Judgment Approved by the court for handing down.

Neutral Citation Number: [2023] EWCA Crim 1016

Case No: 202201554 B3

IN THE COURT OF APPEAL, CRIMINAL DIVISION
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
MRS JUSTICE McGOWAN
T20207051

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/09/2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE MORRIS
and
HH JUDGE ANGELA MORRIS

- -

Between:

JAMES WATSON	**Appellant**
- and -	
THE KING	**Respondent**

- -
- -

Jenni Dempster KC and Sally Hobson (assigned by **the Registrar of Criminal Appeals**)
for the **appellant**
John Price KC and Nathan Rasiah KC (instructed by **CPS Appeals and Review Unit**)
for the **respondent**

Hearing date: 13 June 2023

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Approved Judgment

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A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Lord Justice Holroyde:

1. Rikki Neave was strangled to death on 28 November 1994. He was just 6 years old. On 21 April 2022 this appellant was convicted of his murder. He was subsequently sentenced to detention at His Majesty's pleasure, with a minimum term of 15 years. By leave of the full court, he now appeals against his conviction.

2. The appeal was heard on 13 June 2023. The court indicated that it would give its decision and its reasons in writing at a later date. This we now do.

Reporting restriction

3. The prosecution case at trial included evidence of an alleged sexual assault by the appellant upon a 6-year old boy in 1993. We shall refer to that boy as "C". C is entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during his lifetime no matter may be included in any publication if it is likely to lead members of the public to identify him as the victim of an alleged sexual offence.

Summary of relevant facts

4. Rikki Neave lived in the Peterborough area with his mother Ruth Neave and his sisters. The family were known to the Social Services. Rikki left their home, wearing his school uniform and a casual jacket, on the morning of 28 November 1994. He did not arrive at his school. Around 6pm his mother reported him missing. At midday on 29 November 1994 his naked body was found in a wooded area adjacent to the Welland housing estate. It had been positioned in a star shape with arms and legs wide apart, in the manner of Leonardo da Vinci's famous drawing of the Vitruvian Man. Post-mortem examination showed that the cause of death was strangulation from behind, and that Rikki had probably died on 28 November 1994.

5. The appellant, then aged 13, frequently truanted from school. He did so on 28 November 1994. He went that morning to the Welland estate, where his father lived. A local resident, who knew both Rikki and the appellant, saw them together, walking towards the woods. Another local resident saw the boys together around 11am, watching diggers working on a building site.

6. Rikki's clothing and shoes were later found in a wheelie bin in a street near where the body had been found. The clothing included Rikki's jacket, which the pathological evidence suggested had been used to strangle Rikki.

7. Numerous items and samples were taken from Rikki's body and clothing for scientific examination. These included fingernail and toenail clippings, and tape lifts from Rikki's body and from his clothing. The use of DNA analysis in criminal investigations was then in its early stages, and the tape lifts were examined only for items such as fibres or hair. Examination of the shoes by a forensic palynologist supported the proposition that Rikki had walked into the woods but had not walked out. It does not appear that the lid of the wheelie bin was examined for fingerprints.

8. The appellant was spoken to as a witness during the initial police investigation. He told the police that he spent a short period of time with Rikki on 28 November 1994.

He accompanied the police to the Welland estate in order to point out where he had seen Rikki. He did not at that stage refer to any physical contact between him and Rikki.

The prosecution of Ruth Neave

9. In 1995, Ruth Neave was charged with the murder of her son Rikki, and with offences of cruelty to Rikki and two of his sisters. It was alleged that her cruelty towards Rikki included hitting, kicking and throttling him, and threatening to kill him. She pleaded guilty to the cruelty offences but denied the charge of murder.

10. In 1996, Ruth Neave stood trial on the charge of murder. She was acquitted. It appears that some of the police officers who had conducted the investigation believed the jury's verdict to be against the weight of the evidence. No further investigation into Rikki's death was pursued for many years.

11. A few weeks after Ruth Neave's trial ended, the police returned Rikki's clothing to her. She subsequently disposed of it. The police also disposed of most of the exhibits which had been recovered during the investigation into Rikki's death. The only scientific exhibits which were retained were the tapings taken from Rikki's clothes, samples of his blood and swabs taken from his mouth and anus.

The prosecution of the appellant

12. Nearly two decades later, there was a full review of the evidence. The tapings recovered from Rikki's clothing were analysed using methods which had not been available at the time of the initial investigation. DNA with a profile matching that of the appellant was found on tape lifts taken from the back of Rikki's trousers and from a sleeve of his shirt. The evidence indicated that the DNA on the trousers had been left by contact with the appellant's hands; the DNA on the shirt might have been the product of secondary contact.

13. The appellant was interviewed by the police in 2015. He was arrested and further interviewed in 2016. He said that at some point during the short time when he was with Rikki, he had lifted Rikki up to that he could look over a fence and watch the diggers at work.

