



Neutral Citation Number: [2026] EWCA Crim 542

Case No: 202303463 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE
CROWN COURT AT GLOUCESTER
His Honour Judge Lowe
T20227059

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 May 2026

Before:

LORD JUSTICE STUART-SMITH
MRS JUSTICE O'FARRELL
and
COMMON SERJEANT OF LONDON
(HIS HONOUR JUDGE MARKS KC)

Between:

REX

Respondent

- and -

MATTHEW DICKENS

Applicant

Lisa Judge (instructed by Winley Ford Solicitors) for the Applicant
Giles Nelson (instructed by CPS Appeals and Review Unit) for the Respondent

Hearing date: 26 March 2026

The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence.

Approved Judgment

This judgment was handed down remotely at 10.30am on 8 May 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Stuart-Smith:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where an allegation has been made that a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act. For the avoidance of doubt, we do not waive or lift the prohibition. To ensure the anonymity of the complainant we shall refer to her as C and to the lay witnesses who gave evidence at trial by letters.

Introduction

2. On 15 September 2023, in the Gloucester Crown Court before His Honour Judge Lowe ("the Judge"), the applicant was convicted on two counts of rape. On 20 October 2023 he was sentenced by the Judge to six years imprisonment on each count, concurrent.
3. An application for leave to appeal against conviction was made on behalf of the applicant by trial counsel, Mr Hayes. That application was refused by the Single Judge. A renewed application for leave was issued but vacated in November 2024, as the applicant wished to instruct fresh counsel.
4. On 27 January 2026 new counsel, Ms Judge, represented the applicant at a hearing where the Full Court considered applications for leave to amend the Grounds of Appeal, leave to adduce fresh evidence, and a renewed application for leave to appeal against conviction. The court adjourned the applications to be heard by the Full Court in a rolled-up hearing.
5. We heard the rolled-up hearing on 26 March 2026. At the rolled-up hearing the applicant applied for leave to amend the Grounds of Appeal and leave to adduce fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968; and he renewed his application for leave to appeal against conviction. We heard full submissions from counsel for the applicant, Ms Judge, and counsel for the Prosecution, Mr Nelson, on a *de bene esse* basis.
6. This is our judgment arising out of the rolled-up hearing. For the reasons we set out below:
 - i) We grant leave to amend the Grounds of Appeal;
 - ii) We refuse the applications to adduce fresh evidence pursuant to section 23 (though we rely on some of the information provided by the applicant in support of his application to adduce the evidence);
 - iii) We give leave to appeal; but
 - iv) We dismiss the appeal.

The factual background

7. Much of the factual evidence was not in dispute. In summary, the material facts are as follows.

8. Prior to the incident in question, C and the applicant were not known to each other. On 16 January 2020 the applicant approached C on Snapchat. They struck up a conversation and C invited the applicant to visit her at university for a few drinks with friends. The following evening, Friday 17 January 2020, the applicant arrived at C's university with his friend B. They had some alcoholic drinks in her room, together with C's friends and fellow students, F and S. At around 10.30pm they all went to the university bar, where they continued drinking and talking.
9. At around 11pm, the applicant and complainant returned to C's bedroom. It is common ground that there was unprotected sexual contact between them; the applicant penetrated C's vagina (count 1) and anus (count 2) with his penis. It is also common ground that C became upset during and after the sexual activity.
10. The prosecution case was that C was vaginally and anally raped by the applicant. The applicant's case was that the vaginal and anal sexual intercourse was consensual.

The prosecution evidence

11. C's evidence was that she had been drinking and had gaps in her memory of the evening but was sober enough to decide whether or not to have sex. She did not remember leaving the bar, saying goodbye to anyone, or why she went with the applicant to her room. She accepted that must have taken her clothes off while the applicant was in the bathroom but she did not remember so doing. The applicant pushed her down on the bed and penetrated her vagina and anus with his penis. C asked him to stop multiple times, because she was in pain and he was not wearing a condom, but he did not stop. The applicant put his hand around her throat and she was unable to breathe. He did eventually stop, put on his clothes and left. She remembered F being in her room but not that she had been there on two occasions; nor could she remember saying to F or to S that she was fine.
12. The following morning, 18 January 2020, C told her friend F what had happened. She reported the allegations of rape to the police and attended a Sexual Assault Referral Centre ("SARC"), where a forensic medical assessment was carried out. There was also a referral to hospital for an assessment of any adverse effects from the alleged strangulation.
13. F's evidence was that the applicant and complainant were chatty and flirting when they had drinks in C's room and when they were in the bar. C and the applicant left the bar but they did not return. F then went to her own room, inviting B to stay, as he could not drive because he had been drinking. C sent a message to F, asking her to come to her room. She described the message as quite calm and that it did not make her feel panicked or anything. When F arrived at C's room, she opened the door and put her head through. She saw C naked in bed and the applicant coming out of the bathroom, fastening his trousers. She asked C whether she was all right; C replied that she was fine. There were no signs of distress.
14. Later, F received a message on WhatsApp from S, asking her to come to C's room. When she arrived, C was quite hysterical and crying; S was taking the sheets off her bed. The applicant was not there. She helped C to remove her make up in the bathroom and asked what was wrong but C did not tell her. The applicant returned to the room briefly to collect his watch and jacket. In her witness statement, F said that when asked why C was

crying, he stated that it was something that happened to her when she was 12. F later found the applicant in the corridor and invited him to sleep on her floor with B, which he did. At that stage there was nothing to set alarm bells ringing. The applicant and B left the next morning.

15. The following morning she asked C if she had slept with the applicant; C said that she had done so. They went to a pharmacy for emergency contraception. F had the impression that C was in pain and saw that she had bruising to her neck, which she thought could have been a love bite. C told F that the applicant had “strangled her”, “put his willy up her bum” and “this had really hurt her.” She accompanied C to the SARC.
16. At the conclusion of her evidence, the Judge asked F about whether she had spoken to the applicant when he came back to C’s room for his watch and jacket. We review this evidence in detail later – see paragraph [48] below.
17. S’s evidence was that, after drinks and “banter” in C’s room, he had gone back to his room because he was tired. Before he went to bed, he messaged C to check that she was okay. She responded by asking him to come and help. When S arrived at C’s room, she was in bed with the applicant. S asked her if everything was all right, and she said that everything was fine. He did not see anything untoward and returned to his room. About 20-30 minutes later, S received a Snapchat from C asking him to come to her room. When he arrived, F and C were in the bathroom. The duvet was turned up and he noticed blood on the bed, in the region of the groin area. He stripped the bedcovers off the bed. C was crying, had difficulty speaking and he did not get a clear idea of what had happened. The applicant returned to the room to collect his watch and coat and left with B. C stayed in S’s room that night.

Defence evidence

18. The applicant gave evidence in support of his case that the sexual activity was consensual. C took off her own clothes. She initiated vaginal sex and did not want the applicant to use a condom. C guided the applicant’s penis into her anus. The applicant only touched C’s neck or throat to give her a love bite. When C got upset, she assured the applicant that it was nothing to do with anything he had done.
19. The applicant gave evidence that he matched with C on Tinder and she invited him to talk to her on Snapchat. She then invited him to her university on the Friday night, so he went to see her with his friend B. It was planned that he would stay overnight, but he did not go there expecting sex. They chatted and had drinks in C’s room, together with F, B and S. C seemed flirtatious and there was a conversation among everyone about sex swings, threesomes and foursomes.
20. They went on to the bar, where the applicant remembered touching C’s hip flirtatiously, but she did not tell him to stop. C continued to flirt with him in the bar. He asked C where the toilets were and she asked whether he wanted to use the toilet in her bedroom. He agreed, and she led the way. Once in C’s bedroom, the applicant went to the bathroom. When he returned, she was in bed, apparently naked under the covers with her clothes nearby. This caused him to believe that C had invited him back for sex.
21. C invited him to come over and kiss her. There was foreplay, including oral sex, and C initiated the vaginal sex. She told him not to worry about a condom, despite him being

willing to use one. C then instigated anal sex by repositioning the applicant's penis. He did not remember seeing any blood. He did not put his hands around C's neck, although he did give her a love bite. He did nothing that could have caused C pain in her neck or collarbone, or difficulties swallowing. C did not tell him to stop at any point, nor did she give any indication that she wanted him to stop.

22. The applicant's evidence was that C became upset during sex. The applicant comforted her but C said she would be okay and instigated further vaginal sex. Again, C became upset. When asked, C said that she was not upset by anything done by the applicant. He offered to contact her friends and then left, returning later to collect his watch and jacket.
23. B's evidence was that the applicant and complainant were flirting when they were all drinking in C's room. There were sexual tones to the conversation between them all. After the bar, he went back to F's room. F received a message from C and went to her room. It was apparent that C was upset, but he did not know why and was not aware of anything untoward. There was a second visit to C's room when she was upset in the bathroom. He later met up with the applicant, who told him that C was upset but no further details.
24. The issue for the jury was whether C consented to sexual intercourse, and whether the applicant reasonably believed that C so consented.
25. The jury returned unanimous verdicts of guilty on both counts 1 and 2.

