Neutral Citation Number: [2012] EWCA Crim 1433

Case No: 201104812 D4/201104110 B4/201104109 D4/201101641 C5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
REFERENCE BY THE CRIMINAL CASES REVIEW COMMISSION
UNDER S.9 CRIMINAL APPEAL ACT 1995

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2012

Before :

LADY JUSTICE RAFFERTY DBE
MR JUSTICE TREACY
and
HIS HONOUR JUDGE ROOK QC (SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

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Between :

(1) S **(2) B** **(3) C** **(4) R**	**Appellants**
- and - **REGINA**	**Respondent**

- -
- -

J. Price QC and S. Whitehouse for **Respondent**
Mark Barlow for **Appellant (S)**
David Lyons for **Appellant (B)**
Dean Armstrong for **Appellant (C)**
Michael Aspinall for **Appellant (R)**

Hearing dates: 26th & 27th March 2012

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Approved Judgment

Lady Justice Rafferty:

Introduction

1. These four appeals, heard together for convenience but not linked, are from convictions for sexual abuse of children. Each was before the first instance court some years ago and at a time when diagnostic criteria were not as now they are. We have read with care the parts of the current guidance offered to examining physicians by the Royal College of Paediatrics and Child Health. In common to all appeals is an unopposed application by the Appellant to adduce fresh evidence, in all save R the sole Ground. In R the Crown also applies for leave to adduce fresh evidence.

The legal framework

2. S23 CAA 1968 reads where relevant as follows:

> "Evidence.
>
> (1)For the purposes of an 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.
>
> (2)The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—
>
> (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.
>
> (3) Subsection (1)(*c*) above applies to any evidence of a witness (including the appellant) who is competent but not compellable."

3. The approach of the Court to appeals under s. 23 is as follows:

> "Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, always assuming that it accepts it, to

> evaluate its importance in the context of the remainder of the evidence in the case…The primary question is for the court itself and is not what effect the fresh evidence would have had on the mind of the jury. *Dial and another v State of Trinidad and Tobago* [2005] 1 WLR 1660; *R v Noye* [2011] EWCA Crim 650"

4. The legal principles which apply to a proper assessment of the safety of a conviction in an appeal involving an application to adduce fresh evidence are well known: *R-v-Pendleton* [2002] 1.Cr.App.R. 34; *R-v-Hakala* [2002] EWCA Crim 730. The main issue is its impact, there being, in at least three of these cases, no issue as to its truth, reliability and accuracy. When assessing impact the court should assume that the jury was faithful to the directions of law: *R-v-Christou* [1996] 2.Cr.App.R 360 per Lord Taylor LCJ.

5. In the cases of C, S & B no factual issues arise from the new medical evidence which is accepted as correct. Insofar as evidence at trial was significantly inconsistent with it, the evidence at trial is conceded to have been incorrect. In the case certainly of C but possibly also of S and B it is arguable that errors in the medical examination and interpretation arose from incorrect/inadequate practice even by standards of the time. The most recent authoritative guidance is that provided by the Royal College of Paediatrics and Child Health entitled *"An evidence based review of the literature on Physical Signs of Child Sexual Abuse"* published in 2008 ("the 2008 RCPCH")

6. Offering their assistance in all four appeals are Dr Mary Pillai and Dr Jean Price. That the former was instructed for appellants and the latter for the Crown plays no part in these appeals since they are ad idem. Dr Price MB, BS, D.Obst, RCOG, DPH, DPM, FRCPCH from 2001 to 2010 was the designated Community Paediatrician for Child Abuse in Southampton. She has a special interest in child protection. She led a Child Protection Service for many years and examined numerous children complaining of all forms of abuse.

7. Mrs Pillