



Neutral Citation Number: [2023] EWCA Crim 795

Case No: T20167220
202201714 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT DERBY
HHJ SHANT KC SITTING WITH A JURY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 7th July 2023

Before:

LADY JUSTICE CARR
MR JUSTICE JAY
and
SIR NIGEL DAVIS

Between:

GARY BENNETT

Applicant

- and -

THE KING

Respondent

Richard English (instructed by **Draycott Browne Ltd**) for the **Applicant**
Andrew Vout KC (instructed by **CPS**) for the **Respondent**

Hearing date: 30th June 2023

JUDGMENT

MR JUSTICE JAY:

INTRODUCTION

1. On 16th December 2016 Mr Gary Bennett (“the applicant”) was convicted at the Crown Court sitting at Derby (before HHJ Nirmal Shant KC and a jury) of three sexual offences against a child. The three offences were exposure (Count 1), causing a child to watch a sexual act (Count 2) and rape (Count 3). There was a determinate sentence of 1 year imprisonment (on Count 2) with a Special Custodial Sentence under section 236A of the Criminal Justice Act 2003 of 11 years comprising a custodial term of 10 years extended by 1 year on Count 3 consecutive.
2. The standard ancillary and consequential orders were made.
3. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person’s lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence.
4. The applicant now renews his application for an extension of time (1,965 days) in which to apply for leave to appeal against conviction following refusal by the single judge.

THE APPLICATION FOR AN EXTENSION OF TIME

5. Crim PR 36.4 requires that a person seeking an extension of time to give notice of appeal under section 18(3) of the Criminal Appeal Act 1968 must give reasons for his application. In the present case, the reasons given in the Advice on Appeal amount simply to this: that trial counsel having advised the applicant orally that he had no grounds to appeal his conviction, there was then delay in instructing a new legal team, obtaining the relevant papers, obtaining copies of transcripts and in fulfilling the *McCook* procedure.
6. Anticipating that scanty reasons of this sort would be unlikely to be persuasive in a case of such very considerable delay, shortly before the hearing began the applicant’s solicitor helpfully provided the Court with a chronology. The following key points are made (and we add our comments where appropriate):
 - (1) Trial counsel and solicitors gave no advice on 16th December 2016 about the 28-day time limit for appealing.
 - (2) In March 2017 the applicant was “encouraged” by a prison officer to take advice about a possible appeal. Mr Richard English for the applicant accepts that it may well be that his client was made aware of the time limits at that stage.
 - (3) Between April 2017 and April 2020 a firm of solicitors acted informally for the applicant in relation to a possible appeal. It is unclear why the applicant’s relationship with them was not placed on a formal basis, particularly given that a different firm of solicitors was instructed on a privately-funded basis in April

2020. In any case, these solicitors did not progress the case with due expedition, and in 2019 nothing happened at all.

(4) Following the instruction of Draycott Browne Ltd in the summer of 2020, matters proceeded slightly more speedily, although we note that there was delay between December 2020 and September 2021 which has not been explained.

7. We are driven to conclude that the delay that has accumulated is very considerable and much of it cannot be excused or justified. We doubt whether trial counsel and solicitors would have failed in their duty to mention the 28-day time limit, but in any event the applicant knew about that by March 2017. Thereafter, it was the applicant's obligation and responsibility to ensure that an appeal was expeditiously pursued, and that failure cannot be attributed solely to his lawyers – particularly a firm that was never formally instructed.
8. Against that unfavourable backdrop, the applicant relies on the decision of this Court in *R v Ashley King* [2000] 2 Cr. App. R. 391 in support of the contention that an extension of time may be granted even if no proper explanation has been given for the delay. That, however, was an exceptional case involving the potential involvement of the CCRC, and reference must be made to more recent authority, including the decisions of this Court in *R v Hughes* [2009] EWCA Crim 841, *R v Thorsby* [2015] EWCA Crim 1, *R v Wilson* [2016] EWCA Crim 65, *R v Roberts & Others* [2016] EWCA Crim 71, *R v James & Others* [2018] EWCA Crim 285, *R v Gabbana* [2020] EWCA Crim 1473, *R v Patterson* [2022] EWCA Crim 456 and *R v FG* [2022] EWCA Crim 1460. In short, the Court will always examine all the circumstances of the case including the length of the delay, the reasons (if any) for it, and the overall interests of justice including the public interest in finality, the interests of victims, the practicability of a retrial, and any potential injustice to the defendant. Certainly, asserted strong merits cannot of themselves be assumed by prospective appellants and their lawyers to be some sort of trump card in securing an extension of time.
9. In the present case, the delay is, as we have stated, very considerable, no proper explanation has been given for much of it, there is no realistic prospect of a retrial and the applicant has now served the custodial element of his sentence. In these circumstances, we consider that it is incumbent on the applicant to demonstrate at least a compelling case on the merits in order to persuade us to grant the necessary extension of time.
10. The merits of the applicant's grounds of appeal will be examined within this legal framework, but before doing so we must set out the relevant facts.