Grounds of appeal against conviction

26. The renewed application for leave to appeal against conviction raises numerous amended grounds of appeal in a 53-page document. Before us, as set out in her skeleton argument, Ms Judge concentrated on the following principal grounds, which it is said rendered the trial unfair and made the convictions unsafe. Her submissions lost nothing by being made more concisely in her skeleton argument. We have, however, re-read her 53 page of Grounds since the hearing and take it fully into account. In brief outline, the proposed grounds are:
 - i) trial counsel's failure to apply, advise or secure a section 41 ruling;
 - ii) failure of trial counsel and the Judge to ensure effective participation in the trial process by the applicant and failure to inform the jury of the applicant's neurodivergence;
 - iii) trial counsel's failure to secure rebuttal medical evidence, and the prejudicial use of agreed facts and the annotated head/neck chart;
 - iv) general inadequate defence representation, errors in the Judge's summing-up and inappropriate judicial questioning of witnesses.

Ground 1: No section 41 application

The factual background

27. It was common ground that C became distressed during sexual activity with the applicant. The defence case as set out in the Defence Statement was that her distress arose, not from

any act of the applicant but from her own past trauma, specifically her disclosure that she had been sexually abused by her uncle as a child.

28. The Defence Statement included the following explanation by reference to an exchange between C and the applicant when they were in her bedroom:

“8. At one stage [C] became upset. He asked what the matter was & whether it was anything to do with him. She told him that he hadn’t done anything wrong but that she had been raped as a child by her uncle. Mr Dickens comforted her & offered to bring in her friends. She calmed down and initiated sex.

...

10. But later she became upset again because of what had happened to her as a child. [The applicant] tried to comfort her & asked repeatedly if she wanted her friends to come in. Eventually he left her and met up with [B] & [F]. They all slept in the same room.”

29. Ms Judge submits that this explanation was central to understanding both the applicant’s evidence and the context in which C became upset. The appropriate procedural mechanism for introducing that account was by way of an application under Section 41 of the Youth Justice and Criminal Evidence Act 1999, which provides:

“(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—

- (a) no evidence may be adduced, and
 - (b) no question may be asked in cross-examination, by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.
- (2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—
- (a) that subsection (3) or (5) applies, and
 - (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.
- (3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—
- (a) that issue is not an issue of consent ...
- (4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish

or elicit material for impugning the credibility of the complainant as a witness.

- (5) This subsection applies if the evidence or question—
- (a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and
 - (b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.
- (6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).
- ...
- (8) Nothing in this section authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section.”

30. It is said by Ms Judge that trial counsel’s failure to make such an application, despite repeated judicial indications at different stages of the proceedings, deprived the applicant of the opportunity to place before the jury an alternative and innocent explanation for C’s distress.

31. Prior to service of the Defence Statement, the question whether a section 41 application was required was considered by trial counsel for the applicant, Mr Hayes, as he recorded in a sidebar note of 9 November 2022 on the DCS. Mr Hayes recorded that he was due to see the applicant for the first time the next day and would upload a DCS later in the day. This he duly did; the Defence Statement is signed by the applicant and dated 10 November 2022.

32. On 28 November 2022 the section 28 cross-examination of C was undertaken by Mr Hayes. The questions for cross-examination were agreed with the applicant, prosecution counsel and the judge in advance. When asked whether sex with the applicant was contemplated as a possible outcome of the invitation to visit her, C’s evidence was:

“I didn’t invite, I didn’t invite him over to have sex. I know I had never done that before and that wasn’t my intention

...

I’d never really had sex with anyone before and I, I didn’t want that to happen.”

33. Mr Hayes tentatively asked C about the reason she gave to her friends for her distress:

“Q. Well, well both [S] and, and [F] were there and they asked you what you were crying about. Do you remember that?”

A. No I, I can’t remember that.

Q. Do you remember that you said something about you’d once had a bad experience with a guy. Do you remember saying that?

A. No, but I think that, I hadn’t ...

Q. Well ...

A. I hadn’t had sex with anyone before, so I doubt ...

Q. Well I’m, I’m not going to, I’m, I’m not going to ask you anything about sex with anybody else because it’s not relevant to this case. What’s relevant is what happened between you and Matt...”

34. Mr Hayes turned to the topic of the explanation she gave to the applicant for her distress later in cross-examination:

“Q. Do you remember, at one stage, being upset and Matt said to you, this is when you were in bed together, just put that in context. And Matt said “Well what’s the matter? And: “Is it anything to do with me?” And you talked about something that happened years back. Do, do you remember that?”

A. No, but I, I know you said not to talk about before, but nothing had ever happened years back and so I, I, I don’t think I would have said that or ...So he didn’t hear that.”

35. On 1 September 2023 a pre-trial hearing took place before Mr Recorder Bromige at which the question of a section 41 application was raised, apparently at the request of the Trial Judge. The Recorder was told that there was mention of a previous bad experience in the witness statement of F. Having reviewed the transcript of the section 28 cross-examination, the Recorder did not consider that section 41 was engaged.

“... on the face of it, Mr Hayes referencing a bad experience with a male in the context of this case could, could potentially activate section 41, but it wasn’t an overt reference. She’s, she’s replied with that comment, and he said, oh, I’m not going to ask about anything else because it’s not relevant. So I, so I’m, I’m trying to sort of, I’m trying to second guess somewhat what may have been in Judge Lowe’s mind, but if, if it, if it, if section 41 was activated, I would have expected a, the very experienced judge who dealt with the section 28 to have picked up on this and either said, well, you can’t ask that or, well, that’s been recorded, but if you actually wish to rely upon it, you need a section 41 application.

...

I'm going to be very slow to bind the trial judge, whomever that may be, at the moment it's anticipated to be Judge Lowe, but I can't see how this exchange at, at, between them causes section 41 to bite, given the clear overlap with Prosecution witnesses."

36. Mr Hayes was not present for the hearing before Mr Recorder Bromige and replacement counsel for the applicant was instructed. Mr Nelson, who was representing the prosecution as he has done throughout was present. The view of both the prosecution and defence representatives was that no section 41 application was required. The Recorder expressed the view that an application might be required depending on whether the prosecution was going to rely upon the passages in F's statement to which he had been referred.
37. On receiving the Recorder's report of that hearing, the Trial Judge recorded a sidebar note on the DCS, stating his view that there must be a section 41 application if paragraphs 8 and 10 of the Defence Statement were to be relied on. The court indicated that any such application should be listed for an urgent hearing.

"... (i) there should have been a s41 appln if para 8 and para 10 of the DS are to be relied on at trial (ii) no such appln was made, in breach of the CPR and of the laws of evidence (iii) the matter was not put to C in the s28 XX, except in the vaguest possible terms, which no jury could possibly follow or understand; and then counsel seemed to correct himself and move on.

3. Accordingly it seems to me that all reference to the subject matter of paras 8 and 10 of the DS should be deleted from the recorded evidence, and excluded from all other evidence including D's evidence.

4. If the defence submit that that subject matter is admissible under s41 and necessary to be adduced at trial, they must within 7 days submit and upload a written application setting out (i) why it is admissible (ii) why no application was made prior to the s28 XX (iii) why no attempt to put the matter properly was made at the s28 XX hearing (iv) how it would be fair to allow D to rely on this subject matter without it being fairly put to C (v) whether any arrangements are proposed to put it fairly to C at this late stage. They must then have the matter listed for urgent hearing before me, or before the trial judge if known."

38. No section 41 application was filed.
39. At trial, this issue was considered again. On 11 September 2023 Mr Hayes for the applicant confirmed that it had been agreed that he would not rely on section 41. He accepted that the Judge had been right to flag the point because, when answering the question about a bad experience with a guy, C had gone on to deny any previous sexual encounters. Mr Hayes told the Judge that he and the prosecution had agreed to excise that evidence and later clarified that he was talking about the evidence of having had a bad experience with a guy. The Judge did not agree that section 41 would not be engaged by the applicant's evidence that C told the applicant the reason for her distress during sex

was that she had been raped by an uncle as a child. Mr Hayes then explained what had been agreed with the prosecution, which did not satisfy the Judge, as follows:

“Mr Hayes: ... There is no question of that” [i.e. that C was upset because she was raped as a child by her uncle and told the applicant so] “going before the jury. As far as we go is that at some stage he was, she was upset and he comforted her. That’s as far as it goes.

...

His Honour Judge Lowe: He doesn’t wish to tell the jury ... that the Complainant told him why she was upset?

Mr Hayes: No, because then it would infringe section 41, and I have made no section 41 application for the, the legal discussions we had way back before the section 28. So that’s where we are.

His Honour Judge Lowe: So just so I understand this, is he of good character, your client?

Mr Hayes: He is not of good character. He had a problem when he was 15, as Your Honour will have seen. This was consensual sex and both were underage.

