Judgment Approved by the court for handing down.

Neutral Citation Number: [2023] EWCA Crim 954

Case No: 202300268 B4

IN THE COURT OF APPEAL, CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT
AT MANCHESTER, CROWN SQUARE
HH Judge Henshell
T200375433

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE GOOSE
and
SIR ROBIN SPENCER

- -

Between:

ANDREW MALKINSON	**Appellant**
- and -	
THE KING	**Respondent**

- -
- -

Edward Henry KC and Max Hardy (assigned by **The Registrar of Criminal Appeals**) for the **appellant**
John Price KC and Peter Grieves-Smith (instructed by **CPS Appeals Unit, Special Crime Division**) for the **respondent**

Hearing date: 26th July, 2023

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Approved Judgment

Lord Justice Holroyde:

1. Twenty years ago, on 19th July 2003, a young woman was attacked and raped as she walked to her home in the early hours of the morning. We shall refer to her as "C". On 10th February 2004 Andrew Malkinson ("the appellant") was convicted of attempting to choke, suffocate or strangle C with intent to commit an indictable offence, namely rape, and of two offences of rape. He was subsequently sentenced to life imprisonment. He has always denied committing any of the offences. He now appeals against conviction, putting forward five grounds of appeal. At the conclusion of the hearing on 26 July 2023 we announced that his appeal would be allowed on the first of those grounds, and his convictions quashed. We indicated that we would give our decision on the other grounds of appeal, and our reasons, in a written judgment. This we now do.

2. C is entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime no matter may be included in any publication if it is likely to lead members of the public to identify her as the victim of the offences.

3. A further reporting restriction applies to this case. Another man, to whom we shall refer as "Mr B", is now implicated in the offences. In order to avoid a substantial risk of prejudice to the administration of justice in a prosecution of Mr B we have made an order, pursuant to section 4(2) of the Contempt of Court Act 1981, that no report of these proceedings or of this judgment shall include the true name of Mr B, or any detail which may lead to the identification of Mr B. This order shall remain in force until further order of this court or, if earlier, until 16 August 2023.

Summary of relevant facts

4. The facts of the offences are shocking. For present purposes, it is sufficient for us to outline them briefly. C was attacked from behind and forced to a secluded place. She did not know her attacker, but was later able to give the police a description of him. He ordered her to throw away her mobile phone. He removed his shirt, restrained C on the ground, straddled her and choked her. Despite her entreaties, he continued to apply pressure to her throat. In her efforts to resist she believed she scratched his face. She then lost consciousness. Whilst unconscious, she was raped both vaginally and anally.

5. C suffered a number of serious injuries. In particular, her left nipple was partially severed, this injury being consistent with a bite. She was medically examined, and forensic samples taken, by a deputy police surgeon, Dr Anderson. The injuries recorded by Dr Anderson in a witness statement included "broken fingernail middle finger right hand". The samples taken included fingernail scrapings from both hands, and fingernail cuttings from the left hand.

6. On the afternoon of 19 July, and on 23 July 2003, a police crime scene investigator, Ms Evans, took photographs of C's injuries. Ms Evans' witness statement records that she gave all the resultant photographic negatives a single exhibit reference number, and that the negatives were processed and "made up into albums".

7. Two police officers, who had spoken to the appellant in relation to a traffic stop some weeks earlier and recalled his appearance, visited him at his place of work on 20th July 2003, only hours after the offences were committed. He had no visible injury to his face. He was arrested on 2nd August 2003. From the outset, and when interviewed under caution, he denied the allegations. He agreed to take part in identification procedures and to give DNA samples, saying that scientific evidence would show his innocence.

8. At a video identification procedure on 3rd August 2003 C picked out the appellant, saying that she was sure he was her attacker.

9. Two other persons, Michael Seward and Beverley Craig, told the police that they had been out together in the early hours, and had seen a man and a woman near the scene of the crimes. They each gave a description of the man.

10. On 3rd August 2003 Beverley Craig took part in a video identification procedure. After viewing the parade tape twice, she asked to look again at the images of the men numbered 1 and 4. The appellant was number 4. Beverley Craig picked out number 1. Immediately after the procedure had ended, however, she told a police officer that she had picked the wrong man and that she was sure that number 4 was the man she had seen.

