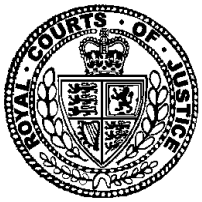

Neutral Citation Number: [2024] EWCA Crim 667

Case Nos: 202301893 B3
202303435 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEWES
HIS HONOUR JUDGE MOONEY
T20207285

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 June 2024

Before:

LORD JUSTICE STUART-SMITH
MRS JUSTICE CHEEMA-GRUBB
and
MR JUSTICE CHOUDHURY

Between:

REX	**Respondent**
and	
BJK	**Appellant**

- -

Andrew Selby KC (instructed by **Bishop and Light Solicitors)** for the **Appellant**
Sarah Lindop (instructed by **CPS Appeals & Review Unit)** for the **Crown**

Hearing date: 30 April 2024

- -

The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where an allegation has been made that a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

Approved Judgment

This judgment was handed down remotely at 10.30am on 14 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Stuart-Smith:

Introduction

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to the offences that are the subject of this appeal. Under those provisions, where an allegation has been made that a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act. For the avoidance of any doubt, we have not and do not waive or lift the prohibition. In order to prevent identification of the victims we shall refer to the appellant as A.

2. In May 2023 in the Crown Court at Lewes, before HHJ Mooney and a jury, A was convicted after a re-trial of 11 offences of serious sexual offending against two complainants, to whom we shall refer as B and C. Counts 1-8 of the indictment had alleged serious abuse committed against B. Counts 9-11 had alleged serious abuse committed against C. The trial judge sentenced A on 14 September 2023 to a Special Custodial Sentence of 10 years for an offender of particular concern pursuant to section 265 Sentencing Act 2020, comprising a custodial term of 9 years with a further 1 year licence period, and a standard determinate sentence of 7 years' imprisonment, consecutive.

3. That aggregate sentence was made up as follows: on count 1, which was an offence of sexual activity with a child, contrary to section 9(1) of the Sexual Offences Act 2003, A was sentenced to 4 years' imprisonment. On count 2, which was an offence of attempting to sexually touch a girl aged 13-15 involving penetration, contrary to section 1(1) of the Criminal Attempts Act 1981, he was sentenced to 7 years' imprisonment, consecutive. On Count 3, which was another offence of sexual activity with a child, he was sentenced to 4 years' imprisonment, concurrent. On count 4, which was another offence of sexual activity with a child, he was sentenced to 4 years' imprisonment, concurrent. On count 5, which was another offence of attempting to sexually touch a girl aged 13-15 involving penetration, he was sentenced to 7 years' imprisonment, concurrent. On count 6, which was another offence of sexual activity with a child, he was sentenced to 4 years' imprisonment, concurrent. On count 7, which was another offence of attempting to sexually touch a girl aged 13-15 involving penetration, he was sentenced to 7 years' imprisonment, concurrent. On count 8, which was another offence of sexual activity with a child, he was sentenced to 4 years' imprisonment, concurrent. On count 9, which was an offence of assault of a child under 13 by penetration, contrary to section 6(1) of the Sexual Offences Act 2003, he was sentenced to a special custodial sentence of 10 years, comprising a custodial term of 9 years and a further 1 year licence period. On count 10, which was an offence of assault by penetration, contrary to section 2 of the Sexual Offences Act 2003, he was sentenced to 9 years' imprisonment, concurrent. Finally, on count 11, which was another offence of assault by penetration, he was sentenced to 9 years' imprisonment, concurrent.

4. A now appeals against his conviction on three grounds, for which leave was given by the Single Judge. Leave was refused on 2 further grounds: A has not renewed his application on those grounds. In the event that his conviction is upheld, he renews his application for leave to appeal against sentence, permission having been refused by the

Single Judge. In addition, the Registrar has identified technical issues relating to the structure of the sentence, which we will address at the end of this judgment as necessary.

5. A has been represented before us by Mr Selby KC, who represented him at trial. The prosecution has been represented before us, as it was at trial, by Ms Lindop. We are grateful to both counsel for their assistance.

The factual background

6. It is not necessary to set out the factual background to the charges that A faced in any great detail. We shall concentrate on the factual background to counts 1-8 because A's appeal is more directly concerned with the case relating to B. It is accepted by the prosecution that, if A's convictions on counts 1-8 are unsafe and must be set aside, then so too must counts 9-11. We agree.

7. A had got to know B in about 2009 when he frequented and worked in local pubs. B, who was born in 1996, lived near the pubs and, despite being under 16, spent time at the pub where A worked because her parents knew the landlord.

8. C was A's stepdaughter and lived for most of the time in a household that included C's mother, to whom we shall refer as M, and A. In early 2019 A and M were having marital problems which led to A leaving the home temporarily. Shortly after leaving, he contacted B with a Facebook friend request. B was then aged about 23. B immediately questioned why A had made contact with her after "what [he] did." Facebook contact continued and at some point B made contact with M, informing M of A's recent contact with her and alleging that he had abused her years before.

9. In due course A moved back into the family home; but the marriage foundered and he left for good in June 2019. After he had left, C told M that A had abused her. M told C's father, and her allegations were reported to the police. C was interviewed in June and August 2019. She alleged that A had touched her vaginal area on three occasions while she had been in her bunk bed and aged between 11 and 13. Those occasions later formed the basis of counts 9-11.

10. M's contact with B continued with many hours of video calls and hundreds of messages. M gave B's contact details to the police, who interviewed B in July 2019. B alleged sexual grooming and intercourse by A when she was aged 13 and A was in his mid-thirties.

11. It later transpired that this was not the first time that B had alleged that A had sexually abused her. This was clearly documented in the unused material: see [17] below. It appears that the original file was closed because B was not at that stage ready to provide an ABE statement; but it was reopened after the further disclosure she provided in mid-2019.

12. A was interviewed about C's allegations in June 2019 when he exercised his right to silence but gave a prepared statement in which he denied ever having assaulted C. He was interviewed again after the police had interviewed B. He again exercised his right to silence but gave a further prepared statement in which he said he had nothing to add to what he had said previously about C's allegations and that he denied all of B's

allegations. He said that he knew B had previously spoken to M and had then alleged that she had been abused by someone else, which he (A) had reported to the police. He said that the only conversation he had had with B was regarding her family issues and her mother's drinking and that the conversation had ended when B had asked him to sleep with her and he had told her mother. At a later interview he had answered questions.

13. B's evidence was of pivotal importance. She alleged that A had befriended her in the pub where he worked and had taken her upstairs where he would lick her vagina and attempt to penetrate her vagina with his penis: that formed the basis of counts 1, 2 and 4. On one occasion he penetrated her mouth with his penis (count 3). On two occasions she said A had taken her to his flat. On one occasion he tried to penetrate her vagina with his penis (count 7); on the other he licked her vagina (count 8). She described one specific occasion when they went to a local skate park. On that occasion he tried to penetrate her with his penis (count 5) and then masturbated and ejaculated onto her body (count 6). The last time she had seen him before he made contact in 2019 was when she was 15 and they had an argument. The prosecution also relied upon evidence from B's mother, M and another man who used to play darts with A in the pub and who described being surprised when he saw B with A because, he said, A should not have been with a young girl.

14. In relation to Counts 9-11, C gave her account of the alleged abuse. The prosecution also relied upon evidence of complaint to M and another adult and sought to draw an adverse inference from A's failure to give evidence.

15. A's case on counts 1-8 was one of complete denial. He had merely offered B advice because he was aware that she was having difficulties with her parents. She became infatuated with him and propositioned him. He had rejected her advances and had told her mother.

16. The issue for the jury was whether they could be sure of the evidence of B and C.

Procedural background

17. The Defence Statement was finalised and signed on 11 January 2021. It set out A's case in relation to B as follows:

> "5. [A] will say that it is clear from material served thus far that [B] suffers from some mental health issues and has made allegations in the past against other people (including [A]). [B] has complained of abuse at the hands of multiple males from the [X] Public House. All that [A] can say is that he did not commit that which is alleged. Perhaps she has transposed abuse she suffered at the hands of another onto this defendant. She is wrong to say that this defendant sexually abused her in any way."

18. The Defence Statement requested disclosure of "details of any complaints that either complainant or indeed witness ([M]) have made in the past pertaining to sexual abuse." It also said:

> "IV It is noted within the unused (and referenced in 5 above) that [B] has previously reported that she was abused at the hands of (possibly) 6 different men (Item 46 MG6C and item 17 where again reference is made of [B] complaining of being "sexually abused by multiple" adult males over a period of time). Further clarification and information pertaining to this is sought."

19. The reference to Item 46 MG6C was a reference to a document entitled "Occurrence enquiry log report", with designated occurrence number 47180123458 @ 14/08/2018, on which the police recorded interactions with potential witnesses, including B. Each entry is dated. The entries now identified as being potentially relevant to this appeal commence before A resumed contact with B in 2019 on 15 August 2018, the day after the document's designation. An entry later in August 2018 recorded that B said she "no longer has any contact with the suspects … ." In October 2018 it recorded her as saying that she was not ready to support the case or provide an ABE and that she was receiving counselling. A further entry that month says that she has named six suspects, whose names are recorded and of whom one was A. She had not at that stage "gone into specifics about what the men did, just that they did sexual things with her." No further details of what the men did appears from the document.

20. However, we are told and accept that when the Defence Statement was drafted, Item 46[1] had not been served. All that had been served was the schedule of unused material. The schedule listed Item 46 as:

> "The relevant material is: CAD 0463 14/08/2018 Call from a lady named [name] calling re [B] asking if the police knew anything about the recent sexual allegations and whether they are doing anything about it. [B] has told her GP and key worker about being groomed online by 6 men and meeting up with 3 of them who would do sexual things with her, [A] is one, he worked at The [named] pub. Case crimed as 47180123458 then passed to SIU."

21. Also on 11 January 2021, Mr Selby composed a skeleton argument to support an application pursuant to section 41 of the Youth Justice and Criminal Evidence Act 1999. In the event, that application stayed on the stocks until the start of the trial over a year later.

22. The case was listed for trial on 4 April 2022. Ms Lindop was newly instructed for the prosecution. She tells us, and we accept, that it was drawn to her attention that there were outstanding issues relating to disclosure (including that the Occurrence enquiry log report had not been served) and that Mr Selby's section 41 application was outstanding. On 5 April 2022 she dealt with the outstanding disclosure issues: the Occurrence enquiry log report was served that day. In addition she saw to it that a further statement was obtained from B that day. That statement ("the 5 April Statement") gave a concise account of her relations with each of the six people identified in the Occurrence Enquiry Log Report other than A and explained (also

[1] In written submission to clarify the exact sequence of events, the Occurrence enquiry log report is referred to on occasion as Item 73. However, nothing turns on it and we have continued to refer to Item 46 throughout.

concisely) why she had made a statement making allegations against A but not against the others.

23. Since it is fundamental to the suggestion that B may have transposed wrong-doing by one or more of the other five and mistakenly alleged that the wrong-doing was by A, it is necessary to set out a summary of what she said about each of the other five in the 5 April Statement. We shall refer to them as E, F, G, H and I:

i) E was part of her stepfather's family who she knew through the family. She saw him at a couple of family parties and eventually he became a friend on Facebook when she was about 13. She met him once after school when she was about 14. She met him at a pub and then got in his car. He unbuttoned her school shirt and put his hand inside and then touched the inside of her thigh. After further conversations on Facebook, she went to the fair and accompanied E to go and get some cash. Nothing happened. She said that she never saw him at the pub where A had worked (and where she said that A had abused her) and that, to her knowledge, E did not know A. She was not sure how old E was;

ii) She never met F except once at a wedding where "nothing happened." She encountered him online through Facebook. The Facebook contact between them was sexually explicit but F never tried to meet her. She never saw him at the pub where she said A abused her and she did not think he knew A. F was in his 40s;

iii) G was one of her stepfather's old school friends. He was a photographer. They met at a couple of family parties when she was 14/15 years old. One of them added the other on Facebook and he would send her sexual messages and arrange to meet her. "A lot of the time" he would drive her in his car to a particular (named) location and on "probably 6 or 7 occasions" he would kiss her and touch her vaginal area. They never had sex and everything that happened took place in his car. She never saw him in the pub where she said A abused her and she did not think he knew A. She thought he was in his 40s;

iv) B was about 14 when she met H. She went to meet a female school friend's boyfriend, telling her mum she was going to a sleepover. She stayed the night with her friend, her friend's boyfriend, and the boyfriend's brother, who was H. H was in his early 20s, maybe 21. Nothing happened that night but later B and H became friends on Facebook. On one occasion H came to the town where B lived and she met him. They kissed, but nothing else happened. There were "a few other encounters" where they met and B slept in his bed and things happened: mainly he touched her breasts and vaginal area and they performed oral sex on each other. B never saw him at the pub where she alleged she was abused by A and she did not think that H knew A. B and H stayed in touch for about 2 years. She "viewed it as a relationship";

v) B could not remember how, but she and I became connected through Facebook. They talked about meeting but never did as B always made up an excuse. He sent her explicit things over messenger. He was in his late 40s or early 50s. She never saw him at the pub where she alleged she was abused by A and she didn't think I knew A. She knew his occupation and would occasionally see him in that occupation.

24. The final paragraph of the 5 April Statement provided B's explanation for giving the police a statement about A rather than about any of the others. She said that it was because he contacted her on Facebook. When she looked at his profile she saw he was married and her first thought was to hope he did not have children. That was her main reason for contacting M. She probably would not have gone to the police or reported anything if he had not contacted her. She just wanted to blank out her past.

25. We deal with the two section 41 applications and rulings in detail below. Mr Selby made his first application (based on his skeleton from 11 January 2021) on 5 April 2022. The application was refused with a written ruling dated 5 April 2022. The Judge refused to permit any cross-examination in respect of previous complaints of abuse by B and refused to allow cross-examination on whether she was confused – the necessary implication of such a question being that there were other men and incidents of sexual behaviour that she may have confused with and "transposed" to A. For unconnected reasons, the original jury had to be discharged. The retrial was fixed for April 2023 but finally came to be heard in May 2023. Before the retrial, the defence advanced its section 41 application again, Mr Selby's new skeleton in support being dated 14 July 2022. The Judge's short written ruling was dated 4 April 2023. The Judge refused the application for the same reasons as before.

The legal framework

26. Section 41 of the Youth Justice and Criminal Evidence Act 1999 provides, so far as relevant to this appeal:

> **"Restriction on evidence or questions about complainant's sexual history.**
>
> (1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—
>
> (a) no evidence may be adduced, and
>
> (b) no question may be asked in cross-examination,
>
> by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.
>
> (2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—
>
> (a) that subsection (3) or (5) applies, and
>
> (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.
>
> (3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—

(a) that issue is not an issue of consent; or

(b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or

(c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,

that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subsection applies if the evidence or question—

(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).

…"

27. Section 42(1) provides:

> "**Interpretation and application of section 41.**
>
> (1) In section 41—
>
> (a) "relevant issue in the case" means any issue falling to be proved by the prosecution or defence in the trial of the accused;
>
> (b) "issue of consent" means any issue whether the complainant in fact consented to the conduct constituting the offence with which the accused is charged (and accordingly does not include any issue as to the belief of the accused that the complainant so consented);
>
> (c) "sexual behaviour" means any sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding (except in section 41(3)(c)(i) and (5)(a)) anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused; …

28. The purpose that underpins section 41 was clearly stated by Lord Hutton at [142] of *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 in terms that bear repeating:

> "142 My Lords, in a criminal trial there are two principal objectives of the law. One is that a defendant should not be convicted of the crime with which he is charged when he has not committed it. The other is that a defendant who is guilty of the crime with which he is charged should be convicted. But where the crime charged is that of rape, the law must have a third objective which is also of great importance: it is to ensure that the woman who complains that she has been raped is treated with dignity in court and is given protection against cross-examination and evidence which invades her privacy unnecessarily and which subjects her to humiliating questioning and accusations which are irrelevant to the charge against the defendant. The need to protect a witness against unfair questioning applies, of course, to all trials but it is of special importance in a trial for rape. Linked to the third objective is the further consideration that allegations relating to the sexual history of the complainant may distort the course of the trial and divert the jury from the issue which they have to determine."

29. More recently, in *R v T* [2021] EWCA Crim 318, while emphasising the continued importance of the passage just cited, Davis LJ said at [39]:

> "One purpose unquestionably was with a view to debunking the "twin myths" as they are known; that is to say, that people who have been prepared to sleep with others in the past maybe the

> more ready to sleep with someone else on the particular occasion in question and, in addition, may be the less capable of belief. … At the same time, and as the decision in *A (No 2)* emphasises, fairness is the underlying key; and it is important that a defendant should not be deprived of the opportunity to put relevant questions if exclusion of such questions could endanger the fairness of the trial."

30. The first question to be asked in any application to which section 41 may apply is whether the evidence that the accused wishes to adduce or the question that the accused wishes to ask in cross-examination is "about any sexual behaviour of the complainant." Since its enactment, the Courts have adopted a wide and purposive approach to what is meant by "sexual behaviour" in the context of section 41 and its definition in section 42. It is clear from the definition in section 42 and well established that the definition is open ended and does not require that the "sexual behaviour or other sexual experience" involves any accused or other person. In *R v T* (supra) the Court of Appeal held that sexual identity and sexual orientation may constitute an "experience" and so be within the meaning of section 41: see [42]-[45]. In reaching that conclusion the Court built on earlier decisions of the Court of Appeal that had held that sexually provocative postings on Facebook or the sending or viewing of pornographic images could amount to "sexual behaviour"; and that behaviour may be "sexual" even if, for example, the complainant is incapacitated or is so young as not to realise it: see [41].

31. It is plain that conduct may amount to sexual behaviour within the meaning of section 41 even if it was either non-consensual or involuntary on the part of the complainant. It is relatively common for a complainant to assert that they have been abused by people other than the accused, and for the accused to wish to rely upon that assertion in one of two ways. The first is to suggest that the assertion is knowingly untrue. In *R v T; R v H* [2001] EWCA Crim 1877, the Court of Appeal said of such a case at [33]:

> "It seems to this Court that normally questions or evidence about false statements in the past by a complainant about sexual assaults or such questions or evidence about a failure to complain about the alleged assault which is the subject matter of the charge, while complaining about other sexual assaults, are not ones "about" any sexual behaviour of the complainant. They relate not to her sexual behaviour but to her statements in the past or to her failure to complain."

Such a case would therefore not fall within section 41. The question then would be whether the evidence or questions were relevant to an issue in the case and/or qualified to be admitted as bad character evidence, subject always to the Court's discretion to exclude the evidence if it was too speculative or otherwise pursuant to s. 78 of PACE. The Court in *R v T; R v H* made clear that the burden of justifying the adducing of the evidence in such a case is significant, saying at [41]:

> "The defence, wishing to put questions about alleged previous false complaints, will need to seek a ruling from the judge that section 41 does not exclude them. It would be professionally improper for those representing the defendant to put such

> questions in order to elicit evidence about the complainant's past sexual behaviour as such under the guise of previous false complaints. But in any case the defence must have a proper evidential basis for asserting that any such previous statement was (a) made and (b) untrue. If those requirements were not met, then the questions would not be about lies but would be "about the sexual behaviour of the complainant" within the meaning of section 41(1)."

32. It needs hardly be repeated that the mere fact that the other complaints were not pursued to a prosecution is insufficient to demonstrate falsity. On the other hand, it is not necessary that the evidence demonstrates conclusively that the evidence is false, or even that it shows "a strong factual foundation for concluding that the previous complaint was false. But there must be some material from which it could properly be concluded that the complaint was false.": see *R v AM* [2009] EWCA Crim 618 at [22]-[26]. What is required is a fact-specific analysis of the circumstances of the case in hand: see *R v Davison* [2015] EWCA Crim 1907 at [18].

33. Even if the accused is not in a position properly to assert that the previous statements about other abuse or abusers are untrue, the accused may (as in the present case) wish to ask questions about those assertions, which would then be questions about the complainant's "sexual behaviour" within the meaning of section 41. The position is then as outlined by the Court of Appeal in *R v C and B* [2003] EWCA Crim 29, at [27]:

> "With regard to questioning about other complaints, *R v. T and H* indicates that, absent any basis for suggesting that such complaints were false, such questioning falls to be regarded as being "about [the] sexual behaviour of the complainant". The rationale, as we see it, must be that, if evidence is adduced about complaints which cannot properly be challenged as false, then the intention must be to elicit that other sexual behaviour or experience, the subject of such complaints, and so to deploy it in one way or another to the complainant's discredit, e.g. by arguing that it has been wrongly transposed and attributed to the present defendant in the complainant's account. On that basis, the judge would have been right to consider that the extent to which it was permissible was a matter for his discretion. If that is so, then we would not fault the exercise of his discretion."

34. Accordingly, where the accused wishes to argue that the complainant has wrongly transposed abuse committed by another person and mistakenly attributed it to the accused, section 41 is engaged. In which case, leave may only be granted if:

i) Section 41(3) and/or (5) applies; and

ii) The evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant; and

iii) A refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

If these pre-requisites are satisfied, the judge is not bound to admit the evidence but has a discretion as to whether to do so.

35. Whether evidence relates to an issue in the case for the purposes of section 41(3) will involve a fact-sensitive analysis taking into account all relevant matters. However, section 41(4) must be borne in mind at all times and requires the court to be astute to determine whether it appears to be reasonable to assume that the ***purpose*** or ***main purpose*** for which the evidence would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness. If it is, leave cannot be given pursuant to section 41(3). If impugning the credibility of the complainant is a subsidiary (but not the main or sole) purpose, section 41(4) does not of itself bar the giving of leave, though the fact that it is a subsidiary purpose may still be relevant to the exercise of the Court's discretion if matters get that far: see *R v F (No 2)* [2005] EWCA Crim 293, [2005] 1 WLR 2848 at [27]. As was said in *R v T* (2021 supra) at [48]:

> "The courts … have to be wary about the potential for assertions to the effect that the challenge is as to malicious motivation to fabricate being, in truth, an obfuscation of the real or main purpose: that is to say, to undermine a complainant's credibility."

36. An illustration of the way in which the court will approach the application of section 41(4) is provided by *R v DWG* [2012] EWCA Crim 1860 where the complainant was the appellant's niece. In an early interview she had said that she had been abused by her grandfather, by the appellant and by another uncle. The appellant had wanted to adduce evidence about what she had said but permission was refused by the trial judge. On analysis, it was not a case where the appellant was suggesting that the complainant had transposed abuse perpetrated by one of the others and attributed it to him. The kernel of the court's reasoning was at [25]:

> "Thus, we think that the purpose of the questions must have been to enable the defence to suggest to the jury that J was in the habit of making false accusations against family members and with false details and/or that her memory was unreliable. It would have been further suggested that this was inherently unlikely that this abuse by several family members could have been going on or at least without it coming to light in some way. Questions asked for that purpose are, we think, plainly within the ambit of section 41(4). The purpose of all such questions would be to impugn the credibility of [the complainant's] evidence or, to use the expression used by [the appellant's counsel] in argument, the "reliability" of [the complainant's] evidence that the appellant had been the perpetrator of the abuse over many years."

37. Turning to section 41(5), the drafting of the sub-section is clear. The most difficult question for the court is likely to be whether the evidence or question would "go *no further than is necessary* to enable the evidence adduced by the prosecution to be rebutted or explained." Since the issue does not arise in the present case we say no more about it.

38. There is no preconceived limit to the factors that may be taken into account when considering pursuant to section 41(2)(b) whether "a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case." One feature that may affect the court's assessment will be the cogency of the evidence or the evidential foundation for the question that the accused wishes to adduce or ask. Where the evidence or evidential foundation for the question is either speculative or illusory, a purposive approach to section 41 will generally lead to a conclusion that the evidence should not be adduced and the question should not be asked.

The section 41 applications and rulings

The first application and ruling

39. Mr Selby's skeleton argument (dated 11 January 2021) identified that it was "a strand to the defence that [B] has confused what she says has happened to her at the hands of the defendant with something else that may have happened to her at the hands of others." It was submitted that this did not engage section 41 at all and that "the defence are entitled to question the complainant as to the possibility of being confused and "transposing" what one person may have done onto the defendant without s. 41 engaging. "The defence would contend that in those circumstances there is no questioning as to the complainant's "sexual behaviour" within the meaning of "sexual behaviour" set out at s. 42." Alternatively, if section 41 was engaged, then the questioning should be allowed pursuant to section 41(3) and (5). Mr Selby referred to *T & H* (2001 supra) and submitted that "a distinction is to be drawn between questions about sexual behaviour itself and questions concerning statements about such behaviour by the complainant; even if the questions concerned the complainant they were not automatically barred by s. 41."

40. Mr Selby confirmed before us that the questions he wished to ask about other complaints in support of a suggestion of transposition were:

    i) Is it correct that in 2018 you made complaints, not just against [A], but against 5 other men as well?

    ii) Those complaints were against older men, including against friends and relatives of your step-dad?

    iii) The complaints involved not just accusations of sexual activity but also contact made by some of these men via Facebook and the like?

41. In his ruling on this first application, the Judge held that the questions were predicated on the complainant having previously had sexual experience with other men and that the questions about transposing the actions of one man onto the defendant expressly referred to her sexual behaviour with another man. On that basis section 41 was engaged. He recorded that Mr Selby accepted that on the available evidence, the previous sexual behaviour did in fact occur and so the questioning was not directed towards the credibility of B in the sense that it was being suggested that she had fabricated the previous allegations. What was being alleged was inadvertent transposition which was said to be relevant to the issue whether the matters alleged against A happened. He then referred to section 41(2)(b). His conclusion was that the

proposed questions "are so speculative that a failure to ask them could not render a conclusion by the jury that the defendant was guilty of those allegations unsafe." He also rejected the submission that the defence should be allowed to ask a single question, namely whether the complainant had confused he actions of A with those of another because the question could not sensibly be put without reference to the other material (i.e. the fact that B had made allegations of abuse against others). "To permit him to ask it [without reference to that material] would be to invite the jury to speculate why it was asked."

42. The renewed application was supported by the further skeleton argument (dated 14 July 2022). We mean no disrespect to Mr Selby in saying that he advanced essentially the same arguments as before. He emphasised his submission that it would be unfair to exclude reference to the allegations that B had made about other men, though his position in respect of those allegations was now more equivocal: "there is no guarantee that the allegations that she makes against anyone are true and it is arguable to suggest that they might not be." He submitted that the test to be applied was not that the allegations were untrue but that they might be, citing *R v M* (2009, see [32] above). He submitted that not to allow the questions he wished to put would render any conviction unsafe.

43. The Crown's response, drafted by Ms Lindop and dated 1 April 2023 was to submit that there was no basis for a suggestion that B had transposed the offending of other men onto A. Asking the questions engaged section 41. Simply asking whether B had made a complaint about other men and may have transposed their behaviour would leave too many questions unanswered for the jury. Section 41(3) was said not to apply because it was pure and unfounded speculation to suggest that B had transposed conduct of other men, Section 41(5) was said not apply as the questions went further than was necessary to rebut or explain the evidence adduced by the prosecution.

44. In his short written ruling dated 4 April 2023 the Judge rejected the defence submissions in exactly the same terms as set out in his previous ruling.

The appeal against conviction

45. The central question in the appeal against conviction is whether the Judge was wrong to exclude cross-examination of B (a) about the complaints of abuse that she had made against other men or (b) suggesting that she may have been confused about it being the appellant who had abused her rather than it being someone else. A also contends that the account he gave in interview should not have been edited out. As previously, his primary submission is that section 41 is not engaged. If that is wrong, he advances his submission on the basis that section 41(3) applies because the material relates to a relevant issue in the case and the issue is not an issue of consent. He submits that there was evidence upon the basis of which a jury could properly reach the conclusion that B got the abusers mixed up. He remains equivocal about whether B's evidence was false (i.e. knowingly false) in attributing abuse to A which either did not happen at all or was inflicted by someone else or whether it was merely mistaken. That said, he submits that "it is certainly arguable that what [B] said about the other men, "might be untrue."

46. As context for his grounds of appeal (though not as separate grounds in their own right) Mr Selby refers to difficulties with drip-feeding of disclosure; to evidence that B had

lied about things other than the infliction of abuse; and to evidence that B had refused to cooperate with the police.

47. The central submission for the Crown is that there is no scope for B to have become confused, that the questioning would be without evidential foundation and entirely speculative, and that there is no risk that the conviction is unsafe.

Discussion and resolution

48. In making his submissions to the Judge below, Mr Selby did so on the basis that B may have been "confused" in asserting that abuse inflicted on her was inflicted by A and not by one of the other men she had spoken about. This approach was unequivocal when he made his first application in April 2022, being based on his first skeleton argument which was explicit on the point. His second application was made on the same basis, though there was also the equivocal statement that "there is no guarantee that the allegations she makes against anyone are true and it is arguable to suggest that they might not be." This is barely the language of a bad character application, if indeed it was intended to be one.

49. Before us, Mr Selby attempted to draw an analogy with [25] of *AM*, where Sweeney J had in argument identified features of that case which could have led a jury to the conclusion that a previous complaint was false. We do not find the analogy helpful. As we have already indicated, what is required is an intense focus on the facts of the case in hand.

50. Given that Mr Selby's central submission was that B may have been mistaken, it is necessary to look again and in detail at what she had said of the other five males: see [23] above. What emerges is that the scope for confusion and mistakenly attributing to A abuse which she had sustained at the hands of one of the others is minimal to the point of being non-existent. There are a number of features which, singly and cumulatively, show that the suggestion of "transposition" is without evidential foundation and purely speculative.

51. First, in each case where she alleged abuse by other men, the abuse/sexual conduct alleged was distinct and distinctly different from the abuse that she said had been inflicted by A. That holds good for each of the five males, leaving on one side that (a) one man (I) she said she never met; (b) another man (F) she only met at a wedding where nothing happened, all subsequent contact being online; and (c) another, younger, man (H) was a person with whom she considered that she was in a relationship. There is no evidential foundation for a suggestion that B may have become confused about her contact with I, F or H or about the nature of their sexual conduct. That leaves E and G. Her account of one meeting with E after school and what he is alleged to have done on that one occasion (putting his hand inside her unbuttoned shirt and touching the inside of her thigh) is so far removed from her evidence against A (see [13] above) as to render the suggestion of confusion wholly implausible. With her account of G's behaviour it may (at its highest) be said that there was repeated abuse, which a young girl would be unlikely to forget; but more importantly, the abuse, though serious (kissing her and touching her vagina), was distinctly different from the yet more serious and protracted abuse that she alleged against A, with no self-evident reason why she might confuse the two abusers.

52. Second, the location where the other sexual conduct was said to have happened were distinctly different from the abuse she alleged that she had suffered from A. In each case, she said that she had never met them at the pub where A worked and, so far as she knew, they did not know A. The physical abuse by E and G took place in their cars, and the named place to which G took her was likely to be memorable for a victim and was not a place that she alleged she went to with A.

53. Third, B's account of abuse by A was supported by her immediate reaction when A contacted her on Facebook. Although not specific about what A had done, her immediate reaction was to recall and assert abuse by A, which she then followed up by contacting M. She did not react in a similar way to any of the other five men to whom she had referred.

54. Virtually the only feature that the various accounts have in common is the use of Facebook to make contact. That is hardly a recipe for confusion; to the contrary, as we have said, her immediate response to A supports the inference that she was not confused and lends no support to the suggestion that she was.

55. In our judgment, once it is accepted (as it must be) that the mere fact that B spoke of five other people is no evidential basis for a safe finding of confusion, there is in fact no evidential basis at all. Rather, adopting the language of the Judge in his first ruling, we agree that any questions would have been entirely speculative. Mr Selby submits that, although B would inevitably say that her statement was correct, it could not be predicted what she might say in answer to further questions. That seems to us to be speculation of a kind that has no place when dealing with a section 41 application. What it reinforces is the view that the Judge was right to hold that there was no evidential basis for asking the questions we have set out above. To hold that such questioning about sexual behaviour should be allowed simply because it is hoped that a complainant might change her evidence, without there being any evidential basis for challenging her evidence, would be contrary to both the objects and the terms of section 41. It would render the section 41 shield illusory at the whim of a defendant.

56. If Mr Selby's equivocal observations about there being no guarantee that what B said about the other males was true is to be taken as a bad character application, it fails for the same reason, namely that there is no evidential basis for such an assertion. It is material to remember the high threshold ("important explanatory evidence" or "substantial probative value in relation to a matter in issue in the proceedings") that must be satisfied for non-defendant bad character evidence to be admitted: section 100(1) Criminal Justice Act 2003. Mr Selby asserted that it was demonstrable that B had lied about other matters. We assume for the sake of the argument that this assertion is true. However, it does not begin to justify a conclusion that her concisely detailed account of her sexual experiences with the other men was unreliable. For the reasons we have set out, a detailed analysis of the facts of this case show that the proposed questions had no evidential foundation. The evidence that was available strongly supported an inference that she was not confused; and there was no evidence capable of rebutting or contradicting that inference.

57. We are therefore in no doubt that the Judge was right to conclude that section 41 was engaged. His conclusion that the proposed questions were speculative was fully justified and right and, on that basis alone, he was justified in concluding that

disallowing the questions (and requiring the editing of A's interview) gave rise to no risk that a conviction would be unsafe.

58. We would also uphold the Judge's ruling on the basis that the sole or main purpose of the application was to undermine B's credibility. Accordingly section 41(4) precluded the giving of leave: see *C & B* (2003, [33] supra).

59. We do not accept that this conclusion gives rise to any unfairness. While it is true that A's Defence Statement identified as a strand of his defence that "[p]erhaps she has transposed abuse she suffered at the hands of another onto this defendant", there was no basis for such a suggestion and no unfairness in a ruling that prevented him from roaming speculatively through her previous sexual behaviour. We reject entirely the suggestion that, since she would have to endure the humiliation of giving evidence about the abuse she alleged against A she would not suffer significant additional humiliation or harassment if required to answer questions about the conduct of the five other men to whom she referred in the Occurrence enquiry log report or the 5 April Statement. The very opposite is true: having to give evidence about the abuse was bad enough; having to go into the sexual behaviour of others could only and would markedly increase the humiliation and harassment and is precisely what section 41 was designed to prevent. And, for the reasons we have explained above, a stand-alone question such as "May you have been mistaken in identifying A as the person who abused you?" would have had no foundation to justify it. Given the inevitable answer that would have followed, the Judge was entitled to refuse to allow it.

60. For these reasons, which are essentially those given by the Judge, this appeal against conviction is dismissed.

Renewed application for leave to appeal against sentence

Victim personal statements

61. B, C and M all made victim statements. Each was eloquent in explaining the devastation that A's conduct had wreaked. B had been seriously affected. She spoke of a sense of powerlessness and being made to feel like a piece of meat, of a sense of shock and surreal numbness that lasted for months and could still resurface at any time. She spoke of the sense of isolation and an all-consuming silence that she had endured as a victim of sexual abuse. C spoke of the abuse controlling her everyday life and tormenting her at nights. A made her feel hidden and silenced and forgotten. He made her feel hopeless. He broke her and stole her childhood, making her feel that she had nothing left. M spoke of a suicide attempt by C and of her own overwhelming guilt as a mother for letting A do what he did to her daughter.

Antecedents

62. A had a long history of offending. Most of his 42 convictions were for acquisitive offences relating to drug abuse. He had a previous conviction for common assault against his then partner. He had no previous convictions for sexual offences.

PSR

63. The writer of the PSR had to contend with A's continued denial of having committed any offences. He was assessed as posing a high risk of re-offending and a high risk of serious harm, posing a particular risk to re-offending against children.

Sentencing remarks

64. The Judge gave the barest outline of A's offending, concluding that he had "treated both of these children as objects to provide you with sexual gratification." There were various matters referred to in the PSR that had not been proved and which he said he put out of his mind. He indicated that he would treat count 9 as the lead offence in relation to C, with counts 10 and 11 running concurrently but being treated as aggravating features; and that he would treat count 2 as the lead offence in relation to B, treating the other convictions as aggravating features. That was an appropriate approach to adopt.

65. The Judge identified the principal aggravating feature as being that these were multiple offences committed against two victims. There were in his view no mitigating features. In the Judge's view, the most significant guideline was that relating to totality. Without further explanation he identified that his starting point would be a sentence of 10 years on counts 9, 10, and 11 for the offending against C; and that it would be a sentence of 8 years of counts 2, 5 and 7, with sentences of 4 years on counts 1, 3, 4, 6 and 8, to run consecutively, giving an overall sentence of 18 years. Then, on grounds of totality he reduced the sentence on counts 9, 10 and 11 to one of 9 years and the sentences on counts 2, 5 and 8 to one of 7 years to run consecutively, giving a total on 16 years.

66. Turning then to the question of dangerousness, the Judge made a finding of dangerousness, in respect of which he imposed an additional one-year period of extended licence on count 9 as an offender of particular concern pursuant to section 265 of the Sentencing Act 2020. By this route he reached the aggregate and individual sentences to which we have referred.

A's submissions

67. Mr Selby submits that, despite saying that he put unproven matters out of mind and expressly having regard to the principle of totality, the sentence reached by the Judge was manifestly excessive. In support of that submission he points to the fact that the Judge moved up from the guideline starting point on counts 9, 10 and 11, as indeed he did on counts 1-8.

Resolution

68. Refusing leave to appeal against sentence, the Single Judge said:

> "The Judge had regard to the appropriate guidelines and adopted the categorisation agreed to be appropriate by the parties. He then increased the sentences on the lead offences to take into account the repeated nature of the offending as set out in the indictment. He was right to order that the sentences in respect of each complainant run consecutively. He then made a modest

> but appropriate reduction to the overall sentence to reflect totality. The sentences passed were stiff but not arguably manifestly excessive."

69. We agree. This was very serious sexual offending against each victim, which had to be met with lengthy sentences both in respect of the individual victims and in aggregate. There can be no criticism of the additional weighting that he placed on the lead offences and the reduction for totality that he made, though relatively modest, was sufficient to ensure that the sentence was within the range that it was properly open to the Judge to pass.

70. Subject to technical considerations correctly raised by the Registrar, therefore, we would dismiss the renewed application for leave to appeal against sentence.

71. The first matter raised by the Registrar is that section 265 of the 2020 Act applies to offenders aged under 21. Since A has at all material times been over 21, the appropriate section to apply was section 278 of the 2020 Act. It appears that this error may have been picked up and amended administratively. Furthermore, it does not appear from the transcript that the Judge followed the correct procedure of announcing the sentence on Count 9 as a single term comprising the custodial element and a further one year period of licence as indicated by the checklist provided by the Court in *R v LF & DS* [2016] EWCA Crim 561 at [27]. In those circumstances, it is right that we should declare that the sentence on Count 9 was a Special Custodial Sentence of 10 years, pursuant to section 278 Sentencing Act 2020, comprising a custodial term of 9 years and a further 1 year licence period.

72. Furthermore, it is established practice that, in a case such as this, the determinate sentence should be imposed first, with the extended sentence being ordered to run consecutively to the determinate sentence: see *R v Clarke* [2017] EWCA Crim 393 at [51].

73. Two other matters have been correctly raised by the Registrar:

    i) The maximum sentence for the offence of attempting to sexually touch a girl agreed 13-15 involving penetration contrary to section 1(1) Criminal Attempts Act 1981 is 14 years and therefore does not meet the criteria of section 244ZA Criminal Justice Act 2003. A would therefore serve half the sentence on Counts 2, 5 and 7;

    ii) The SHPO was stated on the record sheet to be imposed pursuant to section 103 of the Sexual Offences Act 2003. That section was repealed from 1 December 2020. The correct section for the imposition of the SHPO was section 345 Sentencing Act 2020.

74. We therefore give leave to appeal against sentence and:

    i) Declare that the sentence on Count 9 was a Special Custodial Sentence of 10 years, pursuant to section 278 Sentencing Act 2020, comprising a custodial term of 9 years and a further 1 year licence period;

ii) Direct that the determinate sentence should be imposed first, with the extended sentence being ordered to run consecutively to the determinate sentence;

iii) Declare that the SHPO was properly imposed pursuant to section 345 Sentencing Act 2020.

75. To that extent only leave is given and the appeal allowed. In all other respect, the renewed application for leave to appeal against sentence is refused.