Neutral Citation Number: [2017] EWCA Crim 1849

Case No: 2014/3548/B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
HIS HONOUR MR JUSTICE SWEENEY
T20130553

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2017

Before :

LORD JUSTICE TREACY
MRS JUSTICE McGOWAN
and
HIS HONOUR JUDGE BROWN, THE RECORDER OF PRESTON
(SITTING AS A JUDGE OF THE CACD)

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Between :

Regina	**Respondent**
- and -	
Rolf Harris	**Appellant**

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- -

Mr Jonathan Rees QC and Ms Julia Faure Walker (instructed by **Crown Prosecution Service**) for the **Respondent**
(Neither of the above-named Counsel appeared in the Court below)
Mr Stephen Vullo QC and Mr David Patience (instructed by **3D Regulatory Solicitors**) for the **Appellant**

Hearing dates: 7th-8th November 2017

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Approved Judgment

Lord Justice Treacy:

Introduction

1. This is a renewed application for leave to appeal against conviction and a long extension of time in which to do so. Since the allegations are of a sexual nature, the provisions of the Sexual Offences (Amendment) Act 1992 apply so that the complainants are entitled to anonymity.

2. The applicant was convicted after a trial at Southwark Crown Court on 30 June 2014 of 12 counts of indecent assault, contrary to s.14 of the Sexual Offences Act 1956. Those convictions related to four different victims: WR (Count 1); GP (Count 2); JH (Counts 3 to 9); and TL (Counts 10 to 12). On 4 July 2014 the applicant was sentenced to a total of five years and nine months' imprisonment. That has now been served.

3. Following that trial there was an application for leave to appeal against conviction in November 2014. Those grounds are not pursued in this application. The applicant now seeks to advance further grounds of appeal settled by new counsel. At the heart of this renewed application is an application to introduce fresh evidence which, it is submitted, undermines the credibility of two of the complainants, namely, WR (Count 1) and TL (Counts 10 to 12). In addition, however, it is contended that if the convictions in respect of either complainant are found to be unsafe, either because of fresh evidence or additionally in the case of Counts 10 to 12 by reason of lack of disclosure, the convictions on the remaining counts concerning GP and JH are also unsafe given the terms of the Judge's directions in summing up as to cross-admissibility.

4. After the 2014 trial the applicant earlier this year faced a further indictment containing different allegations of indecent assault against seven other complainants. In February 2017 he was acquitted of four counts, with the jury being discharged on the remaining counts after failing to agree. A further trial was held, ending in May 2017 with a jury disagreement. The prosecution did not seek a further retrial and not guilty verdicts were entered on the outstanding counts. That matter is of relevance because transcripts are available from the February 2017 proceedings of evidence given by witnesses now put forward in the fresh evidence application. In the case of three such witnesses, Raymond Piper, Peter Spencer and JW the court has heard oral evidence *de bene esse*.

5. The appellant is a well-known entertainer with a speciality in children's entertainment. He came to this country from Australia in the 1950s and became successful. The Crown's case was that he used his celebrity status to abuse young women and children sexually. It was alleged that between 1969 and 1986 he committed 12 offences of indecent assault against the four complainants named in the indictment. Those offences took place in this country. It was also alleged that in 1978/9 he had sexually assaulted JH (then aged 13) outside the jurisdiction and that between 1969 and 1991 he committed indecent assaults upon other young females outside the jurisdiction which were not reflected in the indictment but which were introduced as bad character evidence.

6. Part of the Crown's case was that the evidence of the complainants named on the indictment was cross-admissible. Its case was that there were telling similarities in the accounts of the four complainants and also in the accounts of complainants whose accounts were admitted as bad character evidence. The jury was provided with a list of similarities in a "schedule of potential relevance".

7. The defence case on all counts was one of denial. In relation to the complainants WR (Count1), GP (Count 2) and TL (Counts 10 to 12) their accounts were untruthful or mistaken. The applicant denied ever meeting WR. Any contact with any of them at the material time was entirely innocent. There was no significance in any similarities between the alleged assaults.

8. As far as JH (Counts 3 to 9) was concerned, the defence case was that the applicant had had a consensual sexual relationship with her but that it did not begin until she was 18. Allegations of earlier sexual contact were untrue.

9. The defence also maintained that due to the passage of time it was difficult for the applicant to recall with precision his movements or attendance at specific events. It was said that contemporaneous records which might have assisted in that respect were no longer in existence and that there had been difficulties in identifying and tracing potential witnesses. All of these matters were alluded to in the summing up.

Waiver of Privilege

10. The applicant signed a limited waiver of privilege and John Harding (a solicitor) and Simon Ray (junior trial counsel) provided statements regarding the extent of enquiries carried out prior to trial in relation to the allegations made by WR and TL, as well as in relation to the reading of Ms Loughlin's statement and related issues.

Ground 1 - Count 1 (WR) – The Evidence at Trial

11. The allegation was one of indecent assault by touching WR's vagina over her clothing. This occurred in 1969 when WR was aged 7 or 8 and had attended an event at the Leigh Park Community Centre in Portsmouth. We set out the evidence relied on by the Crown in the following paragraphs.

12. WR placed the incident in 1969 by reference to television reports of the first moon landings and the applicant's song "Two Little Boys" being in the pop charts. It was agreed that the song was released in the autumn of 1969. WR said she went to the event with her older brother and possibly her older sister. She recalled the applicant performing the song on stage and signing autographs. After he signed an autograph for her, the applicant had put his hand between her legs, touching her twice over her clothing. On the second occasion it was done forcefully and aggressively. She said that the applicant had big hairy hands. Although she had told the police that she might have told her brother and sister, her recollection was that she had not. She had not told her mother, who was unwell at the time. She had married in the early 1980s and told her husband about the incident after they had their first child. She had reported the matter to police in May 2013. She said she had nothing to gain from this apart from closure.

13. WR's husband said that WR, prompted by seeing the applicant on television, had told him early in their relationship that the applicant had indecently assaulted her. This was well before any revelations concerning Jimmy Savile. He could not recall the date or details, beyond saying that she had mentioned it on about four occasions, and that the first mention was prior to the birth of their first child.

14. Karen Dix, a Family Support Officer, had seen WR in 2012, before Jimmy Savile was exposed, and had been told by her that when she was aged about 7, and at a festival or similar event when living in Leigh Park, the applicant had put his hand up her skirt from behind and into her knickers. She thought WR had said that she had told her parents but that they didn't believe her or were dismissive. In April 2013 WR mentioned the matter again, saying she now felt sufficiently confident to report the matter to police.

15. WR's older brother confirmed that he used to take his sisters to the community centre on Saturdays. He did not recall the applicant having visited the centre and said that WR did not tell him that she had been sexually assaulted.

16. WR's sister said she did not recall attending the community centre for the event described, but that did not mean it had not happened. She did not recall WR mentioning an indecent assault by the applicant and said that she would recall it if had been mentioned.

17. WR's mother, MW, said that the family had moved to Leigh Park in September 1969. She remembered the children going to the community centre on a regular basis on Thursday and Saturday afternoons. All of the above witnesses' statements were read, with the exception of WR.

18. David James gave evidence saying he had lived in Leigh Park for many years. He was on a large period of leave having come back from a long tour of duty in Korea at the time of a visit by the applicant to the centre. He recalled that in about 1967 the applicant opened a nearby shop and was invited to the community centre afterwards. He said he had met the applicant and may have got his autograph for his young children. He said that the visit was not in 1978 or later when his children would have been older. Nor had he confused the applicant with other celebrities who had visited the centre.

19. Phillip Willbourn gave evidence that he lived and went to school in the area until moving away in about 1977 when he was aged 20. He recalled that the applicant visited the area in the late 1960s. He had heard about it rather than seeing him in person. He denied that he was mistaken or confusing a later visit to the area by the applicant in 1978 or in the 1980s.

20. Detective Sergeant Pankhurst accepted that the applicant had a high profile in the 1960s and that it might have been expected that a visit to the community centre would have been mentioned in the media. He said that despite extensive research no reports had been found placing the applicant in the Portsmouth area between 1967 and mid-1974. House-to-house enquiries in the locality had failed to lead to any other witnesses who recalled any celebrities visiting the area during that time.

21. Certain agreed facts were put before the jury:

> "24. The Metropolitan Police checked Portsmouth newspapers between April 1968 and May 1970. No trace was found of the event at the Leigh Park Community Centre described by WR. The police action recorded that 'all relevant lines were exhausted and no media available.'
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> 25. A police investigator attended Portsmouth Library and the British Library to examine archived editions of 'The News' Portsmouth, published between January 1967 and May 1974. He found no reference to Rolf Harris.
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> 26. The Metropolitan Police issued a witness appeal to anyone who attended Leigh Park Community Centre between 1968 and 1972 as either a child or an adult asking if anyone knew of any events held at the community centre during this time. A letter was delivered to surrounding roads on the housing estate.
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> 27. Between 12 March 2014 and 31 March 2014 the Metropolitan Police conducted enquiries in the vicinity of Leigh Park, Havant, Portsmouth. The investigator stated that the enquiries were intended 'to ascertain if any residents could recall the subject of Rolf Harris being in the area during the late 1960s or 1970s' but, 'no persons were able to assist'."

22. In addition to the summarised evidence, the Crown relied on an alleged lie told by the applicant in relation to Count 2 in asserting that he had never been to Cambridge prior to 2010/11. This alleged lie was relied on as supporting WR's evidence on Count 1 that the applicant had attended the community centre despite his assertion that he had never been there.

23. The defence case on this count was that WR was lying or mistaken in her account. About 15 years had passed between the alleged incident and her first telling anyone about it. She may genuinely but mistakenly have persuaded herself that the applicant was the person responsible. There was no record, despite very extensive enquiries, of him having visited the community centre in the late 1960s. In summing up, the judge directed the jury that they must be sure that WR had correctly identified the applicant as the person who had assaulted her.

24. We next set out evidence relied on for the defence. The applicant denied ever going to the community centre, let alone meeting WR. He said he did not have big hairy hands.

25. John Tabbener said he had lived near to the community centre except for a period between 1964 and 1967. His family were closely involved with the centre and he would expect to have heard had the applicant ever visited. He would have been in his mid-20s at the time and had no knowledge of any such visit.

26. Lorna Madden, the applicant's solicitor, provided a witness statement stating that she had attended Portsmouth Central Library and reviewed local newspapers for the period 1968-1970. Based on her research she said that the appearance of any notable

individual at the community centre would have been announced in the Portsmouth Telegraph. She had found no reference to the applicant attending the venue. Ms Madden did not give evidence but her statement was used to obtain the admissions set out above along with further admissions confirming her findings from the officer in the case.

Fresh Evidence – Count 1

27. We received evidence from a number of witnesses on a provisional basis. JW, WR's stepfather, gave oral evidence to the effect that the children, and WR in particular, would not have been allowed to go to the community centre unaccompanied. He knew of no meeting between WR and the applicant. He also said he had told the police prior to the first trial that, as a local door-to-door tradesman, he had never heard of the applicant attending the community centre, but that they had not been interested in taking a statement from him.

28. Raymond Piper was a former police officer who had risen to the rank of Detective Superintendent. He had been stationed at Leigh Park between 1968 and 1971 in close proximity to the community centre. He said he had visited the centre almost daily and said that the applicant had never attended. He said he would have known about it from posters or being informed by staff. He accepted it was possible the applicant had visited the centre without his knowledge, but thought it unlikely.

29. Peter Spencer was another former police officer who had retired with the rank of Sergeant. He had been stationed at Leigh Park in 1969 and attended the centre almost daily for CID briefings over coffee. He said that the applicant had not been to the centre for the same reasons as given by Mr Piper, but accepted that he had a lack of interest in who appeared there and that the applicant might have appeared without him noticing. The tenor of his evidence was that he did not believe that the applicant had visited the centre.

30. In addition to those witnesses who gave evidence orally we have read a statement from Joyce Burrows. She was a local resident heavily involved with the centre at the relevant time, as were her family. Her brother John Tabbener gave evidence for the defence at the trial (see above). In 1969 she had had a Saturday job at a supermarket near the centre. She did not recall that the applicant had attended the centre at any point. It was possible that there had been a visit, but as far as she knew, he did not visit.

31. Bruna Zanelli was a personal assistant to the applicant at the relevant time. Her written statement shows that she would not have booked him to attend an event at the community centre and that he would not have promoted "Two Little Boys" at such a venue. At that time it was being promoted on Top of the Pops and other similar television programmes. She also thought it very unlikely that he would have agreed, impromptu, to visit a community centre after opening a shop.

32. Daphne James was the ex-wife of David James who had been called as a prosecution witness (see above). She said he never went to Korea as a serviceman as he had claimed in a witness statement (but not in evidence). He was in fact a long-distance lorry driver who was in the Territorial Army but had never served abroad. She also said that she would have known if he had got the applicant's autograph for their

children, and he had not. Whenever he went to the community centre she always went with him. She had never heard of the applicant going there or of Mr James meeting him. She had lived in the Leigh Park area for most of the time since the late 1930s. As set out at below, information has now come to light about Mr James' antecedents.

33. All of these witnesses gave evidence at the applicant's trial on different allegations early in 2017. Their evidence was adduced pursuant to s.74(3) of the Police and Criminal Evidence Act 1984 in rebuttal of the applicant's convictions at the first trial having been adduced as bad character evidence. This evidence was called by the applicant in seeking to discharge the burden upon him to prove that he had not committed the offences presently before the court. It is relied on afresh before us. In each such case we have read transcripts of the witnesses' evidence given at trial in 2017, in addition to witness statements and/or oral evidence placed before this court.

34. For the defence, it was contended that the combined effect of this fresh evidence, when assessed with the evidence given in relation to Count 1, was to cast extremely serious doubt on the proposition that either the complainant or the applicant had attended the centre in 1969, let alone as alleged by WR. The only direct evidence to that effect, apart from WR, came from David James. Philip Willborn's evidence was secondary. This fresh evidence would have had a significant impact on the minds of a jury, which is a legitimate method of testing the safety of the conviction. The only rational conclusion to be drawn is that the applicant is innocent of the allegation.

35. On behalf of the Crown it was contended that this material did not affect the safety of the conviction. In response to the fresh evidence proffered from JW, WR's stepfather, the prosecution relied on rebuttal evidence given at the first 2017 trial from D.C. Atkin who had seen JW in 2013 prior to the initial trial. D.C. Atkin was called before us. He disputed JW's account of events, saying that no witness statement had been taken from JW since he could not add anything to that which his wife MW had said. The contact with JW was recorded and included in a schedule of unused material. D.C. Atkin refuted the assertion by JW in evidence in 2017 that he or another officer had told JW that they had a witness who could place the applicant at Leigh Park. He pointed out that at the date of the visit to JW the police had no witness other than WR who positively put the applicant at Leigh Park. The statement of David James was not obtained until 23 October 2013, by different officers, some 10 days later. He had only been identified as a witness on 18 October. We were shown documentation confirming this.

36. The Crown's overall submission was that the fresh material did not add anything of significance to the evidence before the trial jury which indicated that, save for WR and David James, extensive research could not identify anyone who recalled the applicant attending the centre. The evidence from the two retired police officers was simply further evidence within a category that had already been adduced before the jury and should not be received. Similar submissions were made in relation to Joyce Burrows. It was clear that she had been specifically considered as a potential witness by the defence at the time of the trial and a decision had been made not to call her because the defence "felt we had enough material to undermine [WR's] allegations".

37. In relation to the evidence of Ms Zanelli, the Crown submitted that there was no good reason as to why her evidence could not have been called at trial. It was clear from

his former solicitors that they had made extensive enquiries as to the applicant's movements at the relevant time and had spoken to those who provided services and support to the applicant. Moreover, if David James' account of a possibly impromptu visit to the centre was correct, the applicant himself was in a position to give evidence as to whether or not he would have done something like that. In any event, this evidence added little to the previous body of evidence.

38. Turning to JW, at trial it was clear to the defence from the statements of WR's mother, MR, and her two siblings that JW was a potential witness. Indeed, he is referred to in statements from two of those three witnesses. His name also featured in a disclosure schedule which recorded that he had no information to add to that which was contained in his wife's statement. The previous defence team had not approached JW, perhaps influenced by that entry, but in any event they had made clear that they felt they had sufficient evidence to undermine WR's allegation of presence at the centre. Much of what JW had to say duplicated evidence already given. Insofar as he went beyond that, the evidence of D.C. Atkin tended to rebut that given by JW. Accordingly, his evidence should not be received.

39. As we have noted, David James was the only person other than WR who gave evidence about Rolf Harris attending the community centre. The Crown accepts that the evidence now put forward by Daphne James potentially undermines his reliability and credibility. He claimed at trial to be able to date the applicant's appearance at the centre to about 1967 by reference to having been on leave following return from a long tour of duty in Korea. That might have been thought to be somewhat odd since the Korean War took place in the early 1950s.

40. It appears, after waiver of privilege, that the defence team did not take steps to trace members of David James' family. They were of the view that they had sufficient material to undermine WR and did not feel that further enquiries were necessary.

41. Prior to the first trial the prosecution did not disclose that Mr James had previous convictions and that he had been discharged from the RAF on medical grounds after a matter of weeks. D.C. Atkin made a statement early in 2017 setting out steps taken prior to discovering a microfiche relating to David James before the 2017 proceedings showing details of convictions for three minor offences of dishonesty (all resulting in fines) in the period 1962 to 1968, and recording discharge from National Service after 10 days for unsatisfactory performance.

42. The same information also revealed that Mr James had worked as a haulage driver between 1963 and 1969. Indeed, one of his convictions concerned dishonestly obtaining just over £1 from his employer by falsely altering a receipt.

43. The Crown submitted that whilst the new information might potentially undermine David James' credibility, in reality it was unlikely to have altered the view taken by the applicant's previous legal team that further enquiries were unnecessary. We record that Mr James has died and so was not available to comment in these proceedings.

44. Overall, the Crown's submission was that whether all or any of the fresh evidence was received, it did not operate to render the conviction on Count 1 unsafe.

The Law

45. The receipt of fresh evidence by this court is governed by s.23 of the Criminal Appeal Act 1968. The primary consideration is the interests of justice, but sub-section (2) sets out a number of matters to which the court should have regard in considering whether to receive any evidence. Those matters include consideration of the credibility of the evidence, whether the evidence may afford a ground for allowing the appeal and whether there is a reasonable explanation for not calling the evidence at the original trial.

46. As to the court's approach to any fresh evidence received, or any other matter raised before the court, it was common ground that the test for the court was whether convictions were safe, notwithstanding matters raised before us. In the absence of controversy, there is no need to develop these matters further.

Discussion of Ground 1

47. It seemed to us that by the far the most cogent evidence presented to us related to David James. That evidence came from his antecedents, revealed for the first time, as confirmed by the evidence of his wife Daphne James. We have already commented on the oddity that nobody at trial picked up on the reference made by Mr James to being on leave from a tour of duty in Korea, notwithstanding the ending of the war there about a decade and a half prior to 1969. Be that as it may, the belated disclosure of Mr James' antecedents shows that what was an apparent peculiarity on the face of his statement is transformed into something rather more significant. The information now available about his military service and employment history tends to suggest that his account of recent service in Korea was a fantasy. Mr Rees QC, for the Crown, rightly accepted that the primary duty in investigating its witness's antecedents lies with the Crown. For some reason, at the time of trial the necessary checks had not been made or had not properly been made as the subsequent investigation by D.C. Atkin showed. The relevant information was available to be found and disclosed, but that did not happen.

48. In our judgment, this was a significant failing. If the material had been obtained and disclosed at the correct time it is very doubtful that Mr James would have been called as a witness. If he had been called to give evidence, his credibility would have suffered devastating damage. The fact of his minor criminal convictions would not have made any material difference since Mr James had not re-offended since 1968, but the exposure of the truth about his military service and employment history would have been of great significance.

49. Mr James was a very important witness on Count 1. He was the only person, apart from WR, to confirm a visit by Rolf Harris to the centre at the relevant time. He confirmed the event described by WR and his evidence had emerged after a public appeal for witnesses so that he would have appeared to be independent and disinterested. His evidence was also significant because the account given suggested an impromptu visit to the centre by Mr Harris. This enabled the Crown to counteract defence reliance on the absence of reports of a visit in the media. There was some minor other supporting evidence from Mr Willbourn, but it was hearsay and somewhat vague. If Mr James is removed from the picture, WR is left on her own in

asserting an encounter with Mr Harris at the community centre in circumstances where there was a body of evidence to the contrary.

50. It is plain to us that it is in the interests of justice that we should receive the evidence of Daphne James and the antecedents of David James. In our view, this operates to weaken the Crown's case on the important issue of whether Rolf Harris ever attended the community centre in 1969 to the extent that we cannot view the conviction on Count 1 as safe. The remaining evidence of WR herself, taken together with evidence of her complaints to others prior to the exposure of Jimmy Savile, is insufficient to give us the necessary degree of confidence in the verdict on Count 1.

51. That conclusion is sufficient to dispose of the fresh evidence adduced in relation to Count 1, but we think it right to deal with the other evidence we heard or read.

52. Joyce Burrows was not heavily relied on by Mr Vullo QC. Her evidence was available at the time of trial and a decision was made not to call her. In those circumstances, it would be an unusual case in which she could now be relied on. We see no basis for doing so and decline to receive her evidence.

53. Bruna Zanelli did not in our view add materially to evidence which was already before the jury. Her evidence faces the additional difficulty that, given her role as diary keeper for Mr Harris, it is hard to see that there could be a reasonable explanation for failure to call her. We decline to receive her evidence.

54. As to the former police officers Piper and Spencer, we say at once that they struck us as honest witnesses who had been in the vicinity at the relevant time and who did not believe that a visit by the applicant to the centre would have escaped their notice. However, there was already a significant body of evidence before the jury, calling into question whether the applicant had visited the centre. We do not consider that the evidence of these witnesses changes that picture and we decline to receive the evidence.

55. JW was a witness heavily relied on by Mr Vullo. There were two particular matters which emerged from his account. Firstly, that at that time his children were not permitted to visit the centre unaccompanied, and secondly, that as a local tradesman he had no knowledge of a visit by Rolf Harris. As to that second point, his information does not add to what was already before the jury. As to the first point, having considered the statements given by other members of his family and evidence given by D.C. Atkin, we are unconvinced about the reliability of JW's assertion, although we accept his honesty. More significantly perhaps, we consider that his reliability is seriously undermined by his insistence that police officers in October 2013 told him that they had another witness who could place Rolf Harris at the community centre. Having heard from D.C. Atkin, who contradicted that assertion, we are satisfied that JW is mistaken in his recollection and have seen documentary evidence which clearly supports that conclusion. For these reasons, we decline to receive the evidence of JW.

Conclusion on Ground 1

56. In the light of our finding in relation to David James' evidence, we give leave and the necessary extension of time in relation to Ground 1. For the reasons given above, we conclude that the conviction on that count is unsafe.