14. In February 2020 the appellant was charged with the murder of Rikki. His trial, before Mrs Justice McGowan and a jury at the Central Criminal Court, suffered a number of interruptions and delays, principally caused by the Covid-19 pandemic. In all, it lasted for 57 working days over a period of more than 4 months between 17 January and 21 April 2022.

15. It is unnecessary, for present purposes, to go into detail about the prosecution evidence. Ruth Neave was called as a prosecution witness. The defence case was that she was the likely murderer, and that the stripping and positioning of Rikki's body was explained by her interest in the occult. The defence relied on her possession of a magazine found in her home which showed the Vitruvian Man on its front cover.

16. The judge made two rulings which are now the subject of grounds of appeal.

The challenged rulings: (1) abuse of process

17. It was submitted on behalf of the appellant that his prosecution was an abuse of the process of the court because the unavailability of important exhibits meant that it was impossible for him to have a fair trial. It was argued that this case fell into the first of the two recognised categories of cases in which it may be possible for an accused person to argue that his prosecution should be stayed as an abuse of the process, namely cases in which it is not possible for the accused to have a fair trial. It was not suggested (and is not suggested now) that the case fell within category two abuse of the process, namely cases in which it would offend the court's sense of justice and propriety to be asked to try the accused (see *R v Maxwell* [2010] UKSC 48).

18. Ms Dempster KC and Ms Hobson, then as now appearing for the appellant, submitted that there had been serious failings in the original investigation, including a failure to interview the appellant's foster mother until 2015. They also submitted that the failure to retain exhibits, in particular Rikki's clothing and shoes, had hindered the expert witnesses instructed by the defence to examine DNA material and the pathology and palynology evidence.

19. Mr Price KC and Mr Rasiah KC, then as now appearing for the respondent, submitted that the Criminal Procedure and Investigations Act 1996 ("CPIA 1996") did not apply to the original investigation, that the failure to retain exhibits did not constitute a breach of any duty, and that in any event the absence of the exhibits did not cause any unfair prejudice to the appellant.

20. The judge reminded herself that the burden was on the appellant to show, on the balance of probabilities, that he had suffered such prejudice that he could not have a fair trial. She said that case law established that the power to stay a prosecution was to be used sparingly, and only in exceptional circumstances.

21. The judge held that, in view of the date on which the investigation into Rikki's death began, CPIA 1996 did not apply, and that the only duty to retain exhibits was the common law duty, which did not extend to a continuing duty to preserve exhibits. She also held, however, that she was in any event bound to consider the consequences of the loss of relevant material in assessing whether the appellant could have a fair trial. She rejected a defence submission that the police and the CPS should have predicted a change in the law which would allow Ruth Neave to be re-tried if fresh evidence emerged, and should therefore have retained the exhibits.

22. The judge rightly considered the issues in the case. She noted that the defence case was that the appellant did not kill Rikki, but that Ruth Neave almost certainly did. She observed that any finding of DNA or other scientific evidence of contact between Rikki and his mother would establish nothing more than contact between mother and child living in the same house. She noted also that the appellant admitted physical contact with Rikki on 28 November 1994 and provided an explanation for the presence of his DNA on Rikki's clothing; that the defence pathological evidence accepted the prosecution case as to the likely mechanism of the cause of death; and that the defence had been able to instruct a palynologist to opine on the finding of soil from the woods on Rikki's shoes.

23. The judge concluded that the defence had not satisfied her that the prosecution should be stayed: although very unusual on its facts, it was not an exceptional case such that it would be an abuse of the process to allow it to continue. She refused the

application, but made clear that she would keep the issue of fairness under review as the trial progressed.

The challenged rulings: (2) bad character evidence

24. The prosecution applied to adduce evidence of three matters as bad character evidence showing that the appellant at the material time had a sexual interest in young boys and in strangulation. The application was made pursuant to section 101(1)(d) of the Criminal Justice Act 2003 ("CJA 2003") on the basis that each of the three matters was relevant to an important matter in issue, in that it assisted to identify the appellant as Rikki's murderer. The prosecution did not seek to rely on the evidence as being capable of establishing any relevant propensity. It was submitted that the circumstances of the murder, and the stripping and positioning of Rikki's body after his death, demonstrated a sexual interest in young boys by the killer and a sexual context to the killing.

25. The three matters were:

    i) First, evidence that in 1993 C's mother reported that C, then aged 6, had told her that the appellant had touched his penis and rubbed it up and down. The appellant, then aged 12, was interviewed by the police. He denied any sexual contact, but said that he had shown C how to shake his penis after urinating. No action was taken against the appellant. By the time of the trial, C himself had no recollection of this incident. The prosecution therefore wished to rely on the hearsay evidence which C's mother could give.

    ii) Secondly, evidence of Jean Larkin, who in 1994 managed a care home in which the appellant was a resident. She said that she found in the appellant's bedroom the carcass of a dead bird, and a catalogue containing pictures of children and babies who were not fully clothed.

    iii) Thirdly, evidence of Nicola Lawson, who had a consensual sexual relationship with the appellant when they were both aged about 14 or 15. She said that he would sometimes put his hands around her throat and throttle her during intercourse. She also reported an occasion about a year after Rikki's death when the appellant had killed a bird and had laid the carcass on its back with the wings spread out.

26. The application was opposed by counsel for the appellant, who argued that the evidence was inadmissible, because even taking all three matters together it did not identify the appellant as the killer; or alternatively, that it should be excluded on grounds of fairness pursuant to section 101(3) of CJA 2003.

27. The judge ruled that evidence of all three matters was admissible. She held that it was open to the jury to find that the killing had a sexual element. If accepted by the jury as true, the evidence, which all related to events close in time to the killing of Rikki, was capable of supporting the prosecution case that the appellant was the killer. She ruled that evidence of a sexual interest in C could assist in identifying the killer. So, too, could Nicola Lawson's evidence of an interest in strangulation during sexual intercourse and of the killing and positioning of a bird. She held that the evidence of

Jean Larkin might not have been admitted if it stood alone, but it provided further evidence capable of assisting to identify the appellant as the killer and –

> "… it is supported by (and gives support to) the evidence of [C's mother] and NL."

28. The judge also held that the remainder of the prosecution evidence showed a case strong enough to admit the bad character evidence in support, and that the admission of the evidence would not be "bolstering a weak case". She accepted that the evidence was prejudicial, but held that it was no more so than other relevant and incriminating evidence and that its admission would not adversely affect the fairness of the proceedings.

The appellant's evidence

29. The appellant gave evidence in his own defence, denying that he had killed Rikki. He said that he had been in Rikki's company for only a few minutes on 28 November 1994, during which time he had lifted him up to look over a fence. He did not dispute the evidence that DNA matching his own profile had been found on the tapings from Rikki's clothing, but said that it could have been deposited in a number of ways, including when he lifted Rikki up.

30. As to the bad character evidence, the appellant denied that he had sexually assaulted C; said that any admissions he may have made in that regard were unreliable; said that his foster mother worked for a catalogue business; denied that he kept a catalogue for any sexual reason; and denied the allegations of Nicola Lawson.

31. The defence case also relied on evidence that Rikki had been seen alive on the afternoon and evening of 28 November 1994, and the fact that Rikki's body had not been seen by a police officer who searched the woods that night.

The jury's retirement

32. The judge provided the jury with written and oral directions of law, and with a route to verdict which identified the issue in the case as being whether the jury were sure that it was the appellant who killed Rikki.

33. The jury retired to consider their verdict shortly before midday on 6 April 2022. They deliberated in all for seven days, spread over a longer period. They sent a number of notes to the judge, some of which could not be shared with counsel because they contained indications of the jurors' current division of views in relation to their verdict.

34. On 11 April, the judge gave the jury a majority direction. After the jury had retired to continue their deliberations, she told counsel that she would not be giving the jury a *Watson* direction (see *R v Watson and others* (1998) 87 Cr App R 1, to which we shall return later in this judgment).

35. Through nobody's fault, there were a number of interruptions of the trial over the following days, including a break over Easter. The trial was resumed after that break on 20 April 2022. Towards the end of that morning, the judge informed counsel that she had received a note indicating that the jury could not reach a majority verdict.

She invited counsel to reflect and said she would hear submissions after the short adjournment.

36. At 2pm, prosecution counsel invited the judge to give the jury more time. Defence counsel invited the judge to ask the jury whether, if given more time, they would be able to reach a verdict. The judge then called the jury back into court. She thanked them for their work and concentration over many weeks, referred to the time which had been lost during the trial because of Covid and other factors, and continued:

> "In fact, although you first went out the week before last, we have not actually reached the point whereby you have been in retirement for six full days yet, and that would not necessarily be thought to be a particularly long time for a case of this length and its complexity.
>
> Now, I know that you have been working hard and I know where you find yourselves at the moment. I also recognise that probably for some of you this is going to seem quite difficult. But what I am going to do is I am going to release you now for today, I am going to ask you to come back tomorrow, at 10.30am please, and I am going to ask you to try again. Do not worry. This is not, as it were, punishment. You are not locked up or anything like that until you do reach a verdict. But obviously this is an important case, it is an old case but it is incredibly important, and if we can reach a result that is the preferred outcome. If we cannot, we cannot, and we recognise that. But I am, I am afraid, going to ask you to give it one more go in the morning.
>
> The usual thing, please: leave it behind, do not worry about it. I know you may be frustrated, some of you may be feeling tired because I recognise it is hard work, the twelve of you trying to reach an agreement. But please leave it here for today, we will pick it up again tomorrow morning at 10.30 am, and we will try, if it is possible, to reach a verdict which can be returned. If it cannot be, it cannot be. But that bit more time might help you."