11. Michael Seward did not attend an identification procedure until 14th January 2004, by which time he had read descriptions of the attacker in the press and had seen an e-fit drawing of the attacker. He picked out the appellant.

The trial

12. The appellant was charged with four offences: attempting to murder C (count 1); attempting to choke, etc, C (count 2, which was an alternative to count 1); vaginal rape (count 3); and anal rape (count 4). He stood trial before HH Judge Henshell and a jury in the Crown Court at Manchester, Crown Square. It was not in dispute that C had been attacked and raped. The prosecution case was that the appellant was the rapist, and that he had worn a condom so as to avoid leaving any evidence by which he could be identified.

13. C gave evidence describing the attack upon her. She said that she had scratched her attacker's face on the right side, from near his eye down towards his jaw, and must have caused some sort of scratch or mark because she had dug her nail in. She said that in doing so, she had broken the nail on the ring or middle finger of her left hand.

14. The prosecution relied on the evidence of C, Beverley Craig and Michael Seward to prove the identity of the attacker. Those three witnesses were cross-examined on the basis that they were mistaken in their identification of the appellant. As the judge reminded the jury in his summing up, it was accepted by the defence that all three witnesses were honest: it was not suggested they were lying. It was also accepted by

the defence that the man seen by Beverley Craig and Michael Seward – whoever he was – must have been the rapist.

15. We need not go into detail about the other evidence on which the prosecution also relied, save to mention that the statement of Dr Anderson was read to the jury by agreement, and that a small number of photographs of C's injuries were shown to the jury. As we understand it, these had been taken from one of the albums prepared by Ms Evans, and were limited to images showing C's face and body, but not her hands.

16. There was no scientific evidence which could support the identification of the appellant. Although DNA profiles had been detected in samples recovered from C or her clothing, it was only possible to identify a major contribution from C herself, with no clear profile of any other donor. At the time of the police investigation and the trial, the limits of DNA analysis did not permit any further findings.

17. The appellant, then aged 38, gave evidence in his own defence. He denied any involvement in the offences, and said that the identifications of him by the three witnesses were mistaken. He told the jury that he had one previous conviction for an offence of criminal damage many years ago, and had been imprisoned in another country for a passport offence, but had no previous convictions for any sexual or violent offence.

18. The judge in his summing up emphasised that the central issue in the case was as to identification, and that the jury must come to their own judgement as to whether a witness was honest, accurate and reliable. He directed the jury:

> "Have the Crown proved – and when I say 'proved', I always mean made you sure – that the defendant was the attacker? If you cannot be sure of that, then you must acquit the defendant of all of these allegations. … The case against the defendant depends wholly on the correctness of the identification of him by [C], Beverley Craig and Michael Seward, which he alleges, in each case, to be mistaken."

19. The judge went on to direct the jury, in conventional terms, about the special need for caution before convicting a defendant in reliance upon evidence of identification. He reminded the jury of the circumstances in which each of the witnesses had seen the man they alleged to be the appellant. He pointed out, as weaknesses in the identification evidence, the facts that the appellant did not have a cut on his face; that the appellant had tattoos on both his arms, a feature not mentioned by C; and that Beverley Craig had changed her mind at the identification procedure. He directed the jury that there was no scientific evidence which could support the identification evidence, but that the evidence of each of the three witnesses was capable of supporting the evidence of the other two, provided the jury were sure that each was an honest and reliable witness.

20. We need say no more about the judge's directions of law. They were appropriate and correct on the basis of the evidence given at trial, and are not criticised in the grounds of appeal.

21. When reminding the jury of the evidence, the judge referred to C's belief that she had scratched her attacker's right cheek with the middle finger of her left hand. He pointed out that the defence emphasised the fact that the appellant had no trace of any such injury. He recalled that when giving her evidence about scratching her attacker's face, C – who told the jury she was right-handed – had held out her left hand and indicated the middle finger. He then reminded the jury of Dr Anderson's evidence that the fingernail was missing from the middle finger of C's right hand, and invited the jury to consider what that told them about C's memory of this particular detail. He continued:

> "Does she really remember scratching the right side of the face of her attacker with her left hand? At the end of her evidence, she said that the scratch which she thought she had inflicted was the only time she had touched him and she said this, that it was the last lash-out as she was being strangled; it was the last thing she did before she became unconscious. If she may have scratched the attacker, then the person responsible for the attack cannot be the defendant. If, after examining all of the evidence, you are sure that she is mistaken on this detail, then you may safely exclude it, but notice the words I use. If and only if you are sure she is mistaken on that detail may you safely exclude it."

22. In the course of their retirement, the jury sought the judge's help on a number of matters. One of their notes to the judge requested him to "re-read summing up in relation to the scratch".

23. The jury found the appellant not guilty of attempted murder, but convicted him of the other three offences. He was, as we have said, sentenced at a later date. Although the minimum term of his life sentence was specified as 6 years and 125 days, he in fact remained in custody for some 17 years before being released on 18 December 2020 subject to the conditions of his life licence. Throughout those many years, the appellant adamantly maintained that he was innocent of the crimes and had been wrongly convicted. He did so in the knowledge that he was thereby delaying his release from prison.

Attempts to overturn the convictions

24. An appeal against conviction, on grounds different from those advanced today, was dismissed by this court in 2006. The judgment of the court on that occasion is publicly available under neutral citation number [2006] EWCA Crim 1891.

25. The appellant, assisted by his present legal representatives, thereafter made two unsuccessful applications to the Criminal Cases Review Commission ("CCRC"). We need not go into the details of the matters raised in those applications.

The CCRC's reference

26. The appellant then made a further application, relying on developments in DNA analysis, and in particular on the possibility of carrying out DNA analysis focusing on the Y chromosome, which targets exclusively the DNA left by male contributors.

This led the CCRC to commission further scientific investigations. Important exhibits, including C's vest top and other items of her clothing, had by this time been destroyed by the police; but fortunately, samples which had been recovered from the clothing had been preserved in a forensic archive.

27. Cellular material, in which DNA was detected, was recovered from a sample of what could be saliva taken from the left upper front of C's vest top and from a sample taken from the left cup of her bra: it will be recalled that C had sustained an injury to her left nipple which was consistent with a bite. The analysis of the sample taken from the vest top indicated the presence of DNA from at least two males. Some of the male DNA could have come from C's partner. Some could have originated from a man who could also have contributed to male DNA in a sample recovered from the left cup of C's bra. A check against a police database showed that the DNA profile on those samples matched the DNA profile of the man we have referred to as Mr B.

28. The key scientific findings may be summarised as follows. None of the additional testing provided any indication of DNA from the appellant on any of the samples. The findings therefore provided no support for the view that the appellant had been in contact with any of the items examined. However, all of the Y-STR DNA components detected could be accounted for by contributions from C's partner and Mr B. The very experienced scientist who conducted the testing and analysis (including by the use of techniques which were not available at the time of the trial) estimated that the findings would be at least one billion times more likely if the DNA detected had originated from C, Mr B and another unknown person rather than if it had originated from C and two other unknown people.

29. In addition, some of the male DNA extracted from another sample from the left upper front of the vest top could have originated from Mr B. The estimated frequency of occurrence for the components not accounted for by DNA from C's partner, and assumed to represent DNA from one other male, was approximately 1 in 28,000. Some of the DNA detected in cellular material recovered from the left cup of the bra could also have originated from Mr B, the findings being within the range of the scientist's expectations if Mr B had been in contact with C at some time.

30. Further, Y-STR profiling revealed DNA which could have come from Mr B in nail cuttings or scrapings taken from C's left hand, and in three other samples taken from C or from an item of her clothing. In addition, further testing commissioned by the respondent detected DNA which could have come from Mr B on a speculum used during the internal examination of C.

31. The CCRC considered that the presence of identifiable and unexplained DNA on the vest top, which might be crime specific and which did not match the appellant, gave rise to a real possibility that the convictions may be overturned. They rightly noted that the significance of the findings in the appellant's case did not depend on whether or not Mr B was charged with the offences. They concluded that if the DNA now available had been available at the time, there is a real possibility that the appellant may not have been convicted, and indeed may not have been prosecuted at all.

32. The CCRC referred the case to this court, pursuant to section 9 of the Criminal Appeal Act 1995, because they concluded that there was a real possibility that new

evidence would be received by this court on appeal and that, if it were received, this court would find the convictions unsafe.

33. In their careful Statement of Reasons, the CCRC focused on the new scientific evidence as the basis of their decision to refer to case to this court. They referred to two additional issues which contributed to the conclusion that the convictions would be found unsafe and were therefore supportive of the referral. First, the new scientific evidence included further DNA findings which, although of very limited probative value, could have come from Mr B. Secondly, photographs of C's hands which were taken shortly after the incident, but which may not have been disclosed to the defence prior to the trial and have only recently come to light, were relied on by the appellant's advisers as contradicting Dr Anderson's evidence and supporting C's account of scratching with her left hand.

34. The CCRC also considered submissions on behalf of the appellant in relation to the criminal records of the witnesses Beverley Craig and Michael Seward. The CCRC found no clear evidence as to whether or not this information had been disclosed to the defence prior to the trial; but even if it had not, the CCRC concluded that the information did not give rise to a separate ground for referral, though it might be supportive of the sole ground for referral.

35. We have summarised very briefly the long series of endeavours which have ultimately resulted in the present appeal to this court, and the mass of scientific and other evidence which has been considered. For present purposes, it is unnecessary for us to do more. We must, however, add two observations. First, we pay tribute to the determination and persistence shown by the appellant and by his legal representatives in their protracted efforts to bring the case before this court. Secondly, we emphasise that the new medical evidence has become possible through a combination of scientific developments and the retention and preservation of the relevant samples. The scientific analysis which is now relied upon could not have been made at the time of the trial, or for many years thereafter.

The grounds of appeal

36. By section 9(2) of the 1995 Act, a reference to this court by the CCRC shall be treated for all purposes as an appeal under section 1 of the Criminal Appeal Act 1968. It follows that, in relation to the one ground on which the convictions have been referred by the CCRC, the appellant did not need to apply to this court either for an extension of time or for leave to appeal.

37. The effect of subsections 14(4A) and 14(4B) of the 1995 Act is that the appeal may not be on any ground which is not related to any reason given by the CCRC for making the reference, unless this court gives leave.

38. On behalf of the appellant, Mr Henry KC and Mr Hardy submit that the convictions are unsafe. They argue that the crucial issue at the trial was as to identification, and that the new scientific findings discredit the evidence identifying the appellant. They put forward five grounds of appeal, and seek to adduce fresh evidence in support of those grounds.

Ground 1

39. The first ground, which does not require leave, is that referred by the CCRC: namely, that the fresh DNA evidence provides no support for the prosecution evidence identifying the appellant and, on the contrary, implicates Mr B. In relation to the key finding of the scientist, it is submitted that the location of the cellular material recovered from the vest top was consistent with the depositing of saliva when C's left nipple was bitten. Other significant findings could also be regarded as relating to DNA from cellular material recovered from crime-specific areas. It is further submitted that Mr B lived at the time close to the crime scene, fitted C's description better than did the appellant, had relevant previous convictions and had no clear alibi.

40. The remaining four grounds, all of which it is acknowledged require leave, are relied on individually and collectively as showing that important material which undermined the reliability and credibility of identification evidence was not disclosed to the defence, with the result that the appellant did not have the fair trial to which he was entitled under article 6 of the European Convention on Human Rights. The grounds are as follows.

Ground 2

41. It is submitted that there was material non-disclosure of the photographs of C's hands, which it is said show that the fingernail of C's right middle finger was not damaged, but that the nail on her left middle finger was noticeably shorter than her other fingernails. It is submitted that these photographs contradict the evidence of Dr Anderson, on the basis of which the jury could have doubted C's evidence that she recalled scratching her attacker's face. The significance, it is submitted, is that the judge directed the jury that they must acquit the appellant if C may have scratched her attacker's face. Although the CCRC could not establish conclusively whether the photographs were disclosed, the court is invited to infer that they cannot have been.

Ground 3

42. It is submitted that there was material non-disclosure of the records of previous convictions of Beverley Craig and Michael Seward, despite a written request for such information in relation to all prosecution witnesses. It is submitted that each of those witnesses was put forward at trial as an honest person acting out of a sense of civic duty, whereas the records show that each had been convicted of offences of dishonesty. Although there is a written record of disclosure of previous convictions in relation to other witnesses, there is no such record in relation to these two witnesses. Again, the court is invited to infer that disclosure cannot have been made.

Ground 4

43. It is submitted that there was material non-disclosure of the fact that Michael Seward, both at the time when he came forward as a witness and at the time when he attended the identification procedure, was facing charges of motoring offences, for which it is said he received lenient penalties. It is submitted that, had these facts been known at the time of the trial, defence counsel would have applied to exclude Michael Seward's evidence and, if unsuccessful in that application, would have been able to suggest to the jury that his evidence was tainted by an improper motive.

Ground 5

44. It is submitted that new evidence is available showing that Michael Seward had been a chronic user of heroin and cannabis for years before he picked out the appellant at the identification procedure, and had used other controlled drugs. Application is made to adduce the evidence of a witness who is a postdoctoral researcher with expertise in psychopharmacology and forensic psychology, which it is submitted shows that Michael Seward's memory could reasonably have been impaired by his drug use. The witness refers to research showing that deficits of memory and cognition are pervasive amongst populations of chronic users of heroin and cannabis. She notes that it is unclear whether Michael Seward was under the acute influence of any drug at the time when he said he saw the appellant. She concludes that it is possible that he could have an accurate memory of the event, but also possible that gaps or errors in his memory could occur due to drug use.

45. Taking grounds 3-5 together, it is submitted that the result of the non-disclosure was that the jury were given a false impression of the character and reliability of the only two witnesses who were relied on as supporting C's evidence of identification.

The respondent's submissions

46. Mr Price KC and Mr Grieves-Smith informed the court that, after careful consideration, the respondent does not feel able to oppose the appeal on ground 1. They accordingly did not oppose this court receiving the fresh evidence which underlies the first ground of appeal, and invited the court to find that the evidence renders the convictions unsafe. They stated that, if the appeal were allowed, no application would be made for the appellant to be retried.

47. Mr Price acknowledged the importance of vindication when considering whether the court should address grounds 2 to 5, and submitted that, if upheld by the court, ground 1 offered a vindication of the appellant in a way which the other grounds of appeal did not. When asked by the court whether the respondent wished to say anything about Mr Henry's submission, that if the new scientific evidence had been available twenty years ago the appellant may not have been prosecuted at all, Mr Price replied –

> "My Lord, it is a fair and cogent submission. … It is difficult to see how a responsible prosecution lawyer, looking at this evidence in the round including all of the scientific evidence, it is difficult to see how they might consider that the Code for Crown Prosecutors' test is met."

48. Grounds 2-5 are, however, opposed by the respondent. It is submitted that the court should either decline to consider them, because it is not in the interests of justice to do so when the appeal will succeed on ground 1, or alternatively should reject them.

49. As to ground 2, the respondent accepts that the photographs were not adduced at the trial, and does not oppose their admission as fresh evidence in this appeal. It is, however, submitted that this evidence alone would not render the convictions unsafe. Mr Price points out that the obvious conflict between C's evidence and Dr Anderson's evidence was not explored at trial. He submits that in any event, the jury had to consider all the evidence in deciding whether C may have been mistaken in her recollection of scratching her attacker's face.

50. As to ground 3, the respondent again does not oppose the records of previous convictions being admitted as fresh evidence, but submits that such evidence was irrelevant to the issues at trial because only the reliability of Beverley Craig and Michael Steward was in issue, not their honesty. Mr Price submits that there was no basis for the defence to suggest that the witnesses were dishonest in their evidence, and the fact of their previous convictions could not provide such a basis.

51. It is submitted that ground 4 is without substance, and that ground 5 adds nothing to ground 3.

Analysis

52. We are very grateful to counsel for their written and oral submissions, and to all those who have assisted them in preparing and presenting this appeal. In particular, the oral submissions of both leading counsel, delivered in contrasting styles, were of great assistance to the court. We have summarised the arguments very briefly, but we have reflected upon all the points made on each side.

53. Before stating our conclusions, we emphasise that our focus must be on the safety of the convictions in the light of the submissions now made and the additional evidence and information now available. It is apparent that the appellant and his advisers have very serious concerns about the manner in which the police investigation was conducted and the prosecution pursued, and about the response of the CCRC when the first two applications to that Commission were made. We make clear that it is no part of our function to enter into those issues in this judgment. Nor, indeed, would we be in a position to do so, for the submissions on both sides have very properly been confined to the issues which the court must resolve.

Ground 1

54. We have no doubt that the concessions made by the respondent in relation to ground 1 were properly made; and we agree with the answer fairly and properly given by Mr Price, which we have quoted in paragraph 47 above. The new scientific evidence is undoubtedly admissible as fresh evidence in accordance with section 23 of the Criminal Appeal Act 1968: it is clearly capable of belief; it affords a ground for allowing the appeal; it would have been admissible at trial; and there is a reasonable explanation for the failure to adduce it at trial, namely the advances in DNA analysis since that time. The evidence clearly shows the convictions to be unsafe. The judge properly directed the jury about the special need for caution when considering evidence of identification, and there is no reason to doubt that the jury loyally followed his directions. But what the jury did not know – and could not have known – was that more advanced scientific techniques would later result in DNA findings which both seriously undermine the case against the appellant and directly implicate another man. Given that neither C's evidence, nor any other evidence in the case, suggests that more than one man was involved in the offences, the evidence now available gravely weakens the case against the appellant; and that is so, regardless of the outcome of any prosecution of Mr B. The stark reality is that the appellant has spent very many years in prison, having been convicted on identification evidence which he always disputed and which cannot now be regarded as providing a safe basis for the jury's verdicts. We regret that this court cannot alter that fact; but – as we

indicated at the conclusion of the hearing – we can and do admit as fresh evidence the further scientific analysis, and allow the appeal on ground 1.

Should the other grounds also be considered?

55. Having already reached the decision that the appeal must be allowed on ground 1, two questions immediately arise: should grounds 2-5 be considered? And if so, should the appeal also be allowed on all or any of those grounds?

56. In *Hamilton and others v Post Office Limited* [2021] EWCA Crim 21 it was held that if this court concludes that an appeal must be allowed on one ground, it is not obliged to hear argument on any other ground of appeal, but may in its discretion do so. At paragraph 36 the court stated that the guiding principle in such circumstances is that it must act in the interests of justice, and identified a non-exhaustive list of factors which the court would usually wish to consider in deciding whether to exercise its discretion.

57. Making the necessary fact-specific evaluation in the present case, we are satisfied that in the interests of justice we should exercise our discretion in favour of determining grounds 2-5. We take into account in particular the overall importance of the case; the article 6 rights of the appellant in circumstances where he has spent long years in custody; the importance of maintaining public confidence in the criminal justice system; and the fact that consideration of these further grounds does not result in any undue delay to this appeal.

58. We accordingly turn to consider those grounds.

Ground 2

59. We have referred earlier in this judgment to the albums of photographs taken by Ms Evans. We have been provided with copies of two photographs in particular, and an enlargement of part of one of those images. Both the photographs (which are very similar) show C's right arm and hand, and we infer that they were taken in order to record a number of abrasions on the inner aspect of the right forearm. Some of the fingers of the right hand can be seen, though they are curled and not fully visible. The thumbnail is not visible. The fingernails of the right ring, middle and little fingers are clearly shown: they are of roughly equal length and are all in good condition, with no damage. On one of the photographs it is possible to see part of the fingernail of the right forefinger, but in our view it is not possible to assess the condition of that nail. It might be thought to look shorter than the nails of the other fingers, but the angle at which the photograph was taken may be deceptive in that regard.

60. On one of the photographs, it can be seen that C's right arm was resting on a hand: by inference, C's left hand. The inner aspect of part of the tips of three fingers – probably the forefinger, middle and ring fingers – can be seen. The enlarged image is of this part of the photographs: the nails of two of the fingers appear to be of roughly equal length. It is possible that the nail of the other finger (probably the middle finger) is shorter; but again, the angle at which the photograph was taken may distort the view, and we cannot agree with the submission that the nail of the middle finger is "noticeably shorter".

61. At the time of the trial, there was not and could not be the scientific evidence now available in relation to the recovery of a DNA profile from samples taken from C's left hand.

62. The counsel and solicitor who represented the appellant at trial have indicated that they did not receive disclosure of photographs of C's hands. The respondent is unable to produce any documentary evidence to the contrary. We proceed on the basis that the two photographs which we have seen, and any others which had been placed into the same album, were not disclosed before or during the trial. We do not know exactly which other photographs were either exhibited or disclosed as unused material. Nor do we know whether any specific enquiry was made, given C's evidence that she damaged a fingernail on her left hand, and given that the appellant on arrest had no relevant facial injury.

63. There was plain inconsistency between C's evidence of scratching with her left hand, and Dr Anderson's evidence of a damaged nail on the right middle finger. Given that Dr Anderson's statement was read to the jury as agreed evidence, and meaning no disrespect to counsel on each side at the trial, we think it may well be that the inconsistency went unnoticed until the judge referred to it in his summing up. An alternative explanation may be that the inconsistency was regarded as being unimportant in the context of the case as a whole. No criticism is or could be made about what the judge said, which was an accurate reference to the evidence before the jury.

64. Whatever may be the explanation for the course taken at trial, we have to consider whether the failure to disclose the two relevant photographs renders the convictions unsafe. We understand why Mr Price submits that this is a minor point, and that the jury had to consider all of the evidence in deciding (as the judge's direction rightly required them to do) whether they could be sure that C did not scratch her attacker's face. We bear very much in mind that the absence of any visible injury to the appellant's face may be thought to be a strong point in the appellant's favour, whether or not the photographs were disclosed. Mr Henry has, however, persuaded us that the failure to disclose these photographs was highly material.

65. We do not think that the photographs alone could have enabled the jury to make any confident finding that C damaged one of the fingernails on her left hand. They would however have provided strong evidence that she did not damage any fingernail on her right hand, and that Dr Anderson's note must have been inaccurate in that respect. Dr Anderson's statement on that point would therefore not have been agreed; and if Dr Anderson had been called to give oral evidence, she would surely have accepted that the photographs showed her to have made a mistake. C's evidence of scratching would then not have been undermined, and Dr Anderson's evidence would not have provided any basis for the jury to think that C's recollection of scratching was unreliable. The judge's directions required the jury to consider whether they were sure that C did not scratch her attacker's face and that she was correct in her identification of the appellant. Those directions would have been the same whether or not the photographs were disclosed, and it would have been open to the jury to conclude that they were sure of those matters. We are, however, persuaded that in the very particular circumstances of this case, the non-disclosure of the two relevant photographs prevented the appellant from putting his case forward in its best light, and strengthened the prosecution case against him in a manner which the photographs

show to have been mistaken. We accept Mr Henry's submission that, if the photographs had been disclosed, the jury's verdicts may have been different.

66. For those reasons we regard the convictions as unsafe on ground 2.

Ground 3

67. It is clear that the criminal records of Beverley Craig and Michael Seward were not disclosed to the defence before or during the trial, notwithstanding the request which had been made. We are satisfied that they should be admitted as fresh evidence pursuant to section 23 of the 1968 Act.

68. The trial took place before the provisions of the Criminal Justice Act 2003, governing the admissibility of evidence of bad character, had come into effect. We accept that, under the law in force at the time of the trial, defence counsel would have been entitled to cross-examine Beverley Craig and Michael Seward about their respective previous convictions, provided only that they were relevant to an issue in the case. Counsel did, indeed, cross-examine two other witnesses about their previous convictions (which had been disclosed). It does not appear that there was any challenge to the relevance of that line of cross-examination, notwithstanding that the evidence of the witnesses concerned were by no means central to the case. We accept that the failure of disclosure denied defence counsel of an opportunity, which he would have wished to take, to question Beverley Craig and Michael Seward about their previous convictions, and to make appropriate submissions to the jury about those convictions. We also accept that the concession made by defence counsel at trial, that the two witnesses were giving evidence honestly, would not have been made if the previous convictions had been disclosed. The importance of these matters is that the support which the identification by one witness could provide for the identifications by others was predicated on the basis (conceded by the defence, on the basis of the evidence and information available to them at trial) that each of the witnesses was honest.

