convict the defendant. It is not disputed that the jury may hear about similar incidents which have not been the subject of a previous trial. The dispute is whether the jury may hear about similar incidents which have been the subject of earlier trials at which the defendant was acquitted. It would be a denial of the principle upon which similar fact evidence is admitted that such evidence should be treated as inadmissible. As I will stress, there will always be a question whether the trial judge should exercise his discretion to exclude the evidence under section 78 of the Police and Criminal Evidence Act 1984. But as regards admissibility, it is in principle admissible.

46. *Z* was decided before the introduction of the Criminal Justice Act 2003. What was then an issue of similar fact evidence now will be a question of admissibility of bad character evidence pursuant to Section 101(1) of the 2003 Act. The principles in *Z* nonetheless hold good.
47. *Z* was concerned only with the principle of admissibility. As Lord Hobhouse said, in any individual case a judge may have to consider whether admitting the evidence would have an adverse effect on the fairness of the proceedings. *Z* gave no guidance on the exercise of that discretion. That would depend on the facts and circumstances of the individual case.
48. In *Hajdarmataj* this court had to consider the exercise by a judge of her discretion to admit the evidence of a complainant in respect of whose complaint a previous jury had acquitted H. In 2011 H had a sexual encounter with a young woman, SD. She alleged that he had raped her. In April 2013 H was acquitted of her rape after a trial.

In September 2014 H had a sexual encounter with another young woman, MW. The circumstances of the encounter – on a drunken night out in Chelmsford – were very similar to that relating to SD save that the allegation was assault by penetration rather than rape.

49. H was tried in respect of the incident in September 2014 in June 2016. On the first day of the trial the prosecution applied to adduce the evidence of SD as bad character evidence under gateway (d) of Section 101 of the 2003 Act. The material served in support of the application consisted only of the Crown Court file from the earlier trial. There were no transcripts of the evidence given at that trial. There was only limited unused material available. The judge concluded that the evidence of SD was relevant to an important issue in the case relating to MW. She further concluded that admission of the evidence would not be so unjust as to render the proceedings unfair.
50. SD gave evidence in the trial. Counsel for H did not have available to him relevant material concerning SD. In particular, he did not have the evidence that SD had expressly denied any sexually inappropriate behaviour on the part of H when she first had spoken to the police and that SD thereafter when speaking with a friend had made no complaint about and had seemed undisturbed by her interaction with H. It follows that SD was not cross-examined on these issues.
51. On H's appeal against conviction, this court concluded that the judge exercised her discretion erroneously. Due to the paucity of the material available in relation to the previous trial relating to SD, the safeguards required to ensure fairness were not in place. The court said this at [43] to [46]:

43. Modern criminal procedure requires a number of safeguards to be in place to ensure fairness. These are too numerous and too well-known to require extensive re-statement, but principal ingredients are disclosure of any relevant "unused material", or records of any previous account given in interview and of any previous witness statements, in order to check consistency. Those safeguards are present for a reason and should be an obvious port of call where the Crown seek to adduce the evidence of an earlier complainant in a later trial. It is for the Crown to satisfy the court that the admission of such evidence will not cause injustice, the more so since it is the Crown's application to introduce the evidence. Absence of these safeguards may well be relevant to the judge's decision on admission, or discretionary exclusion of the evidence.....

45. A useful parallel is to consider the position on a retrial of such allegations following a first inconclusive trial. There, no question would arise but that the Crown should produce the relevant unused material or any previous statements, in interview or otherwise. In addition, on a retrial, it would be normal to obtain a record of the evidence given by the relevant witness or witnesses in the first trial, whether by means of a transcript or access to the recording of the evidence, leading to a note agreed by counsel covering any relevant points. In our judgment it will normally be essential in support of such an application as this for the Crown to produce evidence of what was said in the earlier trial by one suitable means or another. If resort to a recording is impossible or sensible cooperation cannot produce an agreed note, then a transcript would normally be necessary. The safeguards required for the giving of such evidence following an

acquittal cannot normally be less than those required for a retrial, where there has not been an acquittal.

46. Each case, of course, must turn on its facts and the trial judge must consider the safeguards on a case-by-case basis when looking at admissibility under one of the gateways, and on any application to exclude as a matter of discretion. It would normally be relevant to consider the question of the admission of the fact of acquittal when considering admission of such evidence.

Some of these observations were not of immediate relevance to the issues in the appeal. The particular matters which had led to unfairness were by the time of the appeal known to all parties. They were matters which would have been apparent from the unused material had it been in the hands of those representing H. It is to be noted that the court did not preclude an application in any re-trial to adduce the evidence of SD. The outcome of that application would be a matter for the trial judge at the re-trial taking into account the safeguards then in place.