His Honour Judge Lowe: Oh. Oh, yes. Yes, he did, but, in any event, he says, because I’m getting two different versions from you, Mr Hayes, with respect. You’ve told me that he wants to tell the jury that the Complainant told him why she was upset and that he doesn’t want to tell the jury that.

Mr Hayes: No. He wants to tell the jury, but he’s unable to tell the jury. I am not making a section 41 application because we had legal discussions with, with His Honour before, so that is completely and utterly gone. So what my learned friend are of the view, as is, was Judge Lawrie, it is all set out at page 34 and 35, because that is suitably vague but deals with all areas that need to be dealt with.”

40. Mr Hayes told the Judge that it had been made clear by HHJ Lawrie (in 2022) that a section 41 application would not succeed, though he could not remember when it was made clear that an application would not be welcome save that it must have been before the section 28 cross-examination because he had provided all his proposed questions to the prosecution and to HHJ Lawrie. Mr Nelson confirmed that the topic had been discussed and that he had made it clear that paragraphs 8 and 10 of the Defence Statement were “section 41 area”. He did not recall but did not challenge that he had been given the section 28 questions in advance. It was not his recollection that HHJ Lawrie had gone through the questions and approved or altered them.

41. The Judge was concerned that this position could cause difficulties during the trial.

“His Honour Judge Lowe: What happens if your client, after all this, in evidence, gets carried away and thinks he should comply with his

oath by telling the truth, the whole truth and nothing but, and, and gives the evidence about this earlier ... distressing incident?

Mr Hayes: I have taken a great deal of time to explain to him of the consequences of doing that... . I have been very precise with my advice.

...

His Honour Judge Lowe: [After expressing the view that a section 41 application would not necessarily fail...] [b]ecause it deals with the reason she was upset. Now she was upset, and she was upset because she'd just been raped by this Defendant is her case. That's why she was upset. The logical possibilities are that she wasn't raped, she just had sex with him in a consensual manner, and she got upset during the course of it, no doubt because it reminded her of a [sic] experience earlier in her childhood when something awful had happened and she was upset about that, which is the Defendant's case... Is pretty important for the jury. What am I supposed to direct the jury about distress when there's a perfectly good, whether it's true or not, when there's an explanation for it which the jury are not going to ... hear?"

42. In the course of submissions, Mr Nelson had said:

"... forensically, the Crown's view would be were he to give that evidence, ..., questions will be asked by me as to why ... she may have mentioned rape in the context of what we say was a rape, but if he's avoiding the topic, he's avoiding the topic."

43. The Court adjourned at 11.50 on the basis that Mr Hayes would speak to the applicant about this issue. During that time, it is plain that Mr Hayes did so. This is clear from two sources. First, when responding to the new legal team's enquiries, Mr Hayes found a note on the file in the following terms:

"I Matthew Dickens have consulted with counsel & my solicitor about whether to make a s41 application. I agree with the advice that it would not be in my interests to pursue this."

The note was signed by the applicant and dated 11 September 2023. Mr Hayes told the new legal team that the note was signed by the applicant under no pressure but that because it was a "momentous" decision for all of them (i.e. the applicant and his legal team) he felt that it had to be recorded.

44. Second, at 12.32 the applicant sent WhatsApp messages to his girlfriend, R, stating:

"Like the uncle stuff it won't be mentioned at all which Jerry says is good for me which makes sense now.

...

Cause they'll say she told me that cause I raped her and it triggered it or that I made it up as a defence.”

Messages a minute or so later show that the applicant had understood that the relevant evidence would be taken out of F's evidence, that no one would be allowed to say it and that he thought it was better that way.

45. The Court reconvened at 12.43. Following his discussion with the applicant, Mr Hayes confirmed to the court that the applicant would not give evidence that C's explanation to him for her distress was rape by an uncle when she was a child. In response to a direct question from the Judge asking Mr Hayes to confirm that the applicant understood “all that” (i.e. what had been discussed). Mr Hayes confirmed that he did.
46. As no section 41 application was forthcoming, the Judge did not make a ruling on it but he formally recorded on the transcript the discussion and outcome of the issue.

“Well, I'm not required to make any ruling because no application has been made. But I do wish to make a formal entry on the record in this case, before the jury is sworn, about the matters which have been raised here this morning and the resolution of them. And I can do so briefly. The Defendant and the Complainant had a sexual encounter, to use the most neutral term, which is the subject matter of this allegation of rape. After which it is common ground that the Complainant was extremely upset and there were others in the premises who noticed that and enquired about it. One of them enquired of the Defendant why she was upset and was told, according to the Prosecution evidence, that something had happened to her as a child. She was told by the Defendant, being strongly implied by that the Defendant had been told by the Complainant that something had happened to her as a child and that was why she was upset.

And that report, that remark, appears to have been further reported in a piece of hearsay elsewhere in the witness evidence. And then in the Defence statement in the, when interviewed, the Defendant went, no comment, and apart from the prepared statement which made no mention of such details. But in his Defence statement at paragraph 8, he sets out in clear terms that the Complainant became upset during their consensual sexual encounter because she'd been raped as a child by an uncle. And in paragraph 10, he goes on to say that she became upset a second time for that same reason. When I became involved in this case, it seemed to me that that raised sections, questions of section 41, which all parties agree it does. And by that stage, the section 28 cross examination of the Complainant had already taken place with no real questions being put on that topic, save in the vaguest possible way. At section o, page 29, I think I'm right in, with that page reference, where a vague question is asked about something happening in the past, something unspecified, and she says she can't remember and then goes on to say that's she's never had sex with anyone before and therefore she doubts and the question, the answer cuts short at that stage.

Anyway, I raise the matter because, plainly, the fact that the Complainant was upset and crying just after the alleged rape is likely to be of some interest to a jury in deciding whether or not the complaint is true because the Defendant says it's false and everything that happened it was consensual. And if she wasn't upset about being raped by him, then she must have been upset about something else. And the Complainant [sic] in his Defence statement sets out in terms what it was she was upset about, in terms of which are given some degree of support by something he said at the time to a third friend. Those matters not having been put, I could foresee difficulties because, and still can, because the jury may well think it's important why she was upset, and the Defendant might be thought to think it important that he knows the answer.

But the parties have agreed, I'm told, that they're not going to seek to put any further questions, or adduce any evidence, relating to that potential answer as to why she was upset. And therefore the matter will be glossed over, and the jury will be none the wiser as to why she might be upset other than being told it was either because she was raped, which is what the Prosecution say, or for some other unknown reason, which is what the Defence will be obliged to say. I'm told by Mr Hayes, in the clearest possible terms, underlined by the years of his experience in representing Defendants in the criminal courts, that he has given all the advice he needs to, and he does not wish to make at this late stage any section 41 application. And that he and the Prosecution agree that no explanation other than the explanation that was advanced by the Crown, save to say that that isn't accepted, will be adduced in any way by the Defence.

And, and this is an important point it seems to me, because those of us with that sort of experience know what might happen later, the Defendant fully understands that he will not be able to complain at a later stage, or before a later tribunal, that no section 41 application was made in this case, to put that or that the jury did not have the advantage of the simple explanation which he is in a position to advance, but he wishes not to advance it. So, that's a forensic decision he has taken on advice, and it is final, and he can never change his mind about that later, and he understands all that. That's what I've been told, and he listens to this. I'm ... not being asked to make any ruling on section 41 application because none is made, jury are going to be simply left in the position which I have described."

47. In answer to questions from the applicant's new legal team, Mr Hayes has explained the basis on which he advised the applicant that a section 41 application would be unlikely to succeed and could, if successful, prejudice the applicant's case. Counsel's view was that the strongest evidence in support of the applicant's position was the evidence of F and S that when they came to her room on separate occasions, the applicant told them that she was fine. Reference to any childhood rape might explain to the jury her distress but would raise in their minds the issue of rape.

“55. S.41 applications are always fraught with potential dangers. I discussed this with [the applicant] more than anything else. It can be a double-edged sort. We discussed this with the first judge and he indicated that it probably didn’t meet the criteria as there was no supporting evidence. The best evidence in [the applicant’s] favour as you can see from the grounds of appeal are the statements from her friends. We came to the conclusion that we would just remind the jury about rape. The prosecution could have had a field day.

56. I can’t find any record of a written advice on this but we discussed it so much it wasn’t necessary. These judgments are often finely balanced. But we came to the decision together.

57. This was ongoing. We first decided after the discussion with the first judge. And discussed it again after the trial judge tried to force us into it. We came to the conclusion that it was far too risky to what we thought, and I still believe was a strong defence case. ...

61. ... the key issue that she was not distressed when her friends came to see her.”

48. As the Judge foresaw, the consequence of the agreed position caused some difficulty for the witnesses during cross-examination. As agreed, F was not asked by defence counsel in cross-examination what explanation the applicant gave for C’s distress, on his return to C’s room after the incident. In response to the Judge’s question on this issue, F responded in vague terms.

“His Honour Judge Lowe: OK, let me just see if there’s anything I need to be clarified. When [the applicant] [came] back in to get his watch and jacket, back to [C]’s room when you were there, you said you thought, you had spoke[n] to him briefly and asked what was going on. Did he say what was going on?

