Neutral Citation Number: [2023] EWCA Crim 1384

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**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE CROWN COURT AT PRESTON**
**His Honour Judge Parry**
**T20170493**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 November 2023

**Before :**

**LORD JUSTICE FULFORD (SITTING IN RETIREMENT)**
**MR JUSTICE NICKLIN**
and
**SIR NIGEL DAVIS**

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**Between :**

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| **Grahame Brennand** | **Appellant** |
| **- and -** | |
| **Rex** | **Respondent** |

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**Richard English** (instructed by **Forbes Solicitors LLP**) for the **Appellant**
**Mark Kellet** (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 28 September 2023

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# Approved Judgment

This judgment was handed down by the Court remotely by circulation to the parties and their representatives by email and by release on www.judiciary.uk and to The National Archives. The date and time for hand-down is deemed to be 10:00am on 24 November 2023.

**Lord Justice Fulford :**

1. This is the judgment of the Court, substantially prepared by Nicklin J.

**A: Complainants' statutory anonymity**

2. The provisions of s.1 Sexual Offences (Amendment) Act 1992 apply to most complainants mentioned in this judgment. Under those provisions, where a sexual offence has been committed against a person, that person is entitled to anonymity and, during that person's lifetime, nothing can be included in any publication that is likely to lead members of public to identify that person as a victim of that offence.

**B: Background**

3. In February 2018, at the Crown Court in Preston, the Applicant was convicted of 17 counts of indecent assault, contrary to s.14(1) Sexual Offences Act 1956. At the first trial, the jury was unable to reach verdicts on 33 further counts. Following a retrial, at the same court, on 28 September 2018, the Applicant was convicted of a further 26 counts of indecent assault and 3 counts of cruelty to a person under 16 years-old, contrary to s.1(1) Children & Young Persons Act 1933. On 12 October 2018, the Court imposed sentences of imprisonment the combined effect of which was the imposition of a total sentence of 16 years' imprisonment with an extended licence period of 3 years. At the date of sentence, the Applicant was 71 years old.

4. On 10 November 2022, the Applicant lodged an application seeking leave to appeal his conviction. The application was supported by an Advice by new Counsel. The necessary further application for an extension of time - some 3 years and 9 months after the Applicant's first conviction - was supported by the witness statement of the Applicant's solicitor, Peter Turner, dated 3 November 2022, which sought to explain the delay.

5. Given the substantial delay, the application for leave to appeal was referred to the full Court by the Single Judge.

**C: The Facts**

6. Given the scope of the applications before the Court, the facts can be stated as follows.

7. Between 1973 and 1989, the Applicant had been a teacher at a primary school in Baxenden, Lancashire. He had taught children in their final year of primary education, aged 10 to 11 years.

8. In July 2016, a former pupil at the school made a complaint to the police alleging indecent assault by the Applicant. As part of their investigation, the police spoke to several other former classmates of the original complainant and appealed for others to come forward if they had any relevant information. In consequence, several further complainants and witnesses came forward. The Applicant was charged with multiple counts of indecent assault on a total of 25 women, all of whom gave evidence for the prosecution at the Applicant's trials. There were also complaints by two men of alleged cruelty.

## D: The evidence at trial

9. The evidence of the complainants at trial can be summarised as follows:

(1) V1, who, like all of the complainants (with the exception of V27), was a pupil at the St John's Primary School during the indictment period. She gave evidence of times when the Applicant pressed his erect penis into her groin area.

(2) V2 gave evidence of situations when the Applicant rubbed her vagina, over her clothes, with his fingers, and pressed his erect penis against her hip. She said it happened so often it became "*the norm*".

(3) V3 said the Applicant used to pin her against the wall almost daily and then rubbed himself against her so she could feel his erect penis. When he did that, he whispered in her ear, "*do you like this, does it feel nice to you?*". He also used to touch her vagina under her swimming costume during private swimming lessons after school.

(4) V4 said the Applicant used to put his hand down her top and grope her breasts. He used to put his hand inside her underwear and place his fingers on her vagina. She gave evidence of an incident on a boat when the Applicant put his hands down her top and also onto her vagina. He pressed himself into her back and she could feel his erect penis.

(5) V5 gave evidence of the Applicant leaning over her from behind, he would touch her breasts with skin on skin contact and pressed himself into her back. She was part of the First Aid Club and gave evidence of how the Applicant touched and rubbed her vagina over her PE shorts.

(6) V6 said the Applicant used to go to her desk where she was working, put his hands on her shoulders and let them go down to the top of her chest. He used to press his pelvic region into her back, she could recall something firm pressing into her back.

(7) V7, a male pupil, said the Applicant was in charge of discipline at the school. The Applicant used to slap him over the head with such force that it left his ears ringing. On other occasions he slapped the back of his legs. He said the Applicant would sometimes take off a gold chunky bracelet he used to wear before hitting him. The Applicant used to put him in a bag cupboard under the stairs. He recalled marks being left on his legs and wetting himself as a result of being hit.