Grounds 2 and 2A - Counts 10 to 12 (TL)

57. TL grew up in Australia. In 1986 when she was 15 she travelled to the UK with a theatre group. Following its final performance on 31 May 1986 the group met the applicant in a public house. It was alleged that whilst there TL sat on the applicant's knee and he touched her upper leg and vagina (Count 10), and that outside the lavatory he touched her breasts (Count 11) and digitally penetrated her vagina (Count 12).

58. TL's evidence was that on her return to Australia she did not tell her mother. She had first disclosed what had happened to her brother, in brief in about 2008-9, and then in more detail to a counsellor, Robyn Loughlin, in 2012. TL contacted Australian police on 30 April 2013. She had seen a report that British police were interviewing another Australian woman over allegations concerning the applicant. She denied in evidence that, as recorded by the police, she had recently returned to Australia after living in the UK. A police interview was arranged for 1 May 2013 but TL did not attend. She said she went to a police station but did not enter because there were press outside. She denied telling police on 2 May that the reason for her non-attendance was that she had had a car accident and had been in hospital and was moving between houses. She was interviewed on 5 May 2013 by British police. By this stage there was so much media attention that she and her partner, FM, had moved from home into a hotel.

59. On 2 May TL signed an exclusive story agreement with the Bauer Media Group, brokered by an agent. On 6 May 2013 she was interviewed by an Australian magazine for a payment of 22,000 Australian dollars. The interview appeared in an article on 20 May. On 7 May she signed an exclusive interview agreement with an Australian TV network for an agreed fee of 48,000 dollars. That interview was duly recorded and broadcast. When interviewed by the police on 5 May 2013 TL had denied that she had been offered or accepted any offers of payment for her story in relation to the applicant. In June 2013 she admitted to the police that the assertions in the May interview were untrue and gave an account of her involvement with the media, saying she regretted the earlier lies. That history was in evidence before the jury. TL said that her boyfriend, FM, was controlling and violent and wanted to make money from the media. He had persuaded her not to tell the police initially about media dealings.

60. FM had made two statements to the police which were read to the jury. They conflicted in important respects. Neither prosecution nor defence relied upon him as a witness of truth. Evidence of his bad character, including a prison sentence for an assault on TL, was before the jury.

61. Cathy Henkel, the Artistic Director of the theatre group, said that after seeing TL's interview on television she recalled her sitting on the applicant's knee, although she did not know how accurate that memory was. She had kept an eye on the younger members of the theatre group and had not noticed any problems with TL. TL's mother said that TL told her that she had had a happy time on the tour. TL had always worried about her weight, but bulimia had started after the tour.

62. There was also evidence about disclosure or complaints made by TL. TL's brother said that in 2008/2009, when the applicant was on television, TL had referred to him as a "kiddie-fiddler". Robyn Loughlin was an alcohol treatment counsellor in Australia. Her witness statement was read in evidence. She said that TL had been referred to her organisation in September 2011 and that she had started working with TL in November 2012. She had carried out an assessment on 28 November 2012 during which TL had disclosed that she had been sexually assaulted by the applicant, and she described what TL had said.

63. In addition to the foregoing evidence, there were admissions before the jury as follows:

> "28. Medical records for TL dated 10 November 2006 include that she told a doctor that she had been very upset and had been having nightmares as she had been thinking about past sexual abuse by an uncle from the age of 5 to 15.
>
> 29. Medical records and records from drug and alcohol counselling between 2011 and 2013 refer to TL disclosing a history of sexual abuse by a maternal uncle between the ages of 4 and 7 years old.
>
> 30. Medical records for TL from a Dr Leicester (consisting of two A4 pages of handwritten notes, two letters and a copy of a business card for Dr Leicester) include a counselling report from February that states: 'T presented with a number of significant effects from the sexual assault. Indeed she suffers from a range of psychiatric illnesses. For example, she has recently been diagnosed with borderline personality disorder and post-traumatic stress disorder. Equally, she has suffered from anorexia and bulimia from the age of 11 to 31. She has used alcohol as a way of trying to cope'."

64. Ms Loughlin's statement revealed that TL at the time of disclosure to her suffered from post-traumatic stress disorder, alcohol abuse, and family problems. Her children had been taken into care and she was described as emotionally fragile.

65. The applicant was interviewed by police under caution in November 2012 and August 2013 regarding the allegations. He declined to answer questions put to him but put forward written statements. In due course the judge directed the jury not to draw any inference from his declining to answer questions in interview.

66. As already stated, the applicant gave evidence denying the allegations. He relied on character evidence from a number of witnesses and on his previous good character. The applicant's evidence was that although he recalled the occasion, he did not recall TL and her account had been made up. The defence pointed to inconsistencies between the accounts given by TL and accounts which Ms Loughlin and D.S. Hogan of the Australian police reported she had provided to them. Further, the defence relied on the fact that no complaint had been made by TL about the applicant to professionals who had treated her for psychological issues over a number of years prior to her disclosure to Ms Loughlin, although there had been complaints about an

uncle. Moreover, medical records showed that contrary to the evidence of TL and her mother, TL's anorexia and bulimia had started prior to her trip to the UK.

Applicant's Submissions on Counts 10-12 – TL

67. The safety of the convictions on these counts is challenged on two main bases. The first matter relates to disclosure. Subsequent to the applicant's conviction there were civil proceedings for damages brought by TL against the applicant. In those proceedings medical reports held by a number of medical institutions concerning TL were disclosed. It is contended that the records indicate that TL suffered from more complex mental health problems and psychiatric issues than indicated by material disclosed at trial. It was submitted that the prosecution had not fully discharged its disclosure duties under s.3 of the Criminal Procedure Investigations Act 1996 and that the verdicts were thereby rendered unsafe.

68. The safety of the convictions was also challenged on the basis of fresh evidence from Liz Bowsher, described as a defence researcher. We have considered her witness statement on a provisional basis. Ms Bowsher has produced a chronology of Australian media reporting concerning the applicant between October and December 2012. This indicates that on 29 November 2012 the applicant was first named on Twitter as the subject of police investigations and was followed by less specific newspaper coverage. Accordingly, it is said that Ms Loughlin's evidence of disclosure on the preceding day was highly significant and called for live evidence and cross-examination of Ms Loughlin.