F: I think he just said that she said something to him about why she was crying.”

49. In his evidence in chief, the applicant offered no explanation for C’s distress.

“Mr Hayes: Well, you told us a moment ago there was a time she became upset. Did you ask her if you’d done anything wrong?

Applicant: Yes. As soon as she became upset, upset, I, we stopped having sex, and I asked her what was, why, if it was anything I’d done to upset her, and she said no. So I comforted her and asked her if she wanted to get her friends, and she said no, she was OK. So I went and got her some tissue from the bathroom and just comforted her, and then she was, she stopped being upset.

Mr Hayes: Yes. And how many times did that happen?

Applicant: So that actually ended up happening twice. So after she was upset the first time and I comforted her and she stopped, she re-instigated sex, which I was hesitant to, as she'd just been upset.

...

Applicant: So after she re-instigated sex, we had vaginal intercourse, and then she again became upset, and I asked her again if it was anything to do with me, and she said no. So I again comforted her, and I said look, try and, but I couldn't stop, stop her being upset, so I said look, do you want me to get your friends, they, they know you much better ... than I do ...

Mr Hayes: Thank you, Your Honour. So you offered to get her friends because they, or you told her that they knew her much better than, obviously, you. What was the response?

Applicant: She sort of said no, she was OK.

... So I asked, so I asked the question several times because she was upset, and she kept saying no, she was OK, it was nothing. And that was, then her friends eventually turned up ..."

50. No explanation for C's distress was given when the Judge asked additional questions of the applicant. He said he had left because the room was quite busy and she was "in the comfort of her friends" F and S. As we have said, he ended up sleeping in F's room.

"His Honour Judge Lowe: Did you know she was messaging her friends?

Applicant: Yeah, I'd encouraged it because she'd been upset, I wanted someone that knew her better than I did to comfort her for whatever reason was upsetting her.

His Honour Judge Lowe: So, did you know she was doing it? Because you've told us that she said no, no, I'm not going to message my friends.

Applicant: Well, it was a bit bizarre, because I'd obviously, I'd said, did you want me to get your friends, or do you want to get them, and she was like, no, it's fine. But then they turned up ..."

51. B gave vague answers in response to the Judge's questions regarding any discussion with F or the applicant after the incident.

"His Honour Judge Lowe: When you did that, what did you understand was going on and why were you and [F] being asked to go and see [C]?

B: I, I'm not sure, I didn't hear the phone call. I just know that F got the call from [C], and we basically just went up to, to see what was happening.

His Honour Judge Lowe: Yeah, but, didn't, was, at any stage, wasn't there any conversation between you and F about, what was that all about?

B: No. Not that I can remember, no. I think, you know, the consensus, it was apparent that [C] was upset and, but yeah, that was pretty much all I knew.

...

His Honour Judge Lowe: No. I ask that simply because my question is, what did you understand to have happened leading to Matt coming to sleep with you and F, or sleep in that same room?

B: I guess my impression was that [C] had, I don't know, that there was, I guess like a freak out is, is a good word for it, and she just needed to be calmed down somewhat and, and that was the reason that [F] went up there.

His Honour Judge Lowe: Right. Where did you understand, who did you understand those things from?

B: From [F].

His Honour Judge Lowe: Did Matt say anything about, about this incident to you, while [F] was off with them, with, with, with [C]?

B: I can't really remember specifically. I'm sure we would have talked about it but –

His Honour Judge Lowe: Seems likely, yeah.

B: Yeah, I, I honestly, and it's the same thing with this, I can't remember with enough certainty specific details of conversations that were taking place.

His Honour Judge Lowe: Well, don't censor your own evidence about how certain it is, we understand it's a slightly vague memory, but evenly vaguely, what do you remember Matt telling you?

B: I don't know, I guess just that --

His Honour Judge Lowe: Don't guess, just what you can remember.

B: That [C] was upset and, and yeah, that, that's about all, all I got, is just that she was, she was upset about something and, but it, it seemed like she'd calmed down since having the conversation with [F].”

52. As a consequence of the absence of any section 41 application, together with the agreement of both counsel and the Judge to excise that part of C's section 28 evidence, and to direct the witnesses not to refer to anything said by C, relating to any historic rape,

the jury were not given any reason for C's distress during and after the incident. The focus of defence counsel's cross-examination of the witnesses was on the absence of distress, based on C's assurances to F and S that she was fine when they were called to her room.

The applicable test where counsel's conduct is criticised

53. An appeal based on the alleged incompetence of legal representation must demonstrate that: (i) counsel and solicitor's representation was so deficient that it fell below the standard of reasonable professional judgment and standards; and (ii) such deficiency led to identifiable errors or irregularities in the trial, which themselves rendered the trial unfair or the conviction unsafe: *R v Day* [2003] EWCA Crim 1060 per Buxton LJ at [15].
54. Decisions made by counsel in good faith after proper consideration of the competing arguments, and, where appropriate, after due discussion with the defendant, will not without more render a conviction unsafe even where the Court of Appeal may disagree with them. Conversely, if a decision was taken either in defiance of, or without proper instruction, or when all promptings of reason and good sense pointed the other way, this may render a conviction unsafe: *R v Clinton* [1993] 1 WLR 1181 (CA).
55. In approaching Ground 1 and throughout this judgment, our approach is to determine whether, either singly or cumulatively, the matters of which the applicant complains render his conviction unsafe. For that reason, we first address the Grounds in the order in which they were presented to us. Then, having assessed the Grounds individually, we stand back to consider whether the cumulative effect of the criticised features has a greater impact than would be derived from consideration of the Grounds individually.

The applicant's submissions – Ground 1

56. Ms Judge submits that trial counsel failed to make the necessary section 41 application despite the repeated judicial prompts that we have set out extensively above. The Trial Judge made plain his view that, if the explanation summarised in paragraphs 8 and 10 of the Defence Statement was to be advanced, a section 41 application had to be made and had to succeed. No such application was pursued, no adjournment was sought in the light of the Trial Judge's observations and the applicant was misadvised. The applicant was told that he could not mention the explanation but was then asked about it in the witness box. This created an impossible position because, if submitted, the jury were left with only one possible explanation for C's being upset, namely non-consensual behaviour, while the applicant was not able to give what he asserts is the true explanation. In Ms Judge's phrase, "this was not strategy but a profound procedural failure." Without a section 41 ruling, the applicant's defence was artificially truncated and rendered incoherent, with self-evident prejudice to the applicant.
57. In her Perfected Grounds, Ms Judge submits that there was a failure to explain to the applicant either on 11 September 2023 or previously, the potential consequences of not obtaining a section 41 ruling entitling him to raise the explanation about C's uncle. She asserts that he was not informed that his decision on that point would preclude him from relying upon the failure to inform the jury of C's explanation as a ground of appeal. Furthermore, his neuro-divergence was not taken into account and no proper record of the advice or his understanding of it was made or retained by his legal team.

The respondent's submissions – Ground 1

58. The prosecution characterise the decision not to seek a section 41 ruling as a “simple and not unreasonable decision”. They describe Mr Hayes’ “testing the water” in the passages we have set out at [32]-[34] above. C’s response showed that pursuing the point would be dangerous in circumstances where the sole source relating to any a previous incident was the applicant and was not independently supported by other evidence. Mr Nelson takes issue with the suggestion that the applicant did not understand the issues raised or their potential consequences, pointing to the fact that Mr Hayes contemporaneously both recognised that he needed to give precise advice and asserted that he had given it.

Discussion and resolution – Ground 1

59. We do not accept that the advice given to the applicant that no application should be made was incompetent. It is of course correct that, in the absence of a successful section 41 application, the applicant would not be permitted to give evidence in line with paragraphs 8 and 10 of his Defence Statement. We also accept that it would have been open to the Jury to accept the applicant’s explanation if he had given it. However, there was a real risk that giving his explanation would rebound to the applicant’s disadvantage. The applicant put it succinctly in his WhatsApp message to his girlfriend: “they’ll say she told me that cause I raped her and it triggered it or that I made it up as a defence.” Nor was the risk simply an abstract one: Mr Nelson had indicated clearly that the prosecution would advance exactly that case when he said that the prosecution would ask questions as to why C may have mentioned rape in the context of what the prosecution said was a rape: see [42] above. This potentially lethal danger was clear in a case where, on the first occasion that her friends arrived, C was saying that she was fine but on the second occasion she was crying hysterically. We consider that Mr Hayes is right to have said in his answers to the new legal team that “the prosecution could have had a field day” and that, after the hearing before the short adjournment at 11.50 am, it was a reasonable conclusion to reach that “it was far too risky to what we thoughtwas a strong defence case”: see [47] above.
60. Nor are we persuaded that the conviction is or may be rendered unsafe because the applicant did not understand the implications of his decision. We recognise (and will return to) the fact of his neuro-divergence; but it must also be borne in mind that he is also highly intelligent, having secured a first class degree in electronic engineering. We note also the view of Professor Sir Simon Baron-Cohen, which the applicant seeks leave to admit as fresh evidence, that “despite Matthew’s intelligence, his autism, combined with his learning disability, likely rendered him confused by the legal advice he was being given... .” We have scrutinised with care all of the information that is available to us to search for any sign that the appellant may not as a matter of fact have understood the advice he was being given or its consequences. That information includes the transcript of the applicant’s evidence and the schedule of his text messages, which we have read in full, and the observations of the two very experienced Judges who had the opportunity to observe the applicant during the course of proceedings, HHJ Lawrie KC and the trial judge. We address Ground 2 in detail below. For present purposes it is sufficient to say that we are quite unable to detect any sign of a significant lack of understanding of the Court process on the part of the applicant. To the contrary, the actual evidence of his participation in and understanding of decision not to pursue a section 41 application indicates that the theoretical risk that his neurodivergence prevented him from understanding the advice he was given and its potential

consequences did not come to pass. That he understood the basis for the advice he was being given is shown by the messages we have set out at [44] above.

61. There is no substantial evidence on the basis of which to criticise Mr Hayes for failing to give suitable advice to the applicant in terms that were comprehensible for the applicant; nor is there any good reason to doubt his assessment (specifically confirmed to the trial Judge) that the applicant had understood what the advice he was being given. Despite the absence of a written record of his advice, there is no reason to doubt his assertion to the Judge that he had taken a great deal of time to explain to the applicant the consequences of not pursuing a section 41 application and that he had been very precise with his advice. We do not ignore the complaint that Mr Hayes used inappropriate language in the course of his dealings with and advice to the applicant. But that alone does not subvert the conclusion we reach on the basis of all of the relevant evidence.
62. The Judge was right to point out that there could be difficulties if the jury thought it important to know why C became upset. Ms Judge asserts that real difficulties emerged during the witnesses' evidence because they were all told that they were not to mention the explanation that the applicant had chosen not to advance. We have read the whole of the available transcripts of their evidence as requested and have set out the passages that are relevant to this issue at [48]-[51] above. We detect no particular difficulty in the witness responding to questions that either did touch on the explanation or came close to it. In particular, F (to whom the applicant is said to have given the explanation) avoided the issue and there is no sign that the applicant was inconvenienced or unable to deal with the Judge's questions. It is not entirely clear to us why the Judge persisted in his questioning of B as he did; but B did not venture into giving evidence about that, nor did he suggest an explanation.
63. When counsel made their closing speeches to the Jury the prosecution did not rely upon questions of recent complaint; and when summing up the case, the Judge merely gave a conventional "myths and stereotypes" direction and did not trespass into the area of any explanation for why C had become upset. We are unable to detect any major difficulties in relation to this Ground arising from the evidence, speeches or the summing up.
64. We have said that we consider the tactical decision not to pursue a section 41 application was reasonable. The applicant's criticism of Mr Hayes in this regard therefore falls away. However, we have also considered whether, despite the advice being reasonable, it had the consequence in the events that happened of rendering the conviction unsafe. We cannot find any indication that it did.
65. Ground 1 therefore fails.

Ground 2 - Neurodiversity issues

Factual and evidential background

66. The applicant has a diagnosis of ADHD, dyslexia, dyspraxia and autism spectrum disorder.
67. On 25 August 2022 Dr Kennedy prepared a psychiatric report in respect of the applicant. He noted that a previous psychological report by Dr Marriott had assessed the applicant's IQ as in the high-average ability, with an overall level of suggestibility significantly

above average. Dr Kennedy's opinion was that the applicant suffers from autistic spectrum disorder and ADHD (the latter of which is well-controlled by medication). He concluded that the applicant was fit to plead but recommended assessment by a registered intermediary to identify assistance required during the trial with frequent breaks during the trial. He considered that the applicant would be able to give effective evidence on his own behalf but that leading questions should be avoided, given his tendency to suggestibility.

68. On 4 October 2022 Francesca Castellano, the court appointed intermediary, produced a report for the court. Ms Castellano explained that the role of an intermediary is to facilitate communication between the court and a defendant and to assist him or her to communicate with others. She stated that the applicant was able to provide a clear account of events he had experienced, although his narrative employed too much detail and gave no indication of how long things had taken. He could respond to questions about events and expand on the details of those events if questioned in simple language. He was able to correct Ms Castellano when she made incorrect statements and was able to ask her to repeat things that were not clear to him. Although his language and cognitive ability was superficially good, he struggled to interpret social cues. She recommended that the applicant should have an intermediary to assist him during the trial and if he gave evidence to enable his evidence to be coherent, complete and accurate. The proposed assistance included explanation of the court process, summaries of the events and legal arguments, and monitoring his need for breaks.
69. At a case management hearing before HHJ Lawrie KC on 10 November 2022, defence counsel stated that, although he had indicated in a widely shared note on the sidebar the day before that an intermediary was not necessary, he was re-considering whether an intermediary would be needed for the applicant's evidence, following receipt of Dr Kennedy's report. Mr Hayes said that the applicant would feel more comfortable if he had an intermediary. The Judge floated the possibility of steps short of the appointment of an intermediary. It was left on the basis that the defence should notify the court if it became necessary.
70. There was a further discussion on 28 November 2022 at which no final decision on the issue was made. The court indicated that it did not consider that an intermediary would be required; an appropriate person could sit near the applicant during the trial; but did not shut out a future application by defence counsel.

“His Honour Judge Lawrie: ... Come back, Mr Hayes, at any time, back to the court, and I'm happy to hear it via CVP links if there are issues in terms of intermediary or somebody who can give him support. And, I mean, what I've read is that, and I appreciate this is in the context of these types of cases and the allegations raised, he's an intelligent young man, so whatever shortcomings are set out in those letters don't quite match what I see in front of me, so I keep my sense of distance from it, but, equally, I appreciate it's a stressful process, and if there's somebody that might assist by way of support, the Court's happy to concede to it, and they can sit either at the back or along the row in the dock, do it that way.”

71. No such application was made prior to the trial but during the trial, on 13 September 2023, defence counsel raised the issue of an intermediary and reasonable adjustments

before the applicant gave his evidence. Having reviewed the intermediary report, the Judge considered that it did not set out any specific impairment that would justify the appointment of an intermediary.

“His Honour Judge Lowe: I’ve read the report.

Mr Hayes: Yes.

His Honour Judge Lowe: And I’m not surprised you couldn’t tell me what was in it describing that he couldn’t do, because there’s nothing in it that I can see. So on what basis do you say it’s required?

Mr Hayes: Well, Your Honour’s right. It’s, it’s not a very good report.

His Honour Judge Lowe: It’s hopeless.

...

His Honour Judge Lowe: But he doesn’t need help. It’s perfectly plain, from all his answers to her questions, that, when asked by experienced, skilful and sympathetic barristers, he’ll be perfectly all right, and he will, and I’ll ensure that he is, because nobody will bully him. He’ll be OK, and he doesn’t require an intermediary.

Mr Hayes: Your Honour, I’m obliged. The second matter is this afternoon, I know the time, but the one thing that is clear in that report, and is clear from my personal experience with this Defendant, he is very jittery after, after lunch. It would not be, in my respectful submission, in his interests or the interests of justice, in the way that he gives his evidence, to give his evidence this afternoon. I know it is an absolute pain and waste of time, but I’m afraid the court listing hasn’t helped any of us. It’s like this every day. And I know Your Honour says, well, in a perfect world I, I would be delighted to say give his evidence tomorrow, but, in the interests of justice of his evidence, Your Honour, I, I, I, I, I do submit that he really should give his evidence tomorrow.

His Honour Judge Lowe: Regrettably, I disagree. We, we have to take into account the needs of all defendants, all witnesses ...”

72. During the applicant’s evidence, defence counsel’s pupil-barrister sat near to him to provide support. The Judge explained this to the jury by telling them that he wanted a barrister sitting nearby to reassure him. Defence counsel objected to the framing of this explanation. Later, defence counsel invited the Judge to give a direction to the jury concerning the applicant’s diagnosis. The Judge refused the application on the basis that it was not relevant to the issues.

The applicant’s submissions – Ground 2

73. Ms Judge submits that the report of the court appointed expert, Francesca Castellano, dated 4 October 2022 clearly indicated that the appellant required the assistance of an

intermediary to ensure fair participation in trial proceedings. Notwithstanding the applicant's diagnosis and the report, no intermediary was provided, no breaks or other adjustments were given, there was no judicial direction and no disclosure to the jury as to the applicant's disability. The arrangement whereby defence counsel's pupil was directed to sit beside the applicant in the witness box was misconceived and counter-productive. By failing to secure proper accommodations and disregarding the intermediary, psychiatric and psychological evidence then available, defence counsel compromised the applicant's ability to effectively engage with the proceedings, amounting to a breach of the duty to provide reasonable adjustments, affecting the fairness and integrity of the trial.