THE FACTS

11. The applicant is now aged 62 and was a man of previous good character.
12. At the time of these allegations the complainant, whom we will refer to as MN, was six or seven years of age. She was nine at the time of trial. When she was four years old (in 2007/8) she had been adopted by GN and BH. Their relationship ended in 2014 although MN maintained contact with both parents.

13. BH's mother, CS, was the long term partner of the applicant, and they lived together at an address in Derbyshire. The applicant and his partner regularly saw the complainant and a biological daughter of BH, S, who had her own room at their address.
14. The trial concerned three allegations. The complaint was made after the second occasion (Counts 2 and 3). MN later reported an incident that she said had occurred months beforehand when the applicant pulled his trousers and pants down, exposing and then touching his penis (Count 1).
15. Taking these Counts in the order of their complaint rather than their occurrence, on the afternoon of 26th August 2015 the applicant was alone at the home that he shared with CS when BH dropped by unexpectedly with MN. In due course, the applicant and MN were both seated on the reclining armchair in the living room with the television on and BH had gone into one of the bedrooms to use his phone and to rest. BH made two phone calls: the first lasting 39 minutes, starting at 15:46 and ending at 16:25; the second of 15 minutes duration, starting at 16:34 and ending at 16:49. In between these calls he came out of the bedroom into what he described as the living room, and saw the applicant and MN sat on the chair watching a film of a cartoon type. BH saw nothing untoward. BH's evidence at trial was that there may have been previous occasions when MN was alone with the applicant.
16. Later than evening, MN was back at the house of her maternal grandmother, J. MN told J that the applicant had showed her his laptop and she described seeing two women giving oral sex to a man. MN said that the applicant had her arm round her at the time and she was sitting next to him. MN said that the applicant told her that CS used to do what the women were doing when they were in bed, but she was too old now. MN said that he had told her to keep it a secret and not to tell anyone. In answer to J's question, MN said that the applicant had not touched her and that he had not made her touch him.
17. The next morning, MN gave her mother, GN, a similar account. Slightly later, her account to GN was that at one stage the applicant had his hands on her thighs. Subsequently, and with MN now knowing that the police had been called, GN told MN that it was really important to tell them everything and asked her whether she had done so. MN replied that she did not want to say. When GN asked, "say what?", MN said "suck his things, like on the DVDs. He made me do such things".
18. On 27th August 2016 MN gave a recorded ABE interview. She said that they were watching TV when the applicant showed her two clips of pornography on his laptop. Her description of what she saw was consistent with her account to J. MN's description of the first video was that it was "horrible" and showed a lady "biting other people's privates" and then another lady came in and showed her how it was done. MN clarified that by "privates" she meant "the willys". As for the second video, "it were just someone sucking them in bed". MN explained that they only watched a quarter of the second video. The applicant then called her into the dining room where he put his penis into her mouth and told her to suck it. The applicant told her not to tell anyone and they then went back to watch "Care bears" on the TV. She left with her father shortly afterwards. She had not told him there and then because he would "moan".