52. The only clear point of principle which can be taken from the judgment is that every case will depend upon its own facts. In any given case the judge must first consider whether the evidence in question is admissible via one of the gateways in Section 101(1). If the evidence is admissible and the issue of fairness arises, the judge must exercise his discretion whether under Section 78 of the Police and Criminal Evidence Act 1984 or Section 101(3) of the 2003 Act. It is well settled that the burden of proof has no part to play in that exercise in relation to Section 78: *R(Saifi) v Governor of Brixton Prison* [2001] 1 WLR 1134. The same must apply in relation to Section 101(3) of the 2003 Act. The judge must consider the issue of fairness in the round taking into account the interests of both sides. Insofar as the observations in paragraph 43 of *Hajdarmataj* indicate that there is a burden on the prosecution in the conventional sense, we do not consider that they are consistent with long established authority.
53. At [45] of *Hajdarmataj* the court said that a transcript “would normally be necessary”. We do not understand that the court was seeking to lay down a rule for admissibility of evidence from a previous trial. Given the nature of the discretion afforded by Section 78 and Section 101(3), no such rule would be appropriate.
54. In relation to the second ground of appeal we must consider the extent to which what was said in *O’Dowd* is of relevance to this case. *O’Dowd* was charged with sexual offences against a woman referred to as SS. The offences were alleged to have occurred in September 2004. The prosecution applied successfully to adduce evidence which showed that the appellant had committed other sexual offences against other unconnected women. The alleged offences had occurred some time before 2004. In one case the allegation was 22 years old. In another the allegation was 17 years old. The other offences were not admitted. The evidence in relation to those offences occupied over 3 weeks of court time. This court concluded that the admission of the evidence had led to extensive satellite litigation which had prevented the jury from concentrating on the real issues in the case. As a result the trial was unfair.
55. *O’Dowd* was an extreme case on its facts. The introduction of the bad character evidence contributed significantly to the trial occupying a total period of around six

months. The bad character evidence related to individuals with no connection to the facts of the offences with which the appellant was charged. The behaviour had occurred many years prior to the dates of the offences charged on the indictment. All that can properly be drawn from *O'Dowd* is the proposition that bad character evidence should not be admitted if it will lead to a substantial interference with the jury's focus on the charges on the indictment.

Discussion

56. We have no difficulty in concluding that the evidence of MR was relevant to the matters for which the appellant was on trial in 2021. A primary issue in the case was whether the allegations made by C1 and/or C2 had or might have been fabricated. Neither of those boys knew of MR and what he said had occurred in 2003. As the judge observed, the fact of MR's complaint was strong evidence that there had been no fabrication. It would be a notable coincidence for C1 to invent allegations which closely mirrored the allegation made by MR. We also consider that it was open to the jury to conclude that, were they to accept MR's evidence, it showed a propensity on the part of the appellant sexually to assault young boys. Although it was only a single incident which occurred some years earlier, the nature of the behaviour was unusual.
57. Having determined the issue of core admissibility, the judge went on to consider his discretion under Section 101(3). He stated that he had considered the issue of fairness. He noted the material that was available from the previous trial. He acknowledged that no transcripts were available. It is apparent from his ruling that it had been argued that, on the basis of what was said in *Hajdarmataj*, the absence of transcripts was fatal to there being a fair trial. The judge said that the defence position was that, were the evidence of MR to be admitted, they would be fighting that case again with one hand tied behind their back. It was in that context that the judge expressed himself in the terms set out at paragraph 33 above. Taken in isolation it might appear from that passage in his ruling that the judge did not engage in a proper balancing exercise. The issue was the fairness of the proceedings, not whether the appellant was at risk of conviction of another offence. However, the judge had referred to the material available from the trial in 2004 in the context of the fairness of the proceedings. He went on to consider the overall justice of the case. His conclusion was that it would be wrong to deprive the jury of the evidence of MR for their proper consideration of the overall picture.
58. Whether the argument is that the judge failed to engage in an exercise of his discretion or that he exercised his discretion erroneously does not matter for our purposes. We must ask ourselves whether admitting the evidence of MR had such an adverse effect on the fairness of the proceedings that its admission rendered the trial unsafe.
59. The matter in issue between prosecution and defence in relation to the allegation made by MR was very narrow. It was common ground that the appellant had gone into MR's room when MR had gone to the appellant in a distressed state. It also was agreed that the appellant had got onto MR's bed. That he had had the opportunity sexually to assault MR was not in doubt. The sole question was whether the appellant had reached under MR's bed clothing and touched his penis.

60. The core submission made on behalf of the appellant was that it was impossible to know what MR and/or his mother had said at the original trial about motive. The appellant was not in a position to place before the jury in 2021 what was said at the trial in 2004 by MR or his mother in relation to the meeting at a service area en route to Dorset or about the use of the word “stick” as a reference to a penis.
61. The jury did have the evidence of the meeting having taken place. It was not denied by MR and it was something about which the appellant was able to give evidence. In assessing the significance of the jury not being provided with what was said about the meeting at the trial in 2004, it is relevant to consider the potential cogency of the point being made on behalf of the appellant. The proposition was that, at the meeting, MR was put up to making an allegation against the appellant. There is no sensible prospect that this proposition was accepted by MR or his mother in the course of their evidence at the trial in 2004. Had they done so, it is highly unlikely that the case would have proceeded. The best that the appellant could hope for would be to show that there had been a meeting and that there was a pre-existing animus towards him on the part of MR’s mother. Those matters were demonstrable from the evidence available to the jury, in particular the agreed facts. The extent of that evidence, in particular the report of the headmistress relating to the bullying allegations, was wide ranging. It almost certainly went further than would have been admitted in the trial in 2004. It is also relevant to analyse the practical logic of the picture painted by the appellant. On his case MRMM was put up to make an allegation of sexual assault against him. Yet it was wholly fortuitous that the appellant put himself in a position where he had the opportunity sexually to assault MR.
62. In relation to the use of the word “stick” in the evidence of MR’s mother when explaining what was said to her by MR, this could not on its own provide any evidence of invention on the part of MR. The jury had the evidence of the language used by MR when he told his friends on the trip of what had happened. It was open to the appellant to contrast the language with the word to which MR’s mother referred. Quite how far that would have taken the appellant is open to question.
63. In *Hajdarmataj* at [20] the court said:

....It was obvious that the material which was advanced was incomplete. It must also have been obvious that something must have engendered doubt in the minds of the first jury as to whether they could be sure that the evidence of SD was reliable. If they had accepted the evidence as recorded in the court file, they would not have acquitted.

On behalf of the appellant it is said that the same proposition must apply in this case and that there must have been material in the first trial which cast doubt on MR’s evidence. The difficulty with that argument is that the jury in 2004 had to ask themselves whether they were sure that the appellant had sexually assaulted MR. Critical evidence on that issue came from the appellant himself, a dedicated teacher with no previous convictions. Where the appellant was saying that nothing inappropriate had occurred, that would provide an ample basis for the jury to say that they were not sure that it had. The notion that there must have been something specific which engendered doubt in relation to MR’s reliability is misconceived. We remind ourselves of the analysis of Lord Hobhouse in *Z* of the dynamic of a trial of a single allegation where the case amounts to one person’s word against another. In

any event, the surrounding evidence in relation to MR was not wholly supportive of his account. There was some inconsistency between the complaints he apparently made to two of the other boys with whom he shared a bedroom. He had said nothing to the headmistress even though she had sought him out when she had come to Dorset for the day. The appellant had volunteered to the headmistress that he had been with MR during the night when MR was upset i.e. admitting the occasion when on MR's account the sexual assault had occurred.

64. We conclude that the judge did not fall into error when he admitted the evidence of MR. In his directions to the jury the judge provided every possible safeguard to the appellant. The surrounding material adduced by way of agreed facts was significant. It is assisted the appellant in putting his case in relation to MR. It was relevant to his consideration of the overall fairness of the proceedings (namely for all parties) for the judge to have in mind the similarity of the allegations made by C1 to the allegation made by MR.
65. We do not consider that the second ground of appeal is sustainable. Although the judge treated the evidence of the other boys as bad character evidence, we consider that in reality it was evidence to do with the facts of the offences with which the appellant was charged. The events described by the witnesses B, C and D were contemporaneous with the matters alleged by C1. They indicated similar grooming behaviour and an interest in young boys. E's evidence was contemporaneous with the matters alleged by C2 and was relevant for the same reason as the evidence of the other boys. In admitting this body of evidence, the jury did not have their focus taken away from the indicted counts: rather the reverse. The contemporaneous evidence of the other boys was directly relevant to what was alleged by C1 and C2. This case is a far cry from the circumstances of *O'Dowd*. There, the jury was required to consider evidence about sexual assaults against women wholly separate from the complainant on the indictment. Moreover, the assaults had occurred many years earlier. Applying the basic principles set out in *O'Dowd* to which we already have referred, this was not a case in which the evidence admitted by the judge introduced undue complexity to the case or took away the focus of the jury from the real issues.
66. There is a separate point made about material found on the appellant's computer. Because of the factual disputes relating to this material, it was necessary for computer experts to give evidence. This further complicated the case unnecessarily. We are unpersuaded by this argument. The computer evidence was not difficult. It was adduced within a relatively short time. The material on the computer related to the witnesses in the case. It was to do with the facts of the case. The extent to which it helped the jury may be a matter of debate. However, it was relevant evidence which did not take away the jury's focus from the issues in the case.

Sentence

67. The judge explained his sentence in some detail. The sentence imposed on Count 1 was intended to reflect the appellant's overall criminality. The offence in that count involved multiple higher culpability factors. There was abuse of trust, significant planning and grooming. The harm suffered by C1 covered different categories. In the light of the evidence he gave, there was severe psychological harm which put the case in category 1. He was particularly vulnerable due to his personal circumstances i.e. category 2 harm. The nature of the sexual assault, touching genitalia over clothing,

placed the offence into category 3 harm. As a Category 1A case, the starting point in the relevant guideline would be 6 years. Were it to be a Category 2A case, the starting point would be 4 years. There was an overlap in the category ranges.

68. Although the appellant had no previous convictions and was of good character, this was of limited effect since those were the features which provided the appellant with the chance to commit the offence.
69. Count 3 was to be treated as part of the grooming process whereby the sexual assaults were committed. Thus, showing C1 pornography amounted to an aggravating factor in relation to Count 1. Taken on its own, the offence fell within Category 2A in the relevant guideline i.e. a starting point of 2 years with a range of 1 to 3 years.
70. The judge then moved to consider the offences committed against C2. As a single offence, Count 4 (massaging C2) was a Category 3A offence. In the relevant guideline that provided a starting point of 26 weeks' imprisonment. Because there was a course of conduct, the indictment specifying at least 10 occasions on which there had been sexual touching, the offence needed to move up a category. As a Category 2A offence, the starting point was 3 years' custody.
71. Count 5 was a multiple incident count involving at least 5 instances of sexual touching. The judge concluded that the case fell into Category 2A with a starting point of 3 years. The pornography shown to C2 was of an extreme nature. Thus, the offence in Count 6 fell into category 1 harm. As a Category 1A offence, the starting point was 4 years under the relevant guideline.
72. The judge determined that the overall criminality of the appellant required a total sentence of 10 years' imprisonment. He imposed that sentence on Count 1 with shorter concurrent sentences on the other counts. The judge further determined that the appellant presented a significant risk to children, particularly young boys, of serious harm from further serious sexual offences. He concluded that an extended determinate sentence was required to protect the public. The extended licence of 2 years was attached to the sentence of 10 years' imprisonment imposed on Count 1.
73. The appellant challenged the basis of the judge's sentence in relation to each count on the indictment. In relation to Count 1 the judge erred in finding that harm fell into category 1. Because of the spread of harm factors over all three categories the judge should have used Category 2A as the starting point i.e. 4 years' custody rather than 6 years. In respect of Count 3 the judge double counted the effect of the activity reflected by the count because he treated it as an aggravating factor when it was in reality part of the grooming behaviour. The fact that Count 4 reflected a course of conduct should not have moved the starting point up a category. This feature was already reflected within the culpability factors. The same argument applied to the sentence imposed on Count 5. The sentence on Count 6 assumed that the pornography shown to C2 was extreme. The evidence for this was scant.
74. In our judgment the sentence imposed by the judge must be assessed by reference to the overall offending taking into account the guidelines for individual offences. Between 2012 and 2015 the appellant sexually assaulted C1 aged between 9 and 12 on at least 2 occasions. Those assaults were subject to multiple culpability factors. On the evidence heard by the judge they led to severe psychological harm. It is not

arguable that an overall sentence of at least 6 years' custody was inappropriate for that offending. The appellant then moved on to C2. Although his offending was less serious than that committed against C1, it continued between September 2017 and April 2019. It only came to an end because of the complaint made by C1 and the consequent departure of the appellant from the school. Even allowing for totality, a sentence of 4 years' custody in respect of the offences involving C2 was appropriate.

75. It follows that the overall sentence was neither manifestly excessive nor wrong in principle. There was no challenge to the finding of dangerousness or to the imposition of an extended determinate sentence.

Conclusion

76. For the reasons we have given, we dismiss both the appeal against conviction and the appeal against sentence.