The respondent's submissions – ground 2

74. The respondent submits that the issues that were to be addressed in evidence, namely consent or reasonable belief in consent, were relatively straightforward and that, whatever the theoretical disabilities or difficulties affecting the applicant, there is no evidence that he was disadvantaged in fact either generally in relation to his effective engagement with the proceedings or, more specifically, when giving his evidence.

Fresh evidence of Professor Baron-Cohen

75. Ms Judge's submissions rest heavily on a report from Professor Simon Baron-Cohen dated 8 August 2025, which she seeks to have admitted as fresh evidence in connection with this appeal. Professor Baron-Cohen confirmed his diagnosis of the applicant as autism with ADHD, dyslexia and dyspraxia. His assessment is that the applicant demonstrates marked impairments in social reciprocity, literal interpretation of language, rigidity of thought, sensory sensitivity, and difficulties with theory of mind and executive function.
76. Professor Baron-Cohen's opinion is that the applicant's autism substantially affected his ability to process information during the trial, because he was not given sufficient time for an intermediary to explain the proceedings and the choices ahead of him and nor were any reasonable adjustments made. His autism would have meant he needed many words explained to him, or that he would have become fixated on the meaning of specific words, and that he struggled with any ambiguity. It would have been essential for the jury to have known about his autism, which could explain his demeanour in giving evidence and his lack of emotional response to C's distress. Failure to provide for intermediary support and reasonable procedural adjustments materially impaired the appellant's capacity to participate effectively in the trial.
77. There are, however, a number of observations that need to be made about Professor Baron-Cohen's report and Ms Judge's reliance upon it. First, the report does not identify the sources of information upon which he relies. In particular, it is not clear that he had the transcript of the applicant's evidence and there is no suggestion that he was able to listen to a tape that would enable him to gauge the nature of the applicant's affect when giving his evidence;
78. Second, it is plain that Professor Baron-Cohen had and relied upon information that was not before the jury. An example of this which forms a significant part of the material on which the Professor's opinions are based is the suggestion that C had suggested to the applicant that he leave and enjoy his evening in the bar and that the applicant took this

as a literal expression of her wishes because his autism “limited his ability to interpret the subtext or emotional nuance behind that statement.” This is treated as important by the Professor because “his decision to leave, though potentially appearing callous to an observer, was in fact the product of his literal interpretation and logical reasoning.” This is relied upon by the Professor (and Ms Judge) as giving rise to the possibility of an unjustified adverse inference by the jury who may have thought his decision to leave in such circumstances was callous. It would be unjustified because a non-autistic person “might have inferred that her emotional state warranted staying with her to provide comfort and reassurance, regardless of what was said.” The difficulty with this element of the report and submissions is that there was no evidence before the jury that C said any such thing or that her saying it was the reason he left (later to return to collect his watch and jacket). Nor was it any part of the prosecution case that the applicant acted callously or inappropriately in leaving as and when he did.

79. Third, in relation to the critical issues of consent or reasonable belief in consent, the Professor’s opinion is that: “[the applicant] was able to tell [C] was upset because she was crying, so the cues were simple and obvious, and he reports he instantly stopped the sexual activity. His autism does not impair his ability to understand consent and he reasonably took her initiation of sex and re-initiation of sex as her consenting to sex.”
80. Fourth, there is an underlying assertion or assumption that the applicant had difficulties in understanding the Judge or the barrister’s questions and that they would not have considered that “he might need an intermediary to reduce his cognitive confusion.”
81. Fifth, it is the Professor’s opinion that “he demonstrates a tendency to interpret language in a literal and concrete manner, with difficulty understanding nuance, metaphor, inference or implied meaning.”
82. Sixth, and related to the previous point, it is a central feature of the Professor’s opinion that “despite [the applicant’s] intelligence, his autism, combined with his learning disability, likely rendered him confused by the legal advice he was being given, and the intermediary ought to have methodically guided him through the legal advice to ensure he properly understood it. ...It appears from [the applicant’s] account that he felt totally confused by the options and ill-equipped to make a decision and instruct his legal representatives in an informed way.”

Evidence of the applicant’s engagement with the legal process

83. We have not limited ourselves to reviewing the transcripts of evidence. In addition we have reviewed extensive evidence included in the appeal documentation that shows the close involvement and engagement with the legal process, including the following contributions at various stages:
 - i) detailed comments and questions on the prosecution case;
 - ii) comments on C’s ABE interview;
 - iii) comments on his draft proof of evidence;
 - iv) review of the CCTV evidence;
 - v) comments and questions on the medical evidence;

- vi) comments and questions on C's section 28 cross-examination; and
- vii) text messages passing between the applicant and his girlfriend, discussing aspects of the case and its preparation.

Applicable principles

84. The court has a duty to take such steps as are necessary to ensure that a litigant has a fair trial: *Re M (a Child)* [2012] EWCA Civ 1905 per Thorpe LJ at [21]. This includes the court's inherent power to direct that a defendant be assisted by an intermediary: *R (C) v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin); *R v Cox* [2012] EWCA Crim 549; *R v Thomas* [2020] EWCA Crim 117.

85. The Criminal Procedure Rules 18.23 (in 2022-3, now re-numbered as 18.19) provide that:

“(1) The court must exercise its power to appoint an intermediary to facilitate a defendant's effective participation in the trial where–

- (a) the defendant's ability to participate is likely to be diminished by reason of –

...

- (ii) mental disorder (as defined in section 1(2) of the Mental Health Act 1983), a significant impairment of intelligence and social functioning, or a physical disability or disorder; and

- (b) the appointment is necessary for that purpose.

(2) In determining whether such an appointment is necessary, who to appoint and the duration or purpose of the appointment, the court must have regard to –

- (a) the defendant's communication needs as reported to the court;

- (b) the recommendations in any intermediary's report received by the court;

- (c) any views that the defendant has expressed about –

- (i) receiving the assistance of an intermediary, or

- (ii) other measures or arrangements to facilitate the defendant's effective participation in the trial;

- (d) the likely impact of the defendant's age ... level of intellectual ability or social functioning on the ability to –

- (i) give evidence, and

- (ii) understand what is said and done by the court and other participants;
- e) the likely impact on such participation and on such understanding of any mental disorder or other significant impairment of intelligence or social functioning;
- (f) the adequacy of arrangements for questioning the defendant in the absence of an intermediary;
- ...
- (i) any expert medical opinion that the court may have received; and
- (j) any other matter that the court thinks relevant.”

86. We note that each case is fact specific and must be considered on its merits, having regard to the principles set out above. The material issue is what was necessary in order to ensure that the trial process was fair.

Discussion

87. We have taken the evidence of Dr Kennedy, Ms Castellano and Professor Baron-Cohen into account and given it close attention in the discussion that follows. We acknowledge from the outset that there was a recommendation from Ms Castellano that the applicant be assisted by an intermediary. Furthermore, Professor Baron-Cohen highlights the respects in which, at least in theory, the applicant was liable to be disadvantaged by the absence of an intermediary and in the absence of the jury being told of his neurodiversity. That said, the question for us is whether the potential difficulties outlined in the medical evidence came to pass so as to render the applicant’s conviction unsafe.

88. To that end, we have (before, during and again since the hearing) reviewed the evidence from the trial in search of any material that supports a conclusion that the potential difficulties came to pass so as to render the applicant’s conviction unsafe. We have already commented on our conclusion that the applicant was fully engaged with and fully understood the implications of making (or not) a section 41 application. We have found no evidence to suggest that the applicant did not engage with the preparation of the Defence Statement or that he did not fully understand its contents: subject to paragraphs 8 and 10 it accurately reflected the account that he maintained at trial omitting only his later evidence that he had offered to wear a condom during sex and that he had given C a love bite. The fact that it was compiled during and as a result of the applicant’s first conference with Mr Heyes does not cast doubt on the applicant’s understanding of its contents.

89. Turning to the evidence that the applicant gave at trial, we can well understand why Mr Hayes described him (in his McCook answers) as a “brilliant” witness. He made no concessions to the prosecution case and there is no sign at all of him at any stage being confused or giving answers that may have been based on a misunderstanding. To the contrary, in general his answers were consistent and exceptionally clear: they demonstrate understanding and an ability to respond appropriately to the questioning he

faced. We have not lost sight of the fact that, on three occasions during cross-examination, he made clear that he did not understand the question, or whether something was a question, which led to it being reformulated without giving rise to difficulty. These instances, far from showing him to be at a disadvantage, demonstrate his ability to identify difficulties in his understanding and to protect himself against possible disadvantage. His evidence was of high and consistent quality despite his having to give evidence towards the end of the day.