37. After the jury had left, the judge informed counsel that at some stage on the following day she would ask the jury whether they could reach a majority verdict if given more time.

38. At the start of proceedings on the following day, 21 April 2022, the judge considered with counsel what reporting restrictions would be appropriate if the jury were discharged and a retrial ordered. The jury were then brought into court. The judge addressed them as follows:

> "Before I ask the jury bailiff to make her promise to the court again, I just want to say this so that you understand. We have asked you to come back today so that you have got another chance, a bit more time, to see if time will make any difference.

> That is not to mean that there is pressure on anybody. If time is going to help you to reach a verdict, then you have got as much time as you need. If, having spent some time this morning thinking about things again, you reach the conclusion that no more is going to help, then let us know. This is not, as it were, pressure on you, you have got to do something. It is simply the opportunity to have a little bit more time if that will help you reach the decision. If it does not help, that is the end of it. All right? So spend a little bit of time thinking about that and let us know. If you need time, you can have as much of it as you need. If more time is not going to help, then let us know."

39. The jury retired at 10.35am. At 2.19pm they returned a majority verdict finding the appellant guilty of murder.

The grounds of appeal

40. It is submitted on behalf of the appellant that his conviction is unsafe. Four grounds of appeal were originally put forward. The full court granted leave to appeal only on grounds 1, 2 and 4. We need not refer to ground 3.

41. Ground 1 contends that the judge was wrong to refuse the application to stay the proceedings as an abuse of the process. Ground 2 challenges the judge's decision to admit the bad character evidence. Ground 4 contends that the judge's remarks on 20 and 21 April 2022 placed undue pressure on the jury to reach a verdict.

Summary of the submissions

42. In relation to ground 1, Ms Dempster accepts that CPIA 1996 did not apply in this case, that the burden lies on the accused to show that a prosecution is an abuse of the process, and that a stay of proceedings is a remedy of last resort. She submits, however, that the non-availability of key exhibits (in particular, the fibre tapings and nail clippings taken from Rikki's body) meant that critical enquiries could not be undertaken. She points out that, in relation to those exhibits, the defence were denied the opportunity to utilise the advances in DNA analysis on which the prosecution relied for its case against the appellant; and the police were deprived of the ability to investigate the possibility of other suspects. Ms Dempster relies on case law establishing that, even before CPIA 1996, the police were under a common law duty to preserve material which may be relevant during an investigation or trial, subject to a judgement by the officer in charge of the investigation to decide what may be relevant. She argues that, in a high profile case of great seriousness, the police repeatedly breached that duty. She submits that further serious prejudice was caused by the failure of the police to conduct obvious investigations such as examining the wheelie bin for fingerprints.

43. Mr Price submits in response that there was no breach of duty by the police but, even if there was, it caused no prejudice which could not be ameliorated by the trial process. He relies on case law showing that the court should not speculate about what missing evidence might have shown, and that a fair trial does not necessarily require scientific evidence to be available.

44. In granting leave on ground 1, the full court suggested that the hearing of the appeal may provide an opportunity for a review of the current case law relating to submissions that a prosecution should be stayed because of the loss of evidence or exhibits, and whether references in previous cases to exceptionality indicated a free-standing legal test or simply that the likelihood that abuse of process would be made out on this ground is low. Both counsel have assisted us with submissions on those matters.

45. In relation to ground 2, Ms Dempster submits that the bad character evidence on which the prosecution relied was very close to evidence of propensity and that the prosecution's argument as to admissibility – based as it was on an assertion that the killing was sexually motivated – involved some circularity of reasoning. She points out that there was no evidence that Rikki had been sexually assaulted (though she accepts that the absence of direct evidence that he had been so assaulted did not prove that he had not). She argues that the evidence in relation to C was vague and related to an allegation which was wholly different from the alleged murder of Rikki; that Nicola Lawson's evidence was not capable of supporting a conclusion that the appellant was more likely than anyone else to be the killer; that the evidence of Jean Larkin was inherently weak and unreliable; and that the judge was wrong to find that Jean Larkin's evidence supported the other bad character evidence. She submits that unfair prejudice was caused to the appellant by evidence creating a highly emotive picture of him as a sexual offender with strange tendencies.

46. Mr Price points out that the challenge is to the admission of the bad character evidence, not to the terms of the judge's direction about it, and that section 109 of CJA 2003 required the judge to assume, when deciding admissibility, that the evidence was true. He submits that the jury were plainly entitled to find that the killing was sexually motivated and committed by someone with a sexual interest in young children; and that the bad character evidence showed the appellant to have a sexual interest in young children, and showed him to have behaved a short time after the killing in a way which was similar to unusual actions by the killer. In relation to the sexual assault upon C, Mr Price relies on admissions made by the appellant in interview. He argues that Jean Larkin's evidence was capable of rebutting the appellant's suggestion in interview that the incident was merely youthful sexual experimentation.

47. In relation to ground 4, Ms Dempster points out that the trial had exceeded its estimated length by four weeks. She submits that the judge's remarks, particularly those on 20 April 2022, created a significant risk that jurors would feel themselves under pressure to compromise their oaths in order to reach a majority verdict, especially if some were indeed feeling frustrated or tired. She criticises the judge's references to the jury's retirement not being thought "a particularly long time", and to the "preferred outcome". She submits that the judge did in fact gave a partial *Watson* direction, but fell into the error of not following the precise wording of that direction.

48. Mr Price submits in response that a judge has a discretion as to how to deal with a note indicating jury disagreement or even deadlock, so long as nothing is said which puts any juror under pressure to reach a particular verdict. He submits that nothing in the judge's remarks placed the jury under any pressure to return a verdict. He points out that no complaint was made by defence counsel on either 20 or 21 April 2022.

49. We are very grateful to all counsel for their written and oral submissions. We have summarised them briefly, but have considered all the points made on each side. Our analysis and conclusions are as follows.

Ground 1, and abuse of process in cases of "missing evidence"

50. We begin our consideration of this ground of appeal by emphasising that we are concerned here only with category 1 abuse of process.

51. With the assistance of counsel's submissions, we have reflected on relevant case law relating to applications to stay a prosecution as an abuse of the process on the ground that relevant evidence or exhibits have not been seized, have not been retained or have been lost or destroyed. The burden is on the accused to show on the balance of probabilities that it is impossible for him to have a fair trial. In *DPP v Fell* [2013] EWHC 562 (Admin) at [15], the granting of a stay of proceedings was described as –

> "… effectively, a measure of last resort. It caters for and only for those cases which cannot be accommodated with all their imperfections within the trial process."

52. The principles established by the case law have recently been summarised by this court in *R v ANP* [2022] EWCA Crim 1111 at [15]-[22], and we need not repeat all that was said there.

53. In *R (Ebrahim) v Feltham Magistrates' Court* [2001] 1 All ER 831 ("*Ebrahim*") a video recording which had not been seized by the police had been taped over by the time of the trial. Brooke LJ emphasised at [25] that the trial process is equipped to deal with most of the complaints on which applications for a stay are founded. He went on to say, in a passage at [27] with which we respectfully agree:

> "It must be remembered that it is a commonplace in criminal trials for a defendant to rely on 'holes' in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence."

54. In *R v D* [2013] EWCA Crim 1592 the appellant had been convicted of sexual offences committed between 39 and 63 years before his trial. He contended that he could not have a fair trial because relevant records were no longer available and relevant witnesses were no longer able to give evidence. At [14], the court emphasised that it was not the length of the delay which was of crucial importance, but rather the effect of that delay on the fairness of the trial and the safety of the convictions. At [15], Treacy LJ said this:

> "In considering the question of prejudice to the defence, it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of the missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to a defendant."

55. In *R v PR* [2019] 2 Cr App R 22 the appellant had been convicted of historical sexual offences which had first been investigated in 2002, when no prosecution had been commenced. He contended that he could not have a fair trial in 2018 because in the intervening years important parts of the 2002 police file had been destroyed. Fulford LJ, at [65], said this:

> "It is important to have in mind the wide variations in the evidence relied on in support of prosecutions: no two trials are the same, and the type, quantity and quality of the evidence differs greatly between cases. Fairness does not require a minimum number of witnesses to be called. Nor is it necessary for documentary, expert or forensic evidence to be available, against which the credibility and reliability of the prosecution witnesses can be evaluated. Some cases involve consideration of a vast amount of documentation or expert/forensic evidence whilst in others the jury is essentially asked to decide between the oral testimony of two or more witnesses, often simply the complainant and the accused. Furthermore, there is no rule that if material has become unavailable, that of itself means the trial is unfair because, for instance, a relevant avenue of enquiry can no longer be explored with the benefit of the missing documents or records. It follows that there is no presumption that extraneous material must be available to enable the defendant to test the reliability of the oral testimony of one or more of the prosecution's witnesses. In some instances, this opportunity exists; in others it does not. It is to be regretted if relevant records become unavailable, but when this happens the effect may be to put the defendant closer to the position of many accused, whose trial turns on a decision by the jury as to whether they are sure of the oral evidence of the prosecution witness or witnesses, absent other substantive information by which their testimony can be tested."

56. We respectfully agree with and endorse those statements of principle by Treacy LJ and Fulford LJ.

57. In *Ebrahim*, at [17], the court stressed that the residual and discretionary power of a court to stay criminal proceedings as an abuse of its process was one which ought only to be employed in exceptional circumstances, whatever the reasons for invoking it. In the present case, as we have noted at paragraph 20 above, the judge quoted that reference to "exceptional circumstances". It is a phrase often used when discussing the principles applicable to applications to stay proceedings as an abuse of the process. In our view, however, it does not indicate a free-standing legal test. Rather, it reflects the fact that the cases in which it will be possible for an accused to show that a fair trial is impossible, and in which it is appropriate to grant a stay, are very rare. The surrounding circumstances may not always be such as to justify a label of "exceptional": after all, particularly in cases involving historical allegations, the loss or destruction of relevant evidence or exhibits, whilst always regrettable, is far from unknown. But the fact that such a label may not be apposite will not in itself be a bar to a stay of proceedings if – very unusually – the accused can show that the effect of the absence of evidence or exhibits is to make it impossible for him to have a fair trial.

58. In each of the cases to which we have referred above, the failure to retain evidence or exhibits breached a duty under CPIA 1996. In the present case, no such duty arose, having regard to date on which the police investigation began. The police therefore owed only the limited common law duty on which Ms Dempster relies.

59. In *Ebrahim* it was held at [16] that a court considering an application to stay proceedings in a "missing evidence" case should first consider the extent of any duty upon the prosecutors to obtain and retain the evidence in question:

> "If they were under no such duty, then it cannot be said that they are abusing the process of the court merely because the material is no longer available. If on the other hand they were in breach of duty, then the court will have to go on to consider whether it should take the exceptional course of staying the proceedings for abuse of process on that ground."

60. However, in *Clay v South Cambridgeshire Justices* [2015] RTR 1 ("*Clay*") at [46]ff, Pitchford LJ (with whom Burton J agreed) doubted that approach:

> "46. With great respect to the court in *Ebrahim*, it seems to me that the question of whether the defendant can have a fair trial does not logically depend on whether anyone was 'at fault' in causing the exigency that created the unfairness.
>
> 47. If vital evidence has as a matter of fact been lost to the defendant whether occasioned by the fault of the police or not, the issue is whether that disadvantage can be accommodated at his trial so as to ensure that his trial is fair.
>
> 48. There is in this respect no difference between an unfair trial occasioned by delay and an unfair trial occasioned by the loss of vital evidence. …"

61. Mr Price suggests that the statements in *Ebrahim* and in *Clay* can be reconciled because, he suggests, it is very difficult to conceive of circumstances in which there is evidence sufficient to prove an accused's guilt but the loss of evidence, through no fault of the police or prosecution, can cause such prejudice to the accused as to make a fair trial impossible. We are not persuaded that that is correct, particularly when one considers cases in which many years have elapsed between the alleged offences and the first complaint, so that crucial evidence may have been lost long before the police are involved. But in any event, with all respect to the court in *Ebrahim* (a decision of the High Court which is not binding upon us), we regard Pitchford LJ's approach as clearly correct. As we have emphasised, we are concerned here with a type of category 1 abuse of process, where the court must focus on the effect on the fairness of the trial of evidence no longer being available. Cases in which there has been no breach of duty, but a fair trial is impossible because of missing evidence, will be very rare; but we cannot say they will never occur. The staying of proceedings because of a category 1 abuse of the process is not a punitive jurisdiction, and we can see no reason why the exercise of it should necessarily be dependent on a finding of fault. Negligence or deliberate breach of duty on the part of the police or the prosecution may of course be relevant to the court's exercise of its discretion, but it is not a necessary prerequisite of it.

62. Applying those principles to the present case, we have no doubt that the judge was correct to reject the application to stay the proceedings. She rightly made a case-specific assessment of the effect of the unavailability of evidence, notwithstanding that there was no relevant breach of duty. It is not clear whether the judge made her decision on the basis of a test of exceptionality. If she did, we accept that she fell into error; but any such error can have made no difference to the outcome, because in the circumstances of this case the appellant plainly could not discharge the burden which lay upon him.

63. What might have been revealed by testing which could not be carried out is, by definition, entirely speculative. The appellant cannot point to anything approaching what Treacy LJ referred to in *R v D* as "missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case". The jury were aware of the history of the case, including the prosecution of Ruth Neave and the fact that evidence and exhibits were no longer available. Defence counsel was in the unusual position of being able to cross-examine the person whom the appellant alleged to be the likely murderer, and who had disposed of Rikki's clothing after it was returned to her by the police. Defence counsel was also able to make submissions to the jury about the difficulties caused to the defence by the unavailability of evidence and exhibits; and the jury were directed about the relevance of delay, in terms which are not and could not be criticised. It must moreover be remembered that the prosecution had equally been deprived of the opportunity of applying modern scientific techniques to many more of the items and samples recovered in the original investigation; and it was of course the prosecution who bore the burden of proving guilt to the criminal standard on the basis of the evidence which remained available.

64. We are therefore satisfied that the judge was correct to find that the appellant could and would have a fair trial. We accordingly reject this ground of appeal.

Ground 2: the bad character evidence

65. Evidence of a defendant's bad character is admissible pursuant to section 101(1)(d) of CJA 2003 if it is relevant to an important matter in issue between the defendant and the prosecution; but by section 101(3), the court must not admit such evidence if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. By section 103(1) of CJA 2003, the matters in issue between the defendant and the prosecution for this purpose include, but are not limited to, the question whether the defendant has a propensity to commit offences of the kind with which he is charged.

66. In the present case, the principal matter in issue between the prosecution and the defence was whether the appellant was proved to be the killer. Although there was no affirmative evidence of any sexual assault on Rikki, we accept the respondent's submission that the jury could properly infer – principally because of the way in which Rikki's body had been stripped of clothing and placed into an unusual and distinctive position – that whoever killed Rikki had a sexual motive for doing so and had a sexual interest in young children.

67. That being so, evidence was admissible if it could properly be relied upon by the jury as showing that the appellant had a sexual interest in young boys, and/or that within a short time after Rikki's murder he acted in ways which were similar to unusual actions by the killer (and which could not be regarded as "copycat" behaviour following newspaper reports of the killing, because the appellant's case was a denial of acting in the manner alleged). Such evidence was in our view correctly relied on by the prosecution as going to the identification of the appellant as the killer, rather than as evidence of a relevant propensity. We accept that the distinction is, as Ms Dempster submitted, a fine one; but it was nonetheless a correct distinction.

68. The evidence of C's mother was admissible on that basis. There could be no successful objection to it based on its being hearsay, since C himself could not recall what had happened to him at a very young age, and his mother had contemporaneously reported to the police what C had told her. Furthermore, the allegation as to what the appellant had done to C was not disputed.

69. Nicola Lawson's evidence was admissible because it could properly be regarded as showing that the appellant had an interest in strangulation in a sexual context. It could also be accepted by the jury as showing the appellant behaving, in relation to a dead bird, in a manner similar to the conduct of the killer in relation to Rikki's body.

70. The evidence of Jean Larkin was admissible because it could properly support the prosecution case by rebutting the innocent explanation put forward by the appellant for handling C's penis; because her evidence that the appellant was in possession of the catalogue could provide some support for the allegation that he had a sexual interest in children; and because her evidence of finding a dead bird provided some support for the evidence of Nicola Lawson (disputed by the appellant) about a dead bird. The judge therefore did not err in saying that Jean Larkin's evidence supported and was supported by the evidence of the other two witnesses.

71. For those reasons, we are satisfied that the judge did not err in admitting the bad character evidence. The weight to be given to the evidence was then a matter for the jury.

72. Nor did the judge err in declining to exclude all or any of that admissible evidence pursuant to section 101(3) of CJA 2003: the limited prejudicial effect of adducing evidence of a few incidents during the appellant's adolescence did not outweigh the probative value of that evidence or render the trial unfair. We would add that the judge in her directions of law rightly instructed the jury that, in relation to the incident with C and the appellant's possession of the catalogue, they must first decide whether there was a sexual element to the killer's acts: if not, then the evidence relating to those matters would be irrelevant and should be considered no further.

73. We accordingly reject the second ground of appeal.

Ground 4: the judge's remarks to the jury

74. This was a long and complex trial, made longer and more difficult by Covid-related delays and other interruptions. It is unsurprising that the jury took a substantial period of time to deliberate. They sent notes to the judge, both before and after they had been given a majority direction, indicating that they were divided in their views.

75. When a jury sends a note indicating what are often referred to as their current "voting figures", it is for the judge to determine how best to proceed. Such a note may, of course, affect the judge's decision as to when it would be appropriate to give a majority direction. Where the majority direction has been given, the precise terms of the note, and of any indication in it that the jury feel they may be unable to reach a verdict by the requisite majority, will be among the factors relevant to the judge's decision. So, too, will be the submissions of counsel, who should generally be invited (as they were in the present case) to make submissions about what course should be taken. But in the end, the judge – who has presided over the trial, has been able to observe the behaviour and dynamics of the jury, and is in the best possible position to make the necessary assessment – must decide what is appropriate. This court will be slow to interfere with a judge's decision unless some obvious error has been made.

76. In the present case, the judge indicated that she would not give a *Watson* direction: that is, a direction of the sort approved by this court in *R v Watson and others*. That decision is not criticised; but it is submitted that the judge nonetheless gave what was in effect a *Watson* direction, or at any rate a partial version of it, but did so in inappropriate terms.