69. In addition, it is asserted that the judge was in error in summing up in referring to the date of TL's referral to the counselling service (13 September 2011) in the context of the timing of her disclosure and in his observation to the jury that TL's disclosure had taken place "long before there was any prospect of media involvement at all".

70. We have read the statement of Kate Prestidge, the applicant's solicitor in the civil proceedings, setting out the details of material disclosed which it is submitted should have been disclosed at trial. We have examined that material.

71. Additionally, reliance is sought to be placed upon evidence from Ms Bowsher of details of an alleged sexual assault given in a television interview by Jimmy Savile's great-niece on 22 October 2012. It is asserted that the details are strikingly similar to the assault alleged by TL against the applicant.

The Crown's Response

72. The Crown's position is that investigators took reasonable and appropriate steps to discharge their duty to pursue all reasonable lines of enquiry to identify relevant material in medical records concerning TL held by third parties. It is submitted that notwithstanding the additional material which has emerged since the trial the convictions remain safe. As far as the fresh evidence of Liz Bowsher is concerned, Ms Loughlin's evidence suggested that TL was unaware that the applicant had been named publicly until a later date, namely, April 2013. This was then followed by contact with the police on 30 April 2013. The defence had Ms Loughlin's statement and were aware of the date of TL's complaint. They had decided to permit the

statement to be read. Accordingly, the evidence should not be admitted. In any event it did not afford a ground for allowing the appeal.

73. As to the similarity between TL's account and that of Jimmy Savile's niece, a decision had been taken at trial not to recall TL for cross-examination on the basis that her account had been based on that of the niece. In those circumstances, this part of Ms Bowsher's evidence was not admissible.

Discussion on Counts 10-12

74. The first area of challenge arises from what is said to be a failure by the Crown in its duties under s.3 of the Criminal Procedure and Investigations Act 1996 to disclose material which might reasonably be considered capable of undermining the case for the prosecution or assisting the case for the defence. Reference was made to the decision of this court in *R v Flook* [2010] 1 Cr App R 30. There, this court noted that the 1996 Act did not make special provision in relation to materials held overseas by individuals, companies or foreign governmental authorities. The court stated that nonetheless it was the obligation of the Crown, whether as investigator or prosecutor, to pursue reasonable lines of enquiry in relation to material that might be held overseas in states outside the European Union. If it appeared that there was relevant material, the Crown must take reasonable steps to obtain it.

75. Subsequent to the trial and conviction of Mr Harris, TL instructed solicitors to bring a civil claim against him. Ms Prestidge, representing Mr Harris in those proceedings, in due course received disclosure of medical records pertaining to TL. By that means, Ms Prestidge was able to identify and obtain still further records. It is those further records accumulated in the process of the civil proceedings which have enabled the applicant to pursue this argument.

76. The court has seen copies of the relevant records. It is clear that the records now provided show a greater number of consultations between TL and medical or counselling services than had been disclosed by the Crown at the trial.

77. Mr Vullo's submission is that those documents had been obtained with relevant ease so that the Crown had not discharged its duty under s.3. It was submitted that the further material was relevant in that it showed a greater degree of contact between TL and professional services in the decade or so prior to her complaint to the police. Moreover, it was significant because the only complaints of sexual abuse recorded were made on frequent occasions and referred to an uncle, with no reference being made to the applicant. For the Crown, it is asserted that the steps taken to obtain medical information on TL held by third parties were reasonable in the circumstances, apparently using the assistance of the Australian Federal Police.

78. Whilst we have some reservations about whether reasonable steps were taken by or on behalf of the Crown to obtain the medical records, the matter was not investigated in any detail before us. This was, no doubt, because the parties recognised that even if it be assumed that there was a failure to discharge disclosure duties, the question for us would in any event be whether the material now available has any significant impact upon the proceedings below.

79. It was frankly acknowledged by Mr Vullo that the additional material did not provide anything other than a repetition and reinforcement of information already available to the jury. The phrase he used was "there is no smoking gun". We think this is important.

80. The evidence before the jury presented a picture of a troubled and unfortunate woman. The jury was aware of diagnoses of post-traumatic stress disorder and borderline personality disorder. TL had suffered from family problems, an abusive relationship, and her children had been removed from her care. She also had had eating disorders and depression, and was assessed as emotionally fragile at around the time she made her complaints. The jury knew that she had sold her story to the media more than once and that initially she had lied to the police about that. The jury also knew that over a significant period of time prior to her complaint about Mr Harris, she had complained to doctors and other professionals about sexual abuse of her by an uncle when she had been younger, but had made no complaint whatsoever about Mr Harris. It is perhaps significant that at trial the defence made no application under s.8 of the 1996 Act for further disclosure. That suggests that the information referred to above was considered to be sufficient for their purposes, even when it must have been apparent that further information might well be available.

81. Having examined the further material it is apparent that although the picture already painted is confirmed in more detail, there is nothing new which might have assisted the defence or undermined the Crown. Importantly, there is nothing in the records we have seen to show that TL was a fantasist or that she was likely to make false allegations. The jury was already fully aware that over a number of years of contact with medical and other professionals, the only allegation of sexual misconduct related to an uncle and not to Mr Harris.

82. In those circumstances, we do not think that this evidence would provide a basis for allowing an appeal and we decline to receive it in evidence.

83. We turn next to the issue raised about a television interview given by Jimmy Savile's great-niece which was said to contain details of a sexual assault which bore similarities to TL's complaint. The defence were aware of the YouTube video relating to Jimmy Savile. There is an issue raised as to whether the defence were under a misapprehension as to the date of TL's complaint to Ms Laughlan, to which we will return later, but it is clear that in any event careful consideration was given as to whether it would be wise to use the video to cross-examine TL and suggest that her account might have been derived from it. We have seen an e-mail from then junior counsel, Mr Ray, sent to the rest of the defence team during the trial. It is clear that there was serious concern that the point might backfire at a time when it was considered there were already strong reasons to put forward suggesting that TL was unreliable. There was concern that those points could be diminished if reliance was placed on the YouTube video. It was thought that the jury might conclude that the description of what was done was "an obvious and unremarkable method by which to commit the assault". The defence were keen not to implant in the jury's minds similarities between Rolf Harris and Jimmy Savile.