(8) V8 said the Applicant used to lean over her from behind to look at her work and, in doing so, his arm went down her blouse, skin to skin, and his finger swiped across her breast area. That occurred almost daily. On other occasions, while standing at the Applicant's desk, he used to place his hand up her skirt, his fingers would sweep across her bottom and into her underwear while she stood at his desk. That occurred at least weekly. She recalled an occasion when she complained to the Applicant about a boy in the class. The Applicant hugged her from behind, kissed her head, neck and shoulders and she felt something hard rubbing into her bottom. She gave other examples of when the Applicant

bandaged to the top of her leg, touched her bottom while he carried her, and pressed his erect penis into her while she was in the swimming pool.

(9) V9 said the Applicant bandaged her leg right to the top of her thigh during a first aid class.

(10) V10, a male pupil, described himself as one of the naughtier children in his school year. He was not in the Applicant's class, but the Applicant used to discipline him. In doing so, the Applicant used to drag him by the ear and pick him up by the jumper so his feet were off the ground. There was an occasion when the Applicant rubbed his nose in dog faeces. The worst incident he would remember was when the Applicant picked him up and threw him across numerous tables and into a wooden bookcase.

(11) V11 was a regular attender at the after school First Aid Club and said that, as a child, she found it odd that they always had to change into their PE kit for the club. During the class the Applicant used to touch her vagina outside her underwear, leant over her so that he could touch her and brush his erect penis against her. When sitting at her desk in class, the Applicant regularly used to brush his hand against her breasts. On one occasion the Applicant lifted her onto his lap and gyrated his hips in order to rub himself against her.

(12) V12 said the Applicant used to press his groin against her during the First Aid Club. He would put leg splints on her, in doing so he touched her thigh and the side and front of her underwear. She said that, on three or four occasions, the Applicant took her to the cupboard and placed his fingers inside her vagina. In class, he used to press his groin against her back. Other times he sat her on his knee and gyrated.

(13) V13 said the Applicant used to touch her down her sides and rub his penis on her lower back.

(14) V14 said the Applicant used to press himself into her while she was sat at her desk. She recalled feeling a lump in the bottom of her back which sometimes went hard.

(15) V15 said the Applicant used to rub his private parts against her back between her shoulder blades while she was sat at her desk. She said there was a huge difference in the way the Applicant treated boys and girls. She recalled a time when she saw him throw a boy across a desk.

(16) V16 gave evidence of an occasion when the Applicant kissed her on the cheek.

(17) V17 said the Applicant was always in her personal space. She said, on one occasion, the Applicant knelt next to her and rubbed up and down her back, then put his hand up her skirt and touched her skin and the side of her underwear. He also used to touch her lower back in class and press his lower body into her. She could feel he was aroused.

(18) V18 said the Applicant used to press his penis into her back, she knew there was some arousal because she could feel his erection.

(19) V19 was not in the Applicant's class but spoke of physical contact at break times. During an after-school activity with the Applicant, his arms went over her shoulders, and he reached down to her vagina. He rubbed her vagina with his fingers over her clothing for a couple of minutes. The Applicant made noises of pleasure and pressed himself into her back. She recalled feeling something hard in her back.

(20) V20 said the Applicant used to place his hands into her underwear on occasions when she was in the stock room. It was skin on skin contact. The Applicant then pressed himself against her and gyrated. She witnessed the Applicant behaving in a similar manor with V21.

(21) V21 said that, during a class when they were talking about heartbeats, the Applicant placed his hand up her top and touched the bare skin of her breast area. On another occasion, in the resource area, the Applicant put his hands down her skirt and into her underwear. He then stroked her vagina and, at the same time, he rubbed himself against her lower back.

(22) V22 recalled an occasion when the Applicant knelt at the side of her desk to give her some help and put his hand between her legs in her groin. From then on, she used to cross her legs every time she asked the Applicant for help.

(23) V23 said the Applicant touched her leg and ran his finger along the elastic of her underwear while he put on a splint during the First Aid Club. He used to also follow her into the store cupboard, trap her between him and the shelves and then rub himself against her.

(24) V24 said the Applicant used to put his hand up her skirt and toucher her vagina over her underwear. While doing that he used to push himself against her back and she could feel something hard. She said that happened about once a week. The Applicant then progressed to moving her underwear aside and putting his fingers inside her vagina which caused her pain.

(25) V25 said the Applicant frequently used to appear behind her as she was sitting at a desk and rub his penis against the small of her back until it got hard. During First Aid Club, the Applicant used to touch her on the outside of her underwear with his thumbs.

(26) V26 said the Applicant rubbed his hands across her chest, rubbed his penis from side to side against her back and made moaning sounds. She said it was just normal behaviour for him.

(27) V27 did not attend St John's Primary School but lived opposite the Applicant. She recalled a time when she and her brother were at the Applicant's house after school and the Applicant put his hand up her skirt and touched her vagina over her underwear.

10. Several other witnesses, called by the prosecution, gave evidence corroborative of the complaints.

11. The Applicant's case was that the allegations were false. He denied all allegations of indecent assault and stated that, during his teaching career, he had no more than ordinary and lawful physical contact with his pupils; accordingly, he denied, in their entirety, the complaints against him.

12. The Applicant further denied allegations of cruelty. He accepted he was a strict disciplinarian but asserted that, when he was a teacher in the 1970s and 1980s, physical chastisement was not only permitted, it was regarded as acceptable. He used physical intervention as a last resort following serious misconduct on the part of the pupil; that usually amounted to no more than a slap with an open hand to the back of a bare leg.

13. The defence submitted that the allegations of the complainants were fabricated and completely implausible. The defence submitted that it was impossible that the sort of persistent and blatant behaviour alleged would have gone unchallenged for so long. The witnesses were lying. There had been plenty of opportunities for collusion and/or collaboration between the witnesses to make up the allegations.

## E: The Judge's directions of law to the jury

14. In the usual way, the Judge shared his proposed written directions of law for the jury with Counsel at the trial. We were told that they were the subject of discussion with Counsel, and some refinement, before being given to the jury. No complaint was made by trial counsel for the Applicant either before or after the directions of law were given to the jury. The court has been provided with the directions that were given in the first trial. No point has been taken by the Applicant that the judge's directions were materially different in the second trial.

15. The written directions contained the standard directions, including directions as to the burden and standard of proof. No complaint is made about these directions. The particular directions sought to be challenged by the Applicant are as follows (emphasis in the original document with paragraph numbers added in square brackets):

(1) Under the heading "CROSS ADMISSIBILITY / PROPENSITY":

> "[1] There are 27 complainants in this case, all of whom allege that Grahame Brennand acted inappropriately towards them, either sexually in the case of the girls, or violently in the case of the boys.
>
> [2] An important question to ask in this case is: What is the relevance of the evidence of one complainant when considering the evidence of another? Or, to what extent can the evidence of one support the complaint of another?
>
> [3] It is a matter entirely for you in what order you consider the Counts on the Indictment, provided of course that you consider them separately. But, to what extent can the complaint of one support the complaint of another?
>
> [4] Well, before there can be any question of the evidence of one witness supporting the complaint made by another, you would have to first be sure that there is no question of the complainants having put their

heads together to make, or support, a false complaint against the Defendant.

[5] That is obvious, but you will also need to consider, even if there has been no open collaboration between them, whether there is nonetheless a possibility that there has been some indirect or subconscious influence from one to the other, or perhaps if matters had been talked about within a friends or family setting, whether one or more were thereby influenced in making their complaints at all, or influenced into making a complaint of a similar nature.

[6] It is precisely for this reason that [Defence Counsel], asked each witness a number of key questions... [the Judge then set out the questions and issues relating to contamination/collaboration on the evidence] …

[7] The mere fact of *some* discussion having taken place, especially within a friend and/or family setting, does not of course automatically mean the complaints cannot be independent and true.

[8] But if you conclude that there has been conscious or subconscious, direct or indirect collusion or contamination between the complainants, then the evidence of one cannot support the complaint of the other.

[9] **The real questions are:**

**(i) is the complaint of one witness truly independent of the other? and**

**(ii) is the complaint truly the product of that person's genuine experience at the hands of the Defendant?**

If, however, you are sure that there has been no collusion or contamination, then go on to ask yourselves this question:

**(iii) is it reasonably possible that these complainants, independently making similar accusations that they were sexually and/or violently assaulted by the Defendant, could each be either lying or mistaken?**

[10] That is of course a common-sense question for you to address in considering the degree of similarity between the accusations and the circumstances in which the complainants say they occurred.

[11] The greater the degree of similarity the more likely you may think that the complaints are true for it would be something of a coincidence, would it not, for them each to have hit upon the same lies or to have made the same mistakes as to matters of fact.

[12] On the other hand, the less degree of similarity the less weight to be given to the evidence of one as supporting the other's complaint.

[13] The similar features pointed to by the Prosecution are: [the Judge set out the key features relied upon by the prosecution]…

[14] The Defence on the other hand say there are features in the case or inconsistencies in the accounts, which undermine the Prosecution claims of similarities, for example: [the Judge set out the key features relied upon by the defence]…

[15] Having considered these matters, my Direction to you is as follows:

**There are two possible ways in which the evidence on one count might support the prosecution's case on other counts:**

FIRST:

[a] If you decide in relation to one count that you are *sure* it is made out, in other words that Grahame Brennand is guilty of that count, then that finding is one which you would be entitled to take into account in considering your verdict in relation to the other Count(s).

[b] But that applies only if you are sure that your finding established a propensity, that is to say, a tendency, to behave in that sort of way, ie to sexually offend against his young pupils. If you do consider that such a propensity is established, you are entitled to consider whether that propensity makes it more likely that he committed the further Count(s) you would then be considering.