19. On the same day the applicant took an overdose and wrote a note in which he apologised for being a “total prick – idiot - fool” and stated that he could not hold his head up if people believed MN. He apologised for all the upset that he would have caused. He was hospitalised until 29th August.
20. The applicant was arrested and interviewed on 1st September 2015. At that time he stated that he knew nothing of the allegations other than that he had accidentally shown MN pornography on his laptop. He said that he had logged on to his laptop, with the intention of checking his shares, and the clip popped up. He had been watching it earlier. He then turned his laptop round so that MN could not see what was on it. He said that he did not know whether MN had looked back to have a look at what he was viewing, “because she might just have looked back”. He did not immediately close the lid and had some difficulty in turning the machine off. The applicant was almost certain that there was only one film, not two. He had asked her not to tell her father. He recounted the rest of the visit. He adamantly denied that they had been inside the dining room or that he had acted in the way alleged.
21. The applicant was asked by police officers to explain the plot line of the video. The applicant’s explanation was strikingly similar to MN’s. The inferences to be drawn from that coincidence are obvious.
22. The applicant was further interviewed on 19th February 2016 when he denied that what MN alleged took place in the dining room ever happened. He asserted there was never a time it could have happened.
23. MN gave a further ABE interview on 26th October 2016. This was after MN had told a teacher about an event that became the subject-matter of Count 1. MN said that she and the applicant were watching a DVD in the living room and he pulled his trousers and pants down. The applicant then had his hand on “them”, by which she meant his genitals.
24. The applicant was reinterviewed on 8th November 2016 and he denied that this had happened. The complainant was telling stories.
25. The applicant’s laptop was interrogated. This showed that the machine was in use on 26th August 2015 at various times but the periods between 14:27 and 14:36, and 16:13 and 16:20, were important for the Crown’s purposes. As for the first period, the applicant was viewing websites relating to DIY and share prices, and not pornography. At 14:36 the machine entered what is known as a “clamshell sleep”, i.e. the lid was closed. The lid was reopened at 16:13 and reclosed at 16:20. The Crown’s case was that it was during this seven minute window, which corresponded with BH’s first phone call, that the applicant deliberately showed the pornographic clips to MN.
26. The applicant’s account at interview was that he was viewing pornography for about five minutes before 14:36 using the Google private browsing function. He then closed the lid of the machine. This explains why, when he reopened the laptop lid at 16:13, the same webpage was running.

THE TRIAL

27. The trial began on Tuesday 13th December 2016. The judge gave the jury the standard directions about open justice, not discussing the case with anyone and not conducting research on the internet. That was the limit of her directions.
28. The jury heard from BH, MN, J and GN. We were taken to sections of the transcript of MN's evidence. It is clear that MN became distressed at various points towards the end of her cross-examination (she had shown no distress during the ABE interviews and when giving her earlier complaints), including when she told the jury that the applicant's computer was on his knee (at which point there was a six minute break) and when she was asked whether she saw the applicant's willy (at which point there was a three minute break). MN also became distressed when she was asked what the applicant had done with his willy. After being told by the judge to take a deep breath, the applicant said that "he made me suck".
29. Counsel then told the Court that he did not think that it would really assist to ask any further questions.
30. The document at O3 on the DCS shows that the following additional questions were on counsel's list to be asked:

"What did [the applicant's] willy look like?

Did [the applicant] really put his willy in your mouth?

MN: have you seen things on [the applicant's] computer and made up that [the applicant] did those things to you?"
31. The applicant gave evidence which in some but by no means all respects was consistent with his police interviews. On 26th August 2015 at 14:36 he had been looking at the Wickes website and then at a money site. He then said that he opened the "motherless site", presumably adopting his usual practice of private browsing, took a quick look and then shut the lid as he was going to the garage to put up some shelves. He did not shut the site because he was not expecting visitors.
32. Later, when sitting with MN, the applicant said that he got bored whilst she was watching a television programme. He opened the lid of the laptop, inserted the password and the adult pornography came on. It was the same clip that he had seen before going into the garage. His evidence continued:

"She was to the left-hand side of me. I panicked. I turned the laptop to one side, and I did my best to turn it off. I was fumbling with it. I didn't think to close the lid. I believe I managed to turn it off. I was feeling awful. There was a 7-year-old girl sitting to the side of me, and I said, "Sorry, you should not have seen that". She asked what it was and said, "Is that what adults do?" I said, "That's what adults do. C used to do it, but she's now too old."
33. The applicant's explanation for this last comment was that he wanted to make her laugh. The applicant denied that they had gone into the dining room, that he put his penis in her mouth or had ever exposed himself. He said that he had suffered

depression. Later that night it was reported to him that it was being said that he had deliberately shown her pornography. The following morning he had taken the pills and written the note. He explained that he used tools to access the pornography rather than the browser in order not to leave a history because others had access to the laptop. The plot in the relevant clip was that a boyfriend's mother came to show his girlfriend how to perform oral sex. The fact that MN could tell the plot may have meant that she had watched more than he realised but he had not shown it deliberately. The applicant gave evidence that he asked MN if she wanted him to tell her father. This differed from his police interview but he had just been released from hospital when questioned and may not have got everything right. Before these allegations he had enjoyed his relationship with MN.

34. The applicant was pressed in cross-examination about various aspects of this account. We do not have a transcript and are therefore reliant on the judge's summing-up, which on one issue (at page 32E-G) is not altogether clear. However, the key points made by the Crown were that the laptop was on for seven minutes in the presence of MN; that the pornographic clip or clips was or were playing throughout that period; that MN had every opportunity to view this imagery, which was the applicant's intention; that MN was able to give a clear description of what she saw; and that this matched what was very soon to occur in real life.
35. Mr Andrew Vout KC, who was trial counsel when he was still a junior, also cross-examined the applicant about his internet use shortly before 14:36. His account at interview was that he had been on a pornographic site for about five minutes before that time. His evidence to the jury was that he just took a quick look. In any case, what may be described as the public browsing history showed that he was on DIY and share-related websites until 14:36. The interrogation of the computer was, therefore, inconsistent with the police interview and suggested that it was unlikely that there was any private browsing before 14:36. It was put to the applicant that the correct sequence of events was that he searched for the pornographic site using private browsing when MN was seated next to him, and that he did so deliberately: there was no accidental popping up of a clip that he had been watching earlier. The applicant's answer to this question was that there was no change of account; it was just a mistake as to how long he had viewed this material previously.
36. Before delivering her legal directions to the jury, the judge discussed their proposed content with counsel. The transcript shows the following exchange between both counsel and the judge:

“MR VOUT: One other thought I just had: distress. The complainant became quite distressed. We all saw that.

JUDGE SHANT: Well, she became distressed when she was giving evidence which is rather different to the direction one normally gives. It's distress when making the complaint originally.

MR VOUT: That's true.

JUDGE SHANT: This is -- I don't propose to say anything about this distress. It's for them to work out how it affects her evidence as it were.

MR VOUT: Your Honour is quite right.

JUDGE SHANT: Yes, the distress direction is related to it being part and parcel near the time of the original complaint.

MR VOUT: Yes.

JUDGE SHANT: And whether it's referable to the complaint or not and that sort of thing so. Mr Stockwell, is there anything you want to say about that?

MR STOCKWELL: No. Thank you, your Honour.”

37. The upshot was that the judge's legal directions made no reference to MN's evident distress whilst she was giving evidence.