84. That reasoning is entirely understandable and accords with our own reaction. The decision not to use this material was in our view a sound tactical decision. It is not the purpose of appellate proceedings to allow a second bite of the cherry in such

circumstances and we decline to receive this evidence. Any question of a misunderstanding about the date of first complaint to Ms Loughlin was of little moment in the making of the decision by the defence.

85. We turn to submissions arising from the date of the first complaint about Rolf Harris to Ms Loughlin on 28 November 2012. Ms Loughlin's statement to that effect was read at trial and the contention now made is that she should have been challenged as to the date but was not, because of a misapprehension by the defence team to the effect that TL's first complaint had been made in September 2011. The basis for testing Ms Loughlin's fixing of the date was said to arise from the fact that Ms Bowsher's researches showed that in the days following 28 November 2012 a tweet referred to Mr Harris as being under investigation for sexual assault, and Australian newspapers had reported that an Australian entertainer in his 80s was under investigation (without naming Mr Harris). In essence, if Ms Loughlin had been cross-examined and the date of complaint then moved to one later than 28 November, it would enable the defence to suggest that TL had been influenced in her complaint by that publicity.

86. There are a number of difficulties with this approach. There was evidence that TL had, in about 2008, complained to her brother about Rolf Harris. That was supported by evidence from the brother, although he had not appreciated at the time that the comments made by his sister represented TL's own experience. Secondly, although an in-trial e-mail which we have seen appears to show that junior counsel had at one point misapprehended the date of complaint to Ms Loughlin, examination of his papers and those of leading counsel show that both had highlighted the date of 28 November 2012. Further, we have seen contemporaneous documentation created by Ms Loughlin which shows that the date of the assessment was 28 November 2012, as described in her witness statement. The documents refer to an allegation of abuse but, in keeping with the clinic's policy, did not record the alleged perpetrator.

87. A decision was made not to seek to recall TL for cross-examination on this issue or to require Ms Loughlin as a live witness. Mr Ray's witness statement is very careful to state in Ms Loughlin's case that he cannot recall whether he was involved in the decision, but that such decisions were not made without discussion and careful consideration. In the case of TL, he states that "it is relevant to note that the timing of TL's complaint to Ms Loughlin was only one factor that led me to advise not to seek the recall of TL to the witness box".

88. Whilst the e-mail he sent during the trial considering the possible recall of TL for cross-examination seems to show that he was under a misapprehension as to the date of complaint to Ms Loughlin, there is no material to show that any other member of the legal team was under the same misapprehension. There had been two versions of Ms Loughlin's statement served. Only the second statement contained the date of complaint. Both leading and junior counsel had marked the relevant date in their papers and there is no reason to believe that leading counsel fell into the same error which Mr Ray made in his e-mail.

89. In any event, the force of this point can be tested by posing the question of what would have happened if matters had proceeded as it is now suggested they should. If TL had been recalled or if Ms Loughlin had been required to give evidence and the point as to date of complaint to Ms Loughlin had been raised, the mistake which

junior counsel had made would have come to light and it would have been seen that TL made her complaint to Ms Loughlin prior to any reference on Twitter to Rolf Harris and prior to more general comment in the Australian media stating that "an Australian legend" was being investigated by British police. Thus the point would not have assisted the defence, and might have reinforced TL's credibility with the jury.

90. We note in this context that there was evidence both from TL and Ms Loughlin to the effect that when Mr Harris's name emerged in the mainstream media in April 2013 as the focus of an investigation into sexual assault, TL had reacted in a manner, in the presence of Ms Loughlin, which suggested to Ms Loughlin that only at that point had TL become aware of other complaints about Mr Harris. It was this disclosure in Australian mainstream media which was closely followed by TL's complaint to the police. It seems to us that this sequence of events demonstrates that no harm was done to Mr Harris's case by a failure to challenge Ms Loughlin as to the date when TL complained to her. The documents we have seen, as we have already said, fix that date in a way which would have made challenge to it unproductive. Accordingly, this particular argument fails. The fresh materials relied on do not afford a basis for allowing the appeal and we decline to receive them.

91. The remaining point made in the written grounds about the error in summing up was not pursued in oral submissions. Nothing was made of the slip at the time, suggesting that the judge's slip was an inconsequential error. The judge had at another point in a necessarily lengthy summing up given the correct date. We consider this to have been a minor error in an otherwise admirable summing up which could not even arguably affect the safety of the convictions.

Conclusion on Counts 10-12

92. Having considered the various matters raised in relation to these counts, we conclude that nothing arises which could impugn the safety of these convictions.

Ground 3 – Cross-admissibility

93. The defence submitted that if any of the convictions on Count 1 and Counts 10 to 12 were unsafe, the remaining convictions were unsafe, since the judge had given a cross-admissibility direction in relation to all counts. The Crown resisted this and urged that even if convictions on Count 1 and Counts 10 to 12 were unsafe, it did not affect the remaining verdicts. The Crown pointed to a schedule of potential relevance identifying a number of common features between the complaints of WR, GP, JH and TL themselves and with the accounts of a series of witnesses which had been adduced by way of bad character evidence. That evidence related to a number of other young females who alleged that they had been indecently assaulted by the applicant outside the jurisdiction prior to 1997.