69. We must then consider whether the defence case would have been materially assisted if the records of previous convictions had been disclosed. They show that, at the time of the trial, Beverley Craig had only three convictions for theft and one for fraud, the latest of those offences having been committed in February 2000. Michael Seward had a much more substantial criminal record, which at the time of the trial included a number of offences of dishonesty, but the most recent of those was a shoplifting offence committed in 1994. If proper disclosure had been made, the jury would also have been made aware that Michael Seward had been convicted of motoring offences, and cautioned for possession of heroin and amphetamine, during the currency of the prosecution of the appellant. Mr Henry's submissions persuade us that cross-examination about the witnesses' previous convictions would have been capable of casting doubt on their general honesty and capable of affecting the jury's view as to whether they were civic-minded persons doing their best to assist.

70. C's evidence of identification was based on observations of her attacker which she had made in very difficult circumstances. Beverley Craig and Michael Seward provided the only evidence which the prosecution could rely on in support of C's identification. In our judgement, the challenge to the character and credibility of those two identifying witnesses would have been capable of affecting the jury's

overall view as to whether they could be sure that the appellant was correctly identified.

71. If ground 3 stood alone, we would not regard it as sufficient to cast doubt on the safety of the convictions; but when taken in conjunction with ground 2 we conclude, with some hesitation, that the appeal should succeed on ground 3 also.

Ground 4

72. We are unable to accept Mr Henry's submissions as to ground 4. We are not persuaded that there was, even arguably, material non-disclosure in the respect alleged in this ground. There are a number of unsatisfactory features about the sequence of events relating to Michael Seward, in particular the passage of six months before he attended an identification procedure and the fact that he had seen images of the appellant during the intervening period. We understand why it is suggested that the timing of his eventual participation in the identification procedure, viewed against the dates of court appearances in respect of the criminal charges which he was then facing, might be thought suspicious. We are, however, satisfied that this amounts to no more than speculation. There is an absence of detail about the various charges which makes it impossible to draw any inference as to whether the pleas which were ultimately entered, and/or the penalties ultimately imposed, were so favourable to Michael Seward as to raise concerns.

73. The non-disclosure referred to in ground 3 deprived the defence of an opportunity to challenge the honesty and credibility of Beverley Craig and Michael Seward. It seems to us that in reality the basis of ground 4 is an assumption that, given disclosure of the relevant material, the defence would have been able to go beyond that challenge and allege that the witnesses were deliberately giving false evidence for a reason which in some way implicated the police. That assumption is in our view incorrect. Any attempt to make such an attack would have been largely speculative.

74. We are satisfied that the criteria for admitting as fresh evidence the material underlying ground 4 are not met, and that ground 4 cannot in itself provide any basis for doubting the safety of the convictions.

Ground 5

75. The first question we must consider in relation to ground 5 is whether the expert evidence would have been admissible at trial. We are not persuaded that it would have been. The witness is able to identify some frequently-observed effects of long-term drug use; but she is not able to link those effects to the actual state of Michael Seward's memory at the material time, and no other evidence assists in drawing such a link. In any event, the high water mark of her evidence would be that Michael Seward's memory may or may not have been affected, but it is not possible to decide either way. Such evidence, even if it were admissible, could not assist a jury, and does not even arguably cast any doubt on the safety of the convictions.

76. The appellant can in our view derive no assistance, in relation to this ground of appeal, from a statement recently made by Michael Seward's brother Brian. The two brothers had mostly been apart since their childhood, and Brian Seward is not able to provide any evidence as to whether, around the time of the offences and the trial,

Michael Seward's memory was affected by drug use. Michael Seward himself admitted (many years after the events with which we are concerned) that he had been a chronic user of heroin for a long period going back to a time before those events; but again, that cannot assist in determining whether his memory was impaired at the material time.

77. Having reached those conclusions about grounds 4 and 5 individually, we have considered their collective effect. Even taking them together, and even treating them as an adjunct to grounds 2 and 3, they are not, in our view, capable of casting doubt on the safety of the convictions.

Conclusion

78. For those reasons, we reiterate that we have at the conclusion of the hearing admitted the fresh evidence which underlies ground 1, allowed the appeal on that ground and quashed the convictions.

79. We admit the fresh evidence which underlies grounds 2 and 3, grant leave to appeal on those grounds, and allow the appeal on those grounds. Thus the appeal succeeds on grounds 1, 2 and 3.

80. We decline to admit the proposed fresh evidence in relation to grounds 4 and 5 and refuse leave to appeal on those grounds.