90. We reject Ms Judge's submission that the applicant's evidence was "anodyne and robotic". We also reject her submission that there are occasions during his cross-examination where he was "overpedantic". He gave clear, consistent and full answers as he had to Ms Castellano: see [70] above. They might on a few occasions be described as somewhat concrete, but were none the worse for that. Ms Judge submits that he was prevented from giving his best evidence because of the decision not to make a section 41 application; but, as we have set out above, he negotiated the potentially difficult area of the reason for C becoming upset successfully. Viewed overall there is no basis for a speculation that the jury, not knowing that he is autistic, may have drawn an adverse inference from the manner in which he gave his evidence.
91. Ms Judge reminded us more than once of the submission made by Mr Hayes that unless the Judge directed the jury on his autism the applicant would not have a fair trial. The Judge's reaction was to wait and see. Two things are evident from the transcripts: first, the Judge had the applicant's diagnoses well in mind; and, second, the judge was alert to the need to ensure that the applicant was not unfairly disadvantaged.
92. It seems to us that there are three main strands to this ground of appeal.
93. The first is whether the applicant was disadvantaged by not having the benefit of an intermediary. We leave on one side the fact that we would agree with the Judge's assessment that Ms Castellano's report was (to put it in neutral terms) weak. We also bear in mind at all times the need to ensure that we are not misled by the apparent clarity of the transcripts of the applicant's evidence. That said, there is in our judgment, no basis for a conclusion that he was materially disadvantaged by the absence of a conventional intermediary. Put in slightly different words, there is no evidence that he was remotely disadvantaged by not having a conventional intermediary with him while he gave his evidence.
94. The second strand is the somewhat unconventional step of having a pupil barrister sitting next to him as he gave his evidence. Though unconventional, there is no basis for a conclusion that the arrangement renders (or contributes to rendering) the conviction unsafe. Mr Hayes objected to the Judge telling the jury that the pupil was there for reassurance. We are unable to accept that the Judge's description could have so affected the Jury as to render the conviction unsafe.
95. The third strand is the submission that, because they didn't know of his autism, the jury may have taken against the applicant because of his conduct after having sex with C. There might have been some force in this submission if his post-sex conduct had formed any part of the case that the prosecution advanced; but it was not. He was not cross-examined about it and it was not relied upon by the prosecution in the way in which they put their case against him.

96. We accept that the Judge should have informed the jury of the applicant's autism before he gave his evidence and by way of a direction during summing up. We also accept that in theory the failure to do so might have prejudiced the applicant in his defence of the claim. However, for the reasons we have given, we are not persuaded that the applicant failed or struggled to understand the trial process or that he had any material difficulty in giving instructions and his evidence.
97. In our judgment Ground 2 does not give rise to any real risk that the applicant's conviction is unsafe.

Ground 3 - Medical evidence

Medical evidence at trial

98. Denise Waterman, a qualified registered general nurse employed by the NHS as a sexual offence examiner, carried out a forensic medical assessment of C on 18 January 2020. She recorded her assessment in contemporaneous manuscript notes and annotated head and body map. Her findings were set out in her witness statement and included the following:
- i) To the right side of her neck there was an area which was very sore, red small bruising with red erythema around.
 - ii) To the left side of her neck there was a 3cm x 4cm area of red erythema.
 - iii) To the front of her neck C stated it was very tender to touch, she had trouble swallowing but no injuries were visible.
 - iv) C stated that she was sore over her left clavicle (collarbone), no injuries what visible.
 - v) To the back of her neck on the left side she had three areas of erythema, these were horizontal and one above the other, the top area was 7 cm long x 0.4 cm, the middle area was 8 cm long x 0.4 cm and the lower one 4.5 cm long x 0.1 cm.
 - vi) To the right side off the back of her neck there was a 3cm x 1cm area, purple/red with petechia bruising visible.
- C told Ms Waterman that these injuries were caused by the applicant when he grabbed her around the neck causing non-fatal strangulation.
99. Ms Waterman noted laceration, bleeding and bruising to C's anal area and recorded that C was unable to tolerate an internal examination. Her report was disclosed well before trial and exhibited to the witness statement of OIC Robert Brown dated 15 January 2023. Her witness statement was dated 7 April 2023 but was not uploaded until 5 September 2023, shortly before trial.
100. Ms Waterman referred C to hospital to ascertain whether there were any adverse effects relating to non-fatal strangulation. That examination, which was carried out by Rebecca Mann in A&E on 19 January 2020, recorded a tender left clavicle, tenderness around a neck muscle and to the front of her chest but did not refer to any bruising. The assessment

included a chest x-ray and ECG but they did not find anything of concern. The applicant had seen and commented cogently on the A&E materials on 25 November 2022.

101. At trial, the agreed facts included the body map diagram of the head completed during the examination by Ms Waterman on 18 January 2020. The diagram, which was stated to be “not to scale”, included the depiction of three areas of redness to the back of C’s neck as horizontal stripes, one above the other.
102. C’s evidence was that the bruising was caused by strangulation. F gave evidence in cross examination that the bruising appeared to be a ‘love bite’. During the trial the prosecution disclosed that photographs had been taken of the neck but that they had been lost.
103. The Judge’s summing up included commenting on the evidence of the marks charted on the body map diagram of the neck. The Judge said that there were “a number of areas of pain and sensitivity on her neck and throat and several areas of bruising and red marks, some of which appear consistent with being gripped by fingers.”

The applicant’s submissions - Ground 3

104. Ms Judge submits that key medical evidence was served late. No adjournment was sought. No rebuttal expert was instructed. There were material inconsistencies between the SARC nurse’s account and the A&E records. None of this was explored or tested. None of this evidence was given to the applicant.
105. Instead, the medical material was admitted through agreed facts, without the applicant’s informed consent, including the annotated “not to scale” diagram showing marks on C’s neck. She submits that the Judge relied on the visual suggestion created by the chart, referring to the marks as indicating finger pressure, which was not justified and unduly prejudicial to the applicant. These failures went to the heart of the safety of the convictions.

The respondent’s submissions – Ground 3

106. The respondent submits that the substance of Ms Waterman’s evidence had been disclosed long before trial. There could be no doubt that there was bruising on C’s neck. The record of Ms Waterman’s examination and findings is typical of examinations undertaken by the SARC in such circumstances. The reference to A&E was for different purposes and the fact that Ms Mann did not record bruising reflects her different role, namely triaging immediate patient risk in A&E. It was not prepared for forensic or evidential purposes and provides no realistic basis for challenging Ms Waterman’s findings as contemporaneously recorded by her. Furthermore, there was other evidence of bruising, from F and from the applicant himself who explained it by saying that he had given C a love bite. There was no realistic basis for attempting to secure rebuttal evidence.

Discussion

107. In our judgment, the submission that the applicant’s legal team should have attempted to obtain rebuttal medical evidence is quite unrealistic. There would have been no substantial or principled basis for challenging Ms Waterman’s findings as set out in her contemporaneous report. Ms Mann’s report did not refer to the bruising found by Ms

Waterman but that did not suggest that Ms Waterman's evidence was unreliable. Rather, it reflected that the role of the triaging in A&E was different and distinct from that of the SARC examination and was to identify whether there was more serious injury caused by non-fatal strangulation. At best for the applicant, the fact that she did not record bruising as Ms Waterman had done would have been seen as an oversight by Ms Mann. On the other hand, her recording of a tender left clavicle, tenderness around a neck muscle and to the front of C's chest was likely to be damaging if she had been called, as supporting C's evidence of force being applied by the applicant in the area of her neck.

108. In addition, F gave evidence that she saw bruising to C's neck. The applicant said he had given C a love bite. There was therefore no realistic basis for contesting that there was bruising
109. Since there was no realistic basis for asserting that the marks recorded as seen by Ms Waterman were not there, the obvious and sensible course was to reduce her evidence to agreed facts, as was done.
110. The Judge did not say that the three marks indicated finger pressure. What he said was subtly but distinctively different, namely that there were "several areas of bruising and red marks, some of which appear consistent with being gripped by fingers." We accept that there was no medical or other factual evidence to support the Judge's observation and that he should not have made it. What we are quite unable to accept is that his observation casts doubt on the safety of the conviction. Accepting that Ms Waterman's diagram was marked as being not to scale, the bigger question was when and by whom the marks she identified were caused. Since it is an inevitable inference that they were not self-inflicted, the evidence strongly suggested that the marks were inflicted by the applicant during the course of his sexual encounter with C. Only two possibilities were or have been suggested: a love bite or non-fatal strangulation by the applicant placing his hands round her neck. Then comes the question whether the infliction was consented to by C or not. Whether or not the three particular marks were made by being gripped by fingers is and was of secondary importance. In evidence the applicant denied that non-fatal strangulation played any part in their sexual encounter. We do not accept that the Judge's suggestion that the three marks "appear consistent with being gripped by fingers" is liable to have deflected the Jury from their overall task of deciding how the bruising to C's neck area occurred.

Other criticisms - evidence of bloodied sheets

111. At the beginning of his summing up, the Judge gave a brief account of what he called "the broad outline" of what had happened, before giving the Jury their directions on the law. In describing what happened when S came to C's room, the Judge said:

"When [S] arrives he finds [F] comforting [C] who's very upset on the bathroom floor. He also sees [C's] blood on the bedsheets from the sex. [S] takes the sheets off and suggests that [C] stays the night with a friend thinking [F] might be suitable."
112. Mr Hayes objected to the Judge's reference to the blood being "from the sex" saying there was no evidence to support that statement. The Judge responded that S had said the blood was "in the groin area of the sheets" and declined to revisit what he had said with the Jury. He said it had not occurred to him that it could have been anything else

and asked Mr Hayes for suggestions. Mr Hayes offered no alternative and reiterated that the problem was that the Judge had said something for which there was no evidence. The Judge was unmoved.