94. We summarise the effect of the bad character evidence.

    i) CM (statement read) said that in 1989 when she was aged about 11 she was visiting the home of family friends in Australia where the applicant was a house guest. He said he wanted to be the first to "tongue-kiss" her. He held her in a gentle hug, leant forward and put his tongue in her mouth. In his evidence, the applicant accepted visiting the house and that he must have met

CM. He said the incident simply did not happen and he did not know why CM would lie.

ii) MC (statement read) said that she met the applicant in 1970 when she was 16 at a private party in New Zealand. She obtained his autograph which she produced, together with a photograph of them together at the event. The applicant was friendly and asked her to dance. While they danced he put his hand down her back onto her bottom and then moved his hand to the front of her dress and up between her legs to her crotch. The applicant said that although he had been to New Zealand many times he had no recollection of the party. However he accepted, having seen the photograph and autograph, that he must have met MC there. He denied any assault and said that MC was lying although he did not know the reason why.

iii) FW said that in 1970 when she was 18 she visited Malta for a holiday. She met the applicant while seeking assistance in a bar for a friend who had been injured. Later that day she had a drink with the applicant and he offered to show her some art in a public area of the bar. Once in that room he shut the door and tried to kiss her. Initially she was flattered but then he started to touch her breasts and put his hand into her knickers and digitally penetrated her vagina against her wishes. He also placed her hand on his penis through his clothing. In evidence the applicant accepted that he had met FW, since she had produced a photograph of them eating. He said that he had no recall of her and that her account of sexual assault was a fabrication.

iv) Tony Porter, a retired actor and journalist, said that in about 1983-1985 whilst working on a pre-recorded television series with the applicant he saw him tickle a female make-up artist's breasts as she applied make-up, and heard him making lascivious noises. The make-up artist was in her late 20s or mid 30s and clearly did not like it. The applicant said he had no recollection of Mr Porter, but he had not indecently assaulted the make-up artist and was allergic to face powder.

v) SD was a make-up artist who said that in 1986, when she was 24, she was responsible for the applicant's make-up for a television production in Australia. Filming took place over eight hours. The applicant had run his hand up the inside of her leg and inside her shorts a number of times during that day. The applicant's brother had been present on one occasion and there was an all-male crew. She had been upset and had complained to her supervisor. The applicant gave evidence that he had never taken part in a show which had lasted eight hours. He was allergic to powder and SD was simply imagining the incident. The applicant's brother gave evidence in which he said he had no recollection of an eight-hour production. The allegation that groping took place in his presence was ridiculous and he would have stopped it.

vi) JH said that the applicant hugged her when they were introduced at an event at a hardware store in May 1991. At the time she was about 16. The applicant put his hand on her breast and his other hand on her buttock. When she stepped back he had laughed. She had told her mother, who was present, that he was a dirty old man. JH's mother said that the applicant had focussed on

her daughter and confirmed that her daughter had stepped away from close proximity to the applicant. He had told her that he was "very handy". Her daughter had refused to participate during his act. The mother also said that the applicant had rubbed himself against her briefly but forcefully whilst a photograph was taken. She had trodden on his foot, looked him in the eye and told him that he was a disgusting creature. His expression changed from a smile to a sneer and he leaned forward saying that "she" (her daughter) had "liked it". The applicant accepted he had attended the event and had met JH and her mother. A photograph of the three of them had been produced. He denied indecent assault.

Discussion on Cross-admissibility

95. The judge gave the jury a direction which covered not only the counts on the indictment but the incidents of bad character evidence set out above. No criticism is made of the terms of those directions or of additional directions in response to a jury question. At the heart of those directions was the consideration of the unlikelihood of a series of false similar complaints being made independently by unconnected complainants. The question of independent complaint was left to the jury to assess, along with their appraisal of the value of similarities. Defence submissions as to those matters were properly put before the jury.

96. As is already clear, we have concluded that the conviction on Count 1 cannot be safely sustained. Mr Vullo's submission was that quashing of even a single count would suffice to render the remaining convictions unsafe. He argued that that unsafe conviction had the effect of poisoning the minds of the jury on the remaining matters. He placed reliance on the recent decision of this court in *R v Morris* [2016] EWCA Crim 2236. We did not find that decision of assistance. It was plainly based on the facts of that case where cross-admissibility arose as between two complainants, one of whom had given materially misleading evidence.

97. We note that although the judge told the jury they could apply the principle of cross-admissibility if they saw fit after evaluating the evidence, he had also directed the jury to give separate consideration to each count with the possibility of differential verdicts, depending on their view of the evidence. There has been no fresh evidence adduced which directly touches upon the counts involving GP or JH. There has been no fresh evidence which touches upon the bad character evidence. There has been no discrete submission of any sort challenging any of that evidence. Count 1 differed from the other counts in the sense that there were real issues as to whether Mr Harris had ever visited the community centre and whether he had been correctly identified by WR. In that respect, Count 1 was different from the remaining counts.

98. We do not accept that the approach urged by Mr Vullo is the correct one. The issue for us is whether the removal of Count 1 from the picture renders the remaining convictions unsafe. Our conclusion is that it does not. The primary evidence relating to GP and JH remained intact, as did the body of bad character evidence. The subtraction of a single allegation does not in our view have significant impact where there was abundant remaining evidence. We note that in relation to GP, evidence emerged of an alleged lie told by Mr Harris, and that in relation to JH there was a letter written by him to JH's father in 1997 which, on one interpretation, represented a calculated attempt to avoid the police being informed and whose terms indicated that

it had been written by someone who knew perfectly well that he had been abusing her since she was 13.

99. Stepping back and looking at the totality of the evidence of Counts 2 to 12, including the bad character evidence, we find nothing that causes us to doubt the safety of those convictions.

Conclusion on Cross-admissibility

100. This ground is not properly arguable for the reasons given above.

Overall Conclusions

101.

i) The conviction on Count 1 is quashed as unsafe, leave to appeal and an extension of time having been granted.

ii) Leave to appeal is refused on Counts to 2 to 12 inclusive. The applications relating to those counts are refused.

iii) We have considered the question of re-trial on Count 1. The Crown does not seek a re-trial. We agree that one is not in the public interest and make no order in that respect.