THE GROUNDS OF APPEAL

38. There are four grounds of appeal. Ground 1 is that the judge failed to direct the jury about how to treat MN's visible distress when she was giving her evidence. Ground 2 is that the judge failed to direct the jury that they should consider the evidence dispassionately and that they should not be affected by emotion and sympathy. Ground 3 is that the judge, in her summing up, failed to direct the jury regarding the potential unfairness caused to the defence by the fact that cross-examination of MN had to be abandoned due to her levels of distress. Ground 4 is that the judge failed properly to direct the jury regarding the complaint evidence by failing to point out all of the inconsistencies in the complainant's account.
39. These grounds were developed both in writing and orally. Mr David Emanuel KC had drafted the Advice on Appeal, but the oral argument was advanced by Mr English. We are grateful for his precise, measured and well-directed submissions.
40. Mr English's overarching submission was that his grounds had to be considered both individually and cumulatively. It was the overall impact of the judge's errors which, in the circumstances, was material and fatally undermined the safety of the convictions.
41. As for Ground 1, it was submitted that the judge was required to give the standard distress direction as set out in the Crown Court Compendium, which direction was not limited to distress evinced during a complaint. Counsel relied in particular on the decision of this Court in *R v JS* [2019] EWCA Crim 2198 in support of the proposition that the failure to give such a direction renders a conviction unsafe. Given that the allegations were of such a distressing and upsetting nature, it was essential that the jury were directed that the distress they witnessed could not amount to some sort of corroboration or confirmation of the allegations.
42. In oral argument, and having accepted that a distress direction was not required in all cases, Mr English submitted that MN became highly distressed at a critical stage in

her cross-examination when she was being pressed on the central factual issue in the case.

43. As for Ground 2, reliance was placed on *R v Razaq Assadullah* [2004] EWCA Crim 2917 and *R v David G* [2006] EWCA Crim 500 in support of the contention that it was important that the jury be directed that sympathy and emotion should form no part of their decision-making. This is particularly so in a case involving alleged sexual abuse of a young child where there was a clear risk of jury emotion running high.
44. As for Ground 3, it is accepted on behalf of the applicant that the judge did direct the jury to the effect that counsel's questions in cross-examination were all appropriate, that he was constrained by the Court in relation to the questions that could be put, including being unable to put to MN directly that she was lying, and that the jury could well understand why in the circumstances the cross-examination was stopped short. Counsel's argument was that the judge said nothing about the fact that the abandonment of the questioning in the context of MN having become so distressed was not to be held against the applicant in any way. It is further submitted that the jury should have been directed specifically about the unfairness to the applicant flowing from the need to abort the cross-examination, and that the judge should also have told the jury that the final question on counsel's list that was not asked was whether MN had made up the allegation because she had seen those very actions performed on the applicant's computer. In this context, the judge made matters worse by informing the jury that counsel had been unable to ask a particular question when in fact he had asked it. Mr English submitted that the jury should have been expressly directed that they should not speculate as to what MN's answer to that question would have been, and that we should take all of these matters into account in considering the fairness of the proceedings.
45. As for Ground 4, counsel relies on the specimen direction in the Compendium to the effect that "points of consistency and/or inconsistency should be specified". Instead, all that the judge did was to say:

"It's a matter for you whether she's inconsistent or inconsistent [sic] in how you assess that complaint, and whether the lack of disclosure about oral sex at an early stage is down to embarrassment or an indication that she is lying."
46. Counsel's submission was that this was an inadequate direction, and that far more should have been done to underscore the frank inconsistencies in MN's account. Para 86 of the lengthy advice on appeal contends that MN "for whatever reason, was capable of telling lies to her elders. It was not an omission but a direct lie".
47. Finally, counsel submitted that the cumulative effect of these failings and misdirections was to render the applicant's convictions unsafe. This was a paradigm case of one person's word against another's.

THE RESPONDENT'S NOTICE

48. Mr Vout, who represented the Crown with his customary fairness and good judgment, advanced the following submissions in support of the overall safety of these convictions.