113. When the Judge came to summarise F's evidence he said:

“[C] was in the middle of her room crying quite hysterically and [S] was taking the bedsheets off her bed.”

114. When he summarised S's evidence he merely said:

“I then started stripping the bed, I can't remember whether because someone had asked me to or I thought no longer seeing the blood might make her feel better.”

115. Ms Judge submits that the only reference to the bloodstained sheets came from S, who described seeing blood spatter on C's bedding. He was not asked by either counsel where the blood had arisen from as he would be unable to answer. The Police did not obtain the sheet for forensic analysis, there were no samples taken from the sheet and C was never asked any questions in her ABE relating to blood on her bed sheets. It is submitted that the blood could have been present prior to the incident occurring or possibly after. The prosecution did not attempt to draw an inference as to the cause of the blood stains. As such, it was erroneous for the jury to be told by the Judge that the blood on the bed sheet arose from sex. In doing so the Judge gave the impression to the jury that the sex was rough and possibly non-consensual.

Discussion of bloodied sheets

116. Ms Judge is right to submit that there had been no forensic analysis of the blood on the sheet. She is therefore able to submit that there was no evidence of the source of the blood beyond the fact that it was in the groin area of the sheets. There was therefore no positive evidence that the blood had not been present before the sexual encounter. It was, however, common ground that there had been vaginal and anal sex and a natural inference for the jury to draw that the blood, positioned as it was, had been produced in the course of that sexual activity. Mr Hayes when pressed by the Judge did not suggest any alternative explanation. In the circumstances of the case as a whole, it is not clear to us what forensic analysis of the blood on the sheets could or would have shown that could have weakened the inference that it came from sex.

117. We do not accept that the Judge either said or implied anything about whether the sexual activity to which he referred was or was not consensual. Furthermore, we do not accept that the single reference in the course of the broad initial outline was of any great significance in the overall scheme of the summing up. Any impact it might have had would have been diluted by the fact that the Judge did not repeat the suggestion when reviewing the evidence of either F or S. In our judgment, the Judge's single reference could not and would not have misled the Jury or prevented them from forming their own view (if they thought the bloodied sheets were of any relevance in the first place). For these reasons we reject the submission that the Judge's remark rendered the conviction unsafe.

Other criticisms - unused materials

118. In her written submissions Ms Judge made extensive criticisms of the defence team's alleged failures in respect of various categories of unused material. Although not separately developed in the course of oral submissions, we have examined each of the criticisms made in writing. We are not satisfied that anything in the various categories of unused material would have been of any assistance to the defence.

Other criticisms – general

119. Ms Judge emphasised that her distillation of Grounds 1-3 did not mean that she abandoned any of the other matters raised in her Perfected Grounds. We have therefore reviewed them again since the hearing. In our judgment, Ms Judge was right to concentrate as she did on Grounds 1 to 3. We are not persuaded that any of the other matters to which she refers in her Perfected Grounds render the applicant's conviction unsafe. We note that relations between Mr Hayes and the Judge, as revealed by the transcripts, could reasonably be described as combative. We also record that some of the language used by Mr Hayes to describe the Judge when dealing with and advising the applicant was highly inappropriate. We have therefore considered in detail whether those relations and that language itself either caused or contributed to the conviction being unsafe. We are not persuaded that they did. Viewed overall, as we have done, and examining all the materials available to us (including the fresh evidence to which we turn next) we are satisfied that the trial was fair, that the applicant was properly advised, that he engaged closely with his legal advisers and understood the advice he was given on the important decisions that had to be taken.

Fresh evidence – the applicable principles

120. Section 23 of the Criminal Appeal Act 1968 provides that:

“(1) For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice -

...

(c) receive any evidence which was not adduced in the proceedings from which the appeal lies.”

121. Section 23(2) sets out the following particular considerations to which the court should have regard in deciding whether to admit such evidence:

“(a) whether the evidence appears to the court to be capable of belief;

(b) whether it appears to the court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.”

122. An appeal based on ‘fresh evidence’ is no different from an appeal on any other ground, in that the ultimate question is still whether the conviction is unsafe. See *R v Pendleton* [2001] UKHL 66; *R v Pabon* [2018] EWCA Crim 420 at [60] to [64].

Fresh evidence – the applications

123. The applicant seeks to rely on fresh evidence, namely:

- i) A chronology of communications between the applicant and his legal representatives: exhibit LH1; and a separate schedule of communications between the applicant and his girlfriend: exhibit OR1;
- ii) The expert report of Professor Baron-Cohen:
- iii) The document described as a VPS timeline: exhibit SH1.

Fresh evidence – schedules of communications

124. We have considered the schedule of communications in detail and referred to it above where relevant and appropriate. It is the applicant’s case that the schedules demonstrate wholesale failures by the defence team in their preparation for and conduct of the trial and confusion on the part of the applicant in the face of the advice he was being given. More importantly, in our view, the schedules demonstrate close involvement and understanding by the applicant of the issues in the case and the advice he was given, as outlined above. Otherwise, in a case which essentially involved the word of one person against another, its relevance seems to us to be peripheral and to fall far short of demonstrating or evidencing that the trial process was unfair. We reject the submission that the evidence affords grounds for allowing the appeal. The issue on the appeal was consent, or the lack of it. Any relevance to that issue is, in our judgment, minimal.

125. We therefore refuse leave.

Fresh evidence – the report of Professor Baron-Cohen

126. Professor Baron-Cohen’s expertise and eminence are not in doubt. As we have indicated above, we have given close attention to his report and the opinions he has expressed in it. However, also as indicated above, we have formed the view that, on the facts and in the circumstances of this case, the potential difficulties to which he refers with such authority did not manifest themselves during the trial or in the applicant’s dealings with his legal team. For the reasons we have given, we do not accept that the evidence contained in his report affords any grounds for allowing the appeal.

127. We therefore refuse leave.

Fresh evidence – the VPS Timeline

128. In a victim personal statement dated 26 August 2022 C said:

“I have had to endure short and long term effects and I will details the immediate consequences. Firstly, I could not sit down for two weeks without severe discomfort. The pain continued for a year but in a milder form. For the first two months I had pain in my left shoulder and I had painful bruises around my neck. Initially I did not leave my room as I did not want to be judged by other students and I did not eat. As a consequence I lost a stone and half in weight.”

129. The commencement of the VPS Timeline states:

“The complainant participated in multiple horse-riding training sessions at Eventing Training For All throughout the year, with the first recorded session occurring in February 2020, just one month after the reported incident.”

The VPS Timeline then sets out details gleaned from social media which supports the assertion that C participated in horse-riding sessions throughout the period it covers.

130. Ms Judge submits that defence counsel failed to cross-examine C on her victim personal statement. Leave is sought to the VPS timeline, which is said to contradict evidence in the VPS.

131. We do not consider that there is any merit in this point. The VPS describes that C could not sit down for two weeks after the incident. The pain continued for a year but in a milder form. This is not contradicted by the social media posts, showing C riding one month later and it is not necessary for a VPS to be supported by medical evidence as suggested.

132. We therefore consider that, even if it would have been technically admissible, it would have been of no advantage to the applicant for Mr Hayes to have set off on what would have been little more than a fishing expedition in search of minimal or non-existent inconsistencies between C’s victim personal statement and the information recorded in the VPS Timeline. His time was far better spent addressing the central issues in the case as he did rather than pursuing a speculative attack on C’s credibility. The VPS timeline does not afford any ground for allowing the appeal and, as we have indicated, had it been admitted at trial would have been of peripheral relevance only.

133. We therefore refuse leave.

Conclusion

134. Ms Judge has shown extreme commitment and diligence and has left no stone unturned in her attempt to persuade us that this conviction is unsafe. In the course of doing so she has identified aspects of the case that were sub-optimal, as a result of which we give leave to appeal. However, for the reasons we have attempted to summarise above, we remain far from persuaded that this appeal should be allowed. In forming that view we have had regard not just to the issues raised by Ms Judge but to the fact that this was essentially one person’s word against another. It may rightly be said that it is particularly important to ensure in such a case that there is no unfair disadvantage suffered by the defendant, particularly when he is someone having the acknowledged difficulties that the applicant faces. We have borne that in mind at all times. However, it is also right that

we should not leave out of account that the applicant's account faced difficulties of credibility, not least in relation to his assertion that he offered to use a condom but C declined, that C instigated anal sex in the circumstances and manner that the applicant described, and his inability to provide a satisfactory explanation for the marks and bruising contemporaneously recorded by Ms Waterman. We do not know whether or to what extent the Jury were influenced by these and other considerations. We leave out of account the fact that the Jury returned unanimous verdicts of guilty after little more than 2 hours.

135. We are satisfied on all of the material that has been brought to our attention that this appeal must be dismissed.