77. In *R v Watson and others* a five-judge constitution of this court considered problems which had arisen as a result of the use of a form of direction approved in an earlier case, *R v Walhein* (1952) 36 Cr App R 167, which had been decided at a time when majority verdicts were not possible. The court emphasised, at p11, that jurors must be free to deliberate without any form of pressure being imposed upon them, and must not be made to feel that it is incumbent upon them to express agreement with a view they do not truly hold. The court concluded that the *Walhein* direction should no longer be given, but held, at p12, that it would be permissible for a judge to direct a jury in the following terms:

> "Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but collectively. That is the strength of the jury system. Each of you takes into

> the jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If, unhappily, [10 of] you cannot reach agreement, you must say so."

The court went on to say, however, that the judge had a discretion as to whether to give such a direction; that usually there would be no need to do so; and that variations which altered the sense of the direction should be avoided.

78. In *R v Logo* [2015] 2 Cr. App. R. 17 this court emphasised that *R v Watson and others* remains binding on other constitutions of the Court of Appeal, Criminal Division. A *Watson* direction may therefore be given if a trial judge thinks it appropriate to do so in the exercise of his or her discretion. At [21]ff, the court summarised the principles as being that such a direction should only be given after a majority direction had been given and after some further time had elapsed; that there would usually be no need for such a direction; and that a judge should follow the wording in *R v Watson and others*.

79. At [25], the court suggested that trial judges may wish to think long and hard before exercising their discretion to give a *Watson* direction. We respectfully agree with and endorse that observation.

80. A judge who decides that it would not be appropriate to give a *Watson* direction will then have to consider what answer to give to the note received from the jury, and when to give it. Again, the submissions of counsel will be helpful, and should be invited. In some cases, it may be appropriate to ask the jury to consider amongst themselves whether, if given further time to deliberate, they believe they will be able to reach a majority verdict. In other cases, it may be better to defer the asking of such a question and instead to ask the jury to continue their deliberations. These are matters for the judge, who has the feel of the case, to assess and decide.

81. In the present case, the very experienced judge decided, and was entitled to decide, to ask the jury to continue their deliberations for a little longer. We do not accept the submission that what she said to the jury on 20 and 21 April 2022 amounted to a partial *Watson* direction, and we therefore also reject the submission that she fell into error by departing from the precise terms in which a *Watson* direction must be given. We must nonetheless consider whether the judge's remarks may have put pressure on some jurors to compromise their oaths.

82. Ms Dempster particularly criticises three features of the judge's remarks to the jury on the afternoon of 20 April: the reference to jurors possibly feeling frustrated and tired, and finding further deliberations quite difficult, which Ms Dempster submits could have caused jurors to feel under pressure to reach a majority verdict; the reference to the jury's retirement not having been particularly long, which she submits could have caused jurors to feel that the judge thought they were not trying hard enough; and the reference to the preferred outcome, which was not accompanied by a reminder that they must remain true to their oaths and which she submits could have caused jurors to feel that inability to reach a majority verdict would be regarded as a failure.

83. With respect to Ms Dempster's submissions, we are not persuaded by them. In our view, the judge's remarks that afternoon appropriately acknowledged the jury's hard work; sought to reassure them that they were not the only jurors to spend several days considering their verdict in a long and complex case; reassured them that they would not be required to continue their deliberations until they reached a verdict; explicitly told them that a possible outcome would be that they would not reach a verdict on which a sufficient majority agreed; and released them well before the usual end of the court day so that they could return fresh in the morning and see whether "a bit more time" would help them reach a majority verdict.

84. We accept, with all respect to the judge, that it would have been better for her not to speak of a "preferred outcome". In the circumstances of this long trial, however, we do not think that the use of that phrase would have conveyed to the jury anything more than the obvious point that it was in everyone's interests for the trial to conclude with a verdict, whether guilty or not guilty, if the jury felt able to agree upon one.

85. In any event, the judge's remarks on that afternoon must be read in conjunction with her remarks the following morning. Her direction to the jury, when sending them home on 20 April, was that they should leave the case behind until the following morning. The first thing the jury heard when they came back into court the following morning was a clear statement by the judge that they were under no pressure, that they were simply being given "a little bit more time" to see if that would help them to reach a decision, and that if it did not help they must let her know, and that would be "the end of it". No specific criticism is made of those remarks, and none could be. Again, with respect to the judge, it would have been better if she had specifically reminded the jury of the need to remain true to their oaths; but that was implicit in the judge's assurance that they were not under any pressure, that they did not have to "do something", and that they could conclude that further time would not help them to reach a majority verdict.

86. We would add that we see force in Mr Price's submission that no contemporaneous complaint was made by defence counsel about the judge's remarks.

87. Taking the remarks collectively, we are satisfied that they could not have caused any juror to feel under any pressure to compromise his or her oath, and they do not render the conviction unsafe.

88. For those reasons, this appeal fails and must accordingly be dismissed.