[c] But you mustn't assume that because you are sure he is guilty of one Count (if that is what you find) and that he has a tendency to commit sexual offences against his pupils, that he must be guilty of the other counts – that does not automatically follow. This would only be part of the evidence against him on the count you are that time considering and you must not convict him of other counts wholly or mainly on the strength of the fact that you may have found him guilty of earlier ones.

SECOND:

[d] If you are sure there has been no concoction or influence of the kind I have already directed you about, you should consider how likely it is that two or more people, independently of each other, would make allegations that were similar but untrue. If you decide that this is unlikely, then you could, if you think it right, use the evidence of one complainant as support for the evidence of another.

[e] When deciding how far, if at all, the evidence of each complainant supports the other, you should consider how similar in your opinion their allegations are. This is because

> you could take the view that the more similar independent allegations are, the more likely they are to be true.

(2) Under the heading "*THE "WHY?" QUESTION / A REMINDER OF THE BURDEN OF PROOF*":

> [16] As a jury, you may ask yourselves, 'Why would so many former pupils say these things about their teacher, 30-40 years later if they were not true?'.
>
> [17] That is a perfectly proper question to consider. If you conclude that there appears to be no false reason or improper motive for them to make these allegations, you may, not must, conclude that they are true.
>
> [18] In this case, Grahame Brennand was asked by [prosecuting Counsel], why these former pupils have made these accusations if they are not true? Grahame Brennand was unable to give a reason.
>
> [19] However, you must bear this in mind: just because Grahame Brennand was unable to put forward any motive which these witnesses may have for making what the Grahame Brennand says are false allegations, or if you rejected a possible motive he suggested (for example a compensation claim in the case of [complainant 4]) does not mean that the case against him must therefore be made out so that you are sure of his guilt.
>
> [20] Remember what I told you about the burden and standard of proof. The prosecution must prove the case. The defendant does not have to prove anything. He does not have to make you sure that there is some improper motive for what they say amounts to a pack of lies.
>
> [21] The prosecution must make you sure that, firstly, there is no improper motive for the witnesses making these allegations and, secondly, that the allegations are truthful and accurate."

16. The Judge gave substantially the same directions he had given the jury in writing in the first part of his oral summing-up. Indeed, in his oral summing up, the Judge emphasised the direction he had given in [21] by adding:

> "So please don't think that Mr Brennand has to come before you and give a proper or satisfactory explanation as to why they are making these false claims. He doesn't; it works the other way. The prosecution has the burden from first to last, remember."

## F: The proposed grounds of appeal

17. The issue sought to be raised in the Application for leave to appeal principally concerns cross-admissibility of evidence; the way in which the jury could use the evidence of one or more complainants in relation to other counts on the indictment. The Applicant complains that the trial Judge misdirected the jury on this issue. Further, and related to the cross-admissibility issue, the Applicant contends that, in his directions – under "the 'Why?' question" – the Judge gave the impression to the jury that it was for the Applicant to explain why so many complainants had come forward making what he

claimed were false allegations of indecent assault against him; thereby reversing the burden of proof.

18. On the first point, Mr English's submissions are that this was not a case where the evidence in relation to one count was "*much stronger*" than another and, accordingly, this was not one of the "*rare cases*" where the jury should have been directed to consider both propensity and coincidence. In the alternative, if it was appropriate to direct the jury both as to propensity and coincidence, then the Judge had not properly directed the jury to avoid 'double counting'.

19. In relation to his second point, Mr English argued that the Judge's directions as to the 'why?' question (see [16]-[21]), would have left the jury with the impression that the Applicant was required to give an explanation as to why the complaints had been made, thereby practically reversing the burden of proof. This direction, it is argued, should not have been given.

20. Mr English also raised the point that the Crown had made no bad character application in respect of the cross-admissibility of evidence.

**G: The extension of time application**

21. As noted, the Applicant would need a substantial extension of time to bring his application for leave to appeal. The explanation, put forward in the evidence and submissions on his behalf, is that the Applicant was given oral advice as to the prospects of an appeal (including an appeal against conviction) by his trial Counsel following his sentence. Thereafter, at some point in 2020, Lancashire County Council had contacted the Applicant to advise that several of the complainants in the criminal proceedings had threatened (or commenced) civil claims against him and the Council.

22. A friend of the Applicant had contacted the Applicant's present solicitors in March 2020. As a result, the solicitor, Mr Turner, had made an appointment to visit the Applicant in prison on 26 March 2020. However, on 23 March 2020, as a result of the pandemic, all prison visits were suspended. For the remainder of 2020, the solicitors made efforts to contact the Applicant by telephone and by letter. On 17 November 2020, Mr Turner received written authority to obtain his file from his former solicitors. A prison visit was finally arranged for 13 April 2021, however no private conference facilities were available and so little was achieved during the conference.