49. First, a judge is not required to warn a jury whenever a complainant gets upset whilst giving evidence. The Compendium does not require a distress direction to be given in every case. *JS* can be distinguished in that in the instant case the distress was not when challenged on truthfulness but rather when cross-examined about the applicant's penis. The allegations were also corroborated by the forensic evidence in relation to the applicant's computer and did not rely on one word against another.
50. Mr Vout emphasised that MN's distress was not a central feature of the case, and that he made nothing of the point in his closing speech. The very fact that he inquired of the judge at the very end of the discussion between her and the bar whether she was minded to say anything about MN's distress indicates that he was aware of the relevant principles, in particular that a distress direction does not predicate the demonstration of upset during the course of the making of a complaint. Mr Vout accepts that he did not correct the judge's error, but he and his very experienced opponent (now King's Counsel) had probably discussed the issue in advance of the discussion with the judge and had likely reached the view that in the particular circumstances of this case such a direction would not assist.
51. Secondly, the judge was not required as a matter of law to warn the jury about putting emotions to one side. Mr Vout accepted the generality of the argument that cases involving alleged child sex abuse are capable of exciting high emotion, and that, in answer to questioning from us, a direction along these lines is usually given. However, that fell to be balanced against the direction that the judge did clearly give: that the jury should try the case on the evidence.
52. Thirdly, it was trial counsel's judgment on his feet not to ask any further questions. He was not prevented from doing so. The judge did explain the constraints upon the questioning of MN, and that they should not hold that against the applicant.
53. Fourthly, the judge did remind the jury of the inconsistencies in the complaints made, the context in which they were made and the chronology.
54. Overall, Mr Vout submitted that the judge made no material errors of law in her directions to the jury, or lack of them; or, alternatively, that these convictions are in any event safe. Focusing on Grounds 1 and 2 in particular (Mr Vout sensing that the applicant was on much weaker ground elsewhere), it was submitted that such errors as there were did not trespass on the central issues in the case and went to matters of detail only. The directions urged on the Court by the applicant were discretionary in character; they are not mandated in each and every case.

DISCUSSION AND CONCLUSIONS

55. Although it is inevitable that we will have to examine the applicant's grounds of appeal one by one, we do not lose sight of his case that it is the cumulative effect of the errors on which he relies that must form the basis of his essential complaint that these convictions are unsafe. In any event, and as the single judge pointed out, the four grounds of appeal are to some extent interrelated.

Ground 1

56. The relevant sections of the Compendium have not changed materially since 2016, although some of the numbering has altered. Para 20-1 provides in material part:

“11. There is a possibility that juries will make and/or be invited by advocates to make unwarranted assumptions. It is important that the judge should alert the jury to guard against this. This must be done in a fair and balanced way and put in the context of the evidence and the arguments raised by both the prosecution and the defence. ...

12. Depending on the evidence and arguments advanced in the case, guidance may be necessary on one or more of the following supposed indicators relating to the evidence of the complainant: (1) Of untruthfulness:

...

(d) Lack of emotion/distress when giving evidence.

(2) Of truthfulness:

(a) A consistent account given by the complainant.

(b) Emotion/distress when giving evidence.

...

Example 7: Display of emotion/distress or lack of it when providing account to the police played to the jury and/or when giving evidence

[When W gave evidence she was crying and appeared to find it difficult to talk about the allegations.] You should not assume that the way W gave evidence is an indication of whether or not the allegation is true. Witnesses react to giving evidence about allegations of rape/sexual assault in a variety of ways. Some people will show emotion or distress and may cry. But other people will seem very calm or unemotional. The presence or absence of emotion or distress when giving evidence is not a good indication of whether the person is telling the truth or not.”

57. As we have already said, MN did not show any distress when she gave her evolving accounts of what she says happened to the various family members we have identified, nor did she show any during the course of her two ABE interviews. The position changed when MN was cross-examined, and only when she was asked about the specifics. It is true that MN’s distress did not arise in answer to a question that implied that she was lying, but such a question could not be properly asked of her as a child witness and she may well have understood the essential logic of the applicant’s case that she was not telling the truth. Thus, the distress was engendered at a critical stage in counsel’s questioning, and the jury would have understood that.

58. We have to say that the judge's reason for not giving any direction to the jury as to the relevance of MN's distress – that she manifested it in front of the jury and not during the course of making her complaints – is not a sound basis for not following the recommended wording in the Compendium or any alternative wording tailored to the particular circumstances of this case. For obvious reasons the judge did not have the benefit of the decision of this Court in *JS*. Paras 40-42 of *JS* reference a number of authorities including those where the complainant's distress arose during the making of a complaint. However, in *R v Thompson* [2014] EWCA Crim 743, at paras 33-34, this Court held that an appropriate direction should have been given in a case where distress was evinced in the witness box. That, after all, was the philosophy underlying the specimen direction in the 2016 edition of the Compendium.
59. In its recent decision in *R v Lake* [2023] EWCA Crim 710, this Court said as follows:
- “48. In our judgment the jury ought to have been directed as to the evidential value of the complainant's distress, particularly in a case such as this where that distress had been a prominent aspect of the evidence and was strongly relied on by the prosecution. Often, the reason why such a direction is necessary is that the jury will need to consider whether a witness's distress is genuine or feigned. In such a case, factors such as whether the distress has been observed close in time to the circumstances of the alleged offence and whether the complainant was aware that she was being observed will often be particularly relevant.
49. In the present case Mr Emanuel does not suggest that the complainant's distress was feigned, but he points out correctly that it was not necessarily indicative of the appellant's guilt. It was the appellant's case that the complainant's response to penetration, springing out of the bed and leaving in a state of agitation, was consistent with immediate regret on her part (she had said in her ABE interview that she had a boyfriend and would never have agreed to go to the bedroom with someone else), or with a failure to have appreciated what she had encouraged in circumstances where she was sleepy or drunk.
50. In such circumstances the jury should have been directed to consider at least the possibility that genuine distress could have been for reasons which did not support the appellant's guilt, such as remorse and anger with herself at having allowed matters to progress as they did while she was affected by alcohol, or failure on her part to appreciate the signals she was sending. If, having considered that possibility, the jury had rejected it, as they might have done, they would have needed to be careful not to attribute undue significance to the complainant's distress, but we see no reason why they should not have been entitled to regard it as providing some support to her evidence. As it was, however, the Recorder left them with the impression that there was no need to consider such a

possibility and that the complainant's distress was itself potentially important support for the prosecution case."

60. The facts of both *JS* and *Lake* were rather different from those of the present case. In *JS* it was a striking feature of the complainant's evident distress that it arose when challenged as to the truthfulness of her account. In *Lake*, there was a possible explanation for the complainant's distress that was not indicative of the guilt of the appellant. The instant case is far removed from facts such as these; and, furthermore, there could be no suggestion that MN's distress was feigned.
61. Another important aspect of the present case is that Mr Vout, and also probably the applicant's then counsel, were alive to the possibility of a distress direction being given in these circumstances. Whether or not counsel had discussed the issue beforehand is less clear inasmuch as the transcript records Mr Vout saying that it was "one thought I have just had". However, Mr Vout believes that they did discuss it. The point may fairly be made that neither counsel chose to correct the judge's misapprehension that a distress direction was confined to cases of distress manifested during the course of the making of a complaint, but the inference must be that both thought that the issue was of peripheral rather than central importance, and it did not feature in the closing speeches. A distress direction is recommended and, indeed, should usually be given (such that, if not given, the conviction may be unsafe); but the Compendium does not suggest that it is always required and these two highly experienced counsel must have had an acute sense of the overall dynamic of the case and the potential saliency of the issue. The inference must be that they both felt that the jury would unlikely be assisted by any explicit direction from the judge.
62. Unless it be inferred that both counsel made the same error as the judge, the instant case is *a fortiori* *R v Reynolds* [2019] EWCA Crim 2145; [2020] 1 Cr. App. R. 20 where it was held that a failure to comment on the judge's draft directions when given the opportunity to do so will not be fatal to an argument based on alleged misdirection of the jury, but it is likely to influence this Court's assessment of the significance of the alleged deficiency. We have already explained that the Compendium does not require the giving of a distress direction in all cases.
63. It is unnecessary to arrive at a final conclusion on Ground 1. At its very highest, the judge's omission to say anything at all about MN's distress was an error, but it by no means follows that it was material. The impact of the judge's omission on the safety of the applicant's convictions in the context of the application for a very considerable extension of time will have to be assessed by us in all the circumstances of this case, in particular whether it has been fairly characterised as just about one person's word against another's.

Ground 2

64. At no stage did the judge give any direction to the jury about the need to avoid sympathy and emotion. In both *Assadullah* and *David G* a direction along these lines was styled as "important", although these were both cases in which such a direction had been given. The Compendium recommends that the direction should be given "if appropriate", which we would take to mean – give the direction if the case in question is likely to generate an emotional or sympathetic response.

65. In our view, there is force in Mr English's submission that all the obvious features of the instant case could well induce an emotive response in the jury such that a direction should have been given, both at the start of the trial during the course of the standard introductory remarks and in the judge's legal directions. It was not sufficient merely to direct the jury to try the case on all the evidence because that would include the demeanour of MN as she gave her evidence.
66. The issue, though, is whether this omission is sufficiently material as to undermine the safety of these convictions in the context of the application for an extension of time.

Ground 3

67. We consider that this ground has very little weight. The judge's summing-up did go some considerable way in counterbalancing the inherent difficulties and potential unfairness in cross-examining a child witness. Perhaps the judge might have gone further: in making the point explicitly that the jury should not speculate about what answers might have given to questions that were not put. It is also correct that the judge did not tell the jury that counsel had wanted to put to MN the point that, having seen certain things on the applicant's computer, she then fabricated her account to allege that the applicant made her do exactly those things.
68. That question, if asked, was capable of cutting both ways. It was high risk, but in one sense it had to be asked: MN's account was either substantially true, or it was at best a confabulation and at worse a fabrication. Even so, the judge's failure to mention this non-asked question to the jury cannot significantly have prejudiced the applicant. There was nothing to prevent counsel advancing this argument in his closing speech to the jury, and we must assume that he did. The applicant would have been in no better position forensically had the non-asked question been put.

Ground 4

69. This ground is without merit. The judge did not provide a list of the consistencies and inconsistencies in the complaint evidence, but during the course of her fair summing-up of that evidence it was underlined to the jury that MN's account evolved in the less than 48 period between the first revelation to her maternal grandmother and her first ABE interview. We cannot accept the bold submission that MN's developing account demonstrates that she was capable of lying to her elders. That was one possible, albeit frankly implausible, explanation. Another, is that this was all "horrible" (to use MN's own adjective deployed in the context of the videos), and it is therefore quite understandable that it would take a period of time for the full story to emerge. These possibilities were fairly before the jury.

Drawing these strands together

70. In view of the conclusions we have reached thus far, the ultimate question is not simply whether these convictions are safe, because posing the question in those terms would predicate a timely application for leave to appeal. To the contrary, the question should be posed in these terms: has a sufficiently compelling case been advanced on Grounds 1 and 2 so as exceptionally to justify such a lengthy extension of time?

71. Looking at the applicant's case in the round, his essential contention is that, in light of the judge's omissions, there is an unacceptable risk that the jury might have placed too much weight on MN's distress and allowed their emotions to take over.
72. In our judgment, the risk that the applicant has identified is more than wholly theoretical but it is unquantifiable. Aside from these omissions, we bear in mind that the judge's summing-up was fair and balanced, and that no one was putting forward an explanation for MN's distress consistent with the applicant's possible innocence. Quite rightly, the issue was left untouched by counsel.
73. In any case, when assessing the risk that we have identified, we must also bear in mind that this was not a case of one person's word against another's *simpliciter*. There was powerful supporting evidence in relation to that seven minute period throughout most of which (excluding the time it would have taken for the applicant to have found the relevant website) the pornographic clip or clips were playing on the applicant's laptop in the presence of MN. We have already set out the strength of the Crown's case in this regard. The idea that MN made up the allegation *because* she had seen this material is, for obvious reasons, extremely difficult to accept. The applicant's apparently desperate attempts to close down his laptop rather than simply close the lid did not, it seems, impress this jury. Moreover, the jury would surely have been struck by the obvious connection between MN's evidence of the subsequent enactment and the plot line of the main clip, coupled with the applicant's admitted remark proffered, apparently, in jocular terms. Not merely was there no joke, the very fact that the applicant felt it necessary to utter it demonstrates that he well understood that MN had seen far more of what was on his screen than he was prepared to accept.
74. For all these reasons, we are satisfied that this application falls well short of demonstrating the existence of a sufficiently compelling case to justify on exceptional grounds the very lengthy extension of time sought.

CONCLUSION

75. The application for an extension of time in which to apply for leave to appeal against conviction is refused.