23. Transcripts of the relevant parts of the trial were requested by the Applicant's solicitors on 30 May 2021, and subsequently received on 24 June 2021. A further prison visit took place on 10 August 2021, but the conditions were the same as the first visit. Mr Turner submitted a complaint about the unsuitability of the facilities for legal visits offered at the prison was sent to the prison governor on 15 October 2021. After further correspondence, on 3 February 2022, the request for a private solicitor/client meeting was refused on the grounds of "*social distancing*". A further visit was arranged for 1 March 2022, but this had to be cancelled because Mr Turner was unwell. During his convalescence, the case was referred to Counsel on 11 March 2022.

24. A meeting was arranged between Counsel and the Applicant on 11 June 2022 at which the Applicant provided a folder of further material. A further conference took place

with Counsel, on 27 October 2022, before the application for leave to appeal, dated 10 November 2022, was submitted to the Court of Appeal.

25. Mr English acknowledged that the Applicant was seeking a significant extension of time, but he argued that the interests of justice would be served by permitting the Applicant to apply for leave out of time.

## H: Decision

### (1) Extension of time

26. In ***R -v- Paterson*** **[2022] EWCA Crim 456**, the President of the Queen's Bench Division set out the principles the Court of Appeal will apply when considering an application for an extension of time:

> [25] The statutory framework for appeals to the Court of Appeal, Criminal Division is contained in the Criminal Appeal Act 1968. Section 18 (1) of the Criminal Appeal Act 1968 provides that a person who wishes to appeal to the Court of Appeal, Criminal Division or to obtain leave to appeal against conviction should give notice of appeal or notice of application for leave to appeal. Notice and grounds of appeal should be lodged within 28 days from the date of conviction, sentence, verdict, finding or decision that is being appealed: see section 18(2) of the Criminal Appeal Act 1968 and Crim PR 39.2(1)). Section 18(3) provides that the time for giving notice under this section may be extended, either before or after it expires, by the Court of Appeal. Further, an extension of time application should be made at the time of service of the notice and grounds of appeal, and give the reasons for the application: see Crim PR 36.4 and 39.3(1)(e)(ii).
>
> [26] The court is asked to exercise its power under section 18(3) to grant an extension of time in many different circumstances and neither the Criminal Appeal Act 1968 nor the Criminal Procedure Rules limit the discretion of the court on the issue whether an extension of time should be granted: see ***R -v- Thorsby*** **[2015] EWCA Crim 1, 1 Cr App R(S) 63** (Pitchford LJ, Popplewell and Edis JJ)
>
> [27] It is not the case however that an arguable case on the merits is simply a trump card without more. If that were to be the position, the legislative scheme, providing as it does for time limits for appeals with a discretionary power to extend, would be rendered nugatory. So would the requirement in the Rules for the applicant to give reasons for the delay in applying.
>
> [28] In ***Thorsby*** the defendants appealed the failure to give them credit, under section 240A of the Criminal Justice Act 2003, for half of the time they had spent on a qualifying curfew. Their appeals were out of time, but the responsibility for this lay with the court and the legal representatives, not the defendants. At [13] to [15], Pitchford LJ addressed the general approach that is taken to extensions of time. Having said, as already mentioned, that neither the Criminal Appeal Act 1968 nor the Criminal Procedure Rules limit the discretion of the Court on the issue whether an extension of time should be granted, Pitchford LJ said that the principled approach to extensions of time is that the court will grant an extension if it is in the interests of justice to do so. There are, however, several components that

> contribute to the interests of justice. The court will have in mind finality, the interests of the parties, the efficient use of resources and good administration. The public interest also critically embraces the justice of the case and the liberty of the individual. Where there is no good reason why the time limits were not complied with, the court is unlikely to grant an extension unless injustice would be caused in consequence. The merits of the underlying grounds will be examined. The judgment is judicial and not merely administrative. The court will be more likely closely to examine the merits of an out of time appeal when it is argued that some principle of law or legal requirement has been ignored or overlooked…
>
> [30] In coming to the view that the application for an extension should be refused, we have in mind that were the application to be successful, one potential outcome could be a retrial, some 5 or more years after the conclusion of the original trial, and many years after the events in question. In that context, we reiterate the point made in ***Thorsby***, that the interests of justice include a number of components, including finality, the interests of the parties (including here, those of the complainants as well as those of the applicant) and the public interest in the efficient use of resources and good administration… The points now made on [the Applicant's] behalf did not involve any lengthy investigation or difficulty. The appeal grounds when they were eventually produced turned on a legal issue arising from a short passage in the directions of law given by the judge in the summing up, which was itself conspicuously thorough and fair. Further, the account given to the court in support of the extension application lacked particularity and left much unexplained. This was the position even though it is well settled that the court requires details of the delay in lodging grounds of appeal and the reasons for it; and where it is clear that the longer the delay, the more convincing and weighty the explanation for any delay will need to be.

27. The delay in the Applicant's case is very substantial. Although we accept the evidence of Mr Turner as to what happened between the Applicant's conviction after the second trial, in late September 2018, and the submission of the Notice and Grounds of Appeal in November 2022, the explanation cannot begin to justify a delay of this length. Undoubtedly, the pandemic generally, and the restrictions it placed on prison visits, particularly, presented challenges for the Applicant's solicitors and impaired their ability to get full instructions from the Applicant. We also accept Mr English's submission that the Applicant's legal advisors needed to consider, and advise upon, all points raised by the Applicant as potential grounds of challenge in any appeal. Nevertheless, the reality is that the grounds now advanced are straightforward. They rely upon alleged errors in the trial judge's directions to the jury. The transcript of the Judge's summing up was available to the Applicant and his solicitors from late June 2021. The application for leave to appeal was not lodged for a further 16 months. Judged simply on the extent of the delay and the reasons put forward to explain it, we would have refused the extension of time.

28. Mr English submitted that, notwithstanding this significant delay, the Court ought nevertheless to hear the Applicant's application for leave to appeal because, if there has been an error, justice requires that it be corrected. As made clear in ***Paterson***, simply demonstrating an arguable case on the merits is not a "*trump card*" that can overcome even substantial delay. As reflected in the judgment quoted above, the time limit on applications for leave to appeal is not imposed arbitrarily or for simple

administrative convenience. Principally it is a measure designed to secure the proper administration of justice; it reflects the important principle of finality in litigation. Substantial delay in making an application for leave to appeal also risks impairing the Court's ability to do justice. In this case, trial Counsel was asked for his observations on the Applicant's grounds. Perhaps understandably, the advocate was unable to provide much by way of assistance because of the substantial period that had elapsed and was only able to offer that there did not appear to be anything factually incorrect in the grounds that were being advanced.

29. Nevertheless, there may, exceptionally, be appeals sought to be brought where the ground(s) advanced are of such cogency that the court is satisfied that it would be contrary to the interests of justice not to allow the substantive appeal to be argued. In such exceptional cases, the Court may grant the necessary extension of time, notwithstanding that no satisfactory explanation for a significant delay has been given. Having considered the points argued on the Applicant's behalf, we are satisfied that the present case is emphatically not such a case.

**(2) Leave to appeal**

30. We can deal with the complaint about the lack of notice by the prosecution that they were seeking to rely on cross-admissibility quite shortly. This ground has no real prospect of success. In fairness, Mr English did not press this ground in his oral submissions.

31. It is, of course, correct – and Mr Kellet does not argue otherwise – that, where the prosecution seeks to rely, by way of bad character, upon one count as being cross-admissible in relation to another, the prosecution must give notice of a bad character application under Crim PR, Rule 21.1: ***R -v- BQC*** **[2021] EWCA Crim 1944** [21]. This requirement is not merely technical: ***R -v- Gabbai*** **[2020] 4 WLR 65** [83]. Nevertheless, the mischief that the notice requirement is seeking to avoid is the defence being taken by surprise by the prosecution seeking to rely upon cross-admissibility between counts on the indictment. In this case, the nature of the allegations, and the evidence relied upon by the prosecution, meant that it was common ground, from the outset, that issues of cross-admissibility would arise. The matter was thoroughly and properly addressed before summing up and speeches and, as we have found, the Judge gave appropriate and clear directions to the jury. No one was taken by surprise. We are satisfied that, in this case, there is no substance in the complaint about the lack of a bad character notice. There has been no unfairness caused to the Applicant and it is not arguable that the failure to serve the relevant notice undermines the safety of his convictions.

32. In his directions on cross-admissibility, the Judge gave both the coincidence direction and the propensity direction. In his written grounds, Mr English had contended that this was not one of the "*rare circumstances*" where the jury should have been directed to consider both. In his oral submissions, he modified this position and accepted that, on the facts of the case, it was appropriate to give both directions. He nevertheless contended that the Judge had failed to give the jury a clear direction on avoiding "*double counting*".

33. Apart from the "double counting" issue, the Applicant makes no complaint about the terms of the directions given by the Judge on propensity and coincidence. As to the

circumstances in which both directions should be given, the current version of the *Crown Court Compendium* (which we appreciate is not the version available to the parties and the Judge at the trial) ("the *Compendium*") states (§13-9) (footnotes omitted, emphasis in the original):

> "In some rare cases it may be appropriate to direct the jury that the evidence that is cross-admissible is capable of being used for propensity type reasoning **and** to rebut coincidence. The leading case is *N(H)* [2011] EWCA Crim 730. Care should be taken by the judge before giving both directions. It is important to avoid double accounting – i.e. the jury cannot use evidence from count 1 to rebut coincidence that D committed count 2 and then, having become sure of guilt on count 2, use that as propensity evidence to convict D on count 1. The issue of whether it is appropriate for both limbs of the direction to be given was considered in *BQC* [2021] EWCA Crim 1944. The court stated that where such was to be done what was needed was a '**clear, concise and well-tailored direction**'. The court further identified that for a jury to follow such a direction they needed '**a clear written document to assist**'."

34. The reference to "*rare cases*" in §13-9 reflects the decision in ***R -v- N(H)*** in which Pitchford LJ stated that, "*it will be in rare circumstances, if at all, that the jury might be directed to consider both [propensity and coincidence] in the same case*" ([31]).

35. We express considerable reservations about these remarks. Whether, in an individual case raising issues of cross-admissibility, directions on propensity and/or coincidence are required is for the trial judge to determine on the facts of the case. There is no legal principle that should preclude a judge, in an appropriate case, giving both directions, and nor should it be taken that ***N(H)*** is laying out some legal requirement of exceptionality before this can be done. Ultimately, the decision as to the appropriate directions to give depends upon the facts of the particular case. We would note that this also appears to be the view of the editors of *Archbold*, who observe (§13-52): "*In theory, there appears to be no good reason of principle why the prosecution should not be able to argue a case of this sort using both coincidence and propensity.*"

36. In some cases, where there are several complainants and a number of complaints, the judge may properly consider that no direction on either propensity or coincidence is appropriate and that jury should simply be given the separate consideration direction (see ***R -v- Adams*** **[2019] EWCA Crim 1363** [18]; ***R -v- Cloud*** **[2022] EWCA Crim 1668**; **[2023] 1 Cr App R 19** [27]-[28]). In others, where issues of cross-admissibility do arise, a direction on propensity but not coincidence may be appropriate. In others again, a direction on coincidence but not propensity may be appropriate. And there may be yet others where a direction both as to propensity and as to coincidence will be appropriate. As will be gathered, we take the view that the present was justifiably assessed by the trial judge to be just such a case.

37. The current version of the *Compendium* contains the following warning to judges who are considering whether to give both propensity and coincidence directions (§13-17):

> "Depending on the evidence and issues in the case, a direction based on both propensity and coincidence approaches may be appropriate. However, such a direction is likely to be complex and, unless great care is taken, confusing. It is suggested that such a direction be given, if at all, only in cases where the evidence on one or more counts is significantly stronger than that on the other(s), and in

> which the jury might therefore convict on the stronger count(s) first, and then treat that as establishing a propensity on D's part to commit offences of the kind charged in the other count(s). Examples would be where there is a recording of D's committing one of the offences charged in the indictment; where one or more witnesses say that they saw D committing one of the offences charged; or where D is said to have confessed to committing one of the offences charged."

38. ***R -v- Gunning*** **[2018] EWCA Crim 677** is cited as the authority for this guidance. In ***Gunning***, the Court also appeared to recognise that there was no requirement of exceptionality before both directions on cross-admissibility could be given and "*plainly each case must turn on its own facts*" ([23]). However, Spencer J did apparently endorse the proposition that both directions should be given "*only*" ([18]):

> "…in cases where the evidence on one or more counts is significantly stronger than that on the other count which the jury may be considering, and that the jury should then have the opportunity to convict on the stronger count establishing propensity before considering the other count. In that event and to avoid the risk of impermissible double-counting, the propensity approach should be explained in the direction first, then the coincidence approach."

39. With respect, the suggestion that a direction both on propensity and on coincidence may be justified, where one count is assessed to be significantly stronger than others, seems hard to accept. Not only might an assessment of the relative strengths of one count as compared to others on an indictment be invidious, but also it seems difficult to ascertain a principled basis for this approach in deciding whether to give a direction both on propensity and coincidence. Nor do we see any reason in law why, as is there suggested, a judge who gives such a direction should always be required to deal first with propensity and only then with coincidence. No doubt that may very well be a convenient approach, but it is not, in our opinion, to be taken as a legal requirement in all cases.

40. In our opinion, therefore, the approach to giving a direction on both propensity and coincidence is rather more open-textured than the restricted approach indicated in ***N(H)*** and ***Gunning*** might suggest. We note, in fact, that a rather broader approach was adopted in the case of ***BQC*** [58] and, as will be gathered, we agree with that approach. It may be, therefore, that the editors of the *Compendium* will wish to consider the guidance currently there given on this issue.

41. We revert to what we have said earlier. In the context of cross-admissibility, in many cases a direction on both propensity and coincidence will not be appropriate. Crown Court judges will be alive to not overloading juries with complex legal directions on matters not, in reality, calling for such directions. But in a case where potential cross-admissibility issues as to propensity or coincidence or both have been raised, the matter should be fully debated with counsel in the absence of the jury and appropriately tailored legal directions crafted accordingly. The overarching principle is that the jury must be given directions that are relevant to and reflect the particular circumstances in which questions of cross-admissibility arise in the case, not template directions without adaptation: ***R -v- Bailey*** **[2017] 1 WLR 4545** [60]. In this respect, we do endorse the following advice from the *Compendium* (§13-14):

> "In any case in which a cross-admissibility direction is contemplated, it is essential to discuss with the advocates in the absence of the jury and before closing speeches the need for and form of any such direction… [T]he jury will inevitably be assisted by some form of written direction."

In cases in which the judge considers that issues of cross-admissibility arise, s/he may well think it prudent, therefore, to raise it with the advocates, in the absence of the jury, at an early stage of the trial. If the prosecution intends to open the case to the jury on the basis that, at the end of the evidence, the jury will be invited to consider issues of both propensity and coincidence, it would be prudent for the matter to be addressed right at the start of the trial to ensure that the parameters are clearly established.

42. As Mr English was inclined to accept, he cannot contend that, on the facts of this case, the Judge was not justified in giving the jury directions on both propensity and coincidence. No challenge is made to the terms of the directions that the Judge gave. It is unhelpful, and unnecessary, to perform any sort of analysis of whether this makes this case "rare" in the cohort of cases where cross-admissibility arises.

43. We have our doubts whether, in a case where the jury are to be directed as to cross-admissibility on both propensity and coincidence, (a) it is right to mandate that they *must* consider propensity first; and (even if, no doubt, that may be a convenient way of approaching matters) (b) that the specimen direction properly directs the jury as to their task and provides an effective warning about avoiding 'double counting'.

44. In this respect, we note what the authors of *Blackstone's Criminal Practice* say on the issue (§§F13.58-13.59):

> "The underlying principle is that the probative value of multiple accusations may depend in part on their similarity, but also on the unlikely prospect that the same person would be falsely accused on different occasions by different and independent individuals. The making of multiple accusations is a coincidence in itself, which must be taken into account in deciding admissibility. As Lord Cross of Chelsea put it in ***DPP -v- Boardman*** **[1975] AC 421** (at p.460):
>
> > '… the point is not whether what the appellant is said to have suggested would be, as coming from a middle-aged active homosexual, in itself particularly unusual but whether it would be unlikely that two youths who were saying untruly that the appellant had made homosexual advances to them would have put such a suggestion into his mouth.'
>
> Similarly, in ***Chopra*** **[2006] EWCA Crim 2133, [2007] 1 Cr App R 16 (225)** where the three young complainants each separately alleged that D, a dentist, had squeezed their breasts in the course of treatment, there was a sufficient connection to warrant cross-admissibility: the Court of Appeal noted that it was more likely to be true than if only one of them had said it, and was not persuaded by the argument that there were many more patients of D who had made no such allegation. See also ***Wallace*** **[2007] EWCA Crim 1760, [2008] 1 WLR 572**.
>
> In directing the jury where evidence is cross-admissible under the provisions of s.101, it would be over-restrictive to suggest that the jury should first determine that they are satisfied in relation to one of the counts before moving on to use the evidence in relation to that count in dealing with any other. The jury,

> though obliged to reach a verdict on each count separately, may use admissible evidence in relation to any count, including the evidence of bad character arising from another (***Freeman*** **[2008] EWCA Crim 1863**, **[2009] 1 Cr App R 11 (137)**, disapproving comments in ***S*** **[2008] EWCA Crim 544**). In part the confusion may have arisen because of a perceived need to conclude that the accused has a propensity to commit such an offence (an inference dependent on the accused's having done so on one occasion) before moving to consider another. However, the process of reasoning in cases such as ***Chopra*** does not depend on reasoning via propensity, but via coincidence, and is holistic rather than sequential (see ***McAllister*** **[2008] EWCA Crim 1544, [2009] 1 Cr App R 10 (129)**…)."

45. The facts of this case rather bear this out. The Judge adopted a hybrid approach to his directions on cross-admissibility. In his direction, he followed the *Compendium* (and ***Gunning***) recommended practice of dealing first with propensity ([15][a]-[c]) and then coincidence ([15][d]-[e]). Although the Judge, in fact, directed the jury to consider propensity first (albeit not mandating them to do so), we are not at all convinced that he could have been criticised if, in this case, he had chosen first to deal with coincidence. There were 25 complainants alleging indecent assault. If the jury was sure that there was no manufacture or contamination, the fact of such a large number of similar allegations against the Applicant was admissible evidence that they could consider in deciding whether they were sure that he was guilty of one or more counts. As noted in the passage above from *Blackstones*, on the issue of coincidence, the approach is holistic not sequential. Insofar as Mr English complains about the absence of a specific direction to avoid 'double counting', he was unable to articulate what more the Judge should have said, on the facts of this case. We rather think that any further specific warning against 'double counting' would have risked directing the jury to approach their task in a sequential rather than holistic manner.

46. Overall, and despite Mr English's thoughtful and helpful submissions, we are not persuaded that the Applicant has a real prospect that the Judge's directions to the jury on cross-admissibility were such as to render the Applicant's convictions unsafe. On the contrary, we consider that the Judge gave careful and clear directions on this issue specifically and appropriately tailored to the facts of the case. The 'why?' question was, to an extent, merely to repeat an element of that part of the cross-admissibility direction relating to coincidence. The Judge properly and firmly directed the jury that this did not alter the burden of proof, which remained on the prosecution, a point to which, as we have noted, he gave further emphasis in his oral directions.

47. For the reasons we have stated above, in all the circumstances, it would be contrary to the interests of justice to grant the extension of time sought. In consequence, the application for leave to appeal against conviction necessarily fails. The issues considered in this decision were fully argued and we give permission for this judgment to be cited notwithstanding this was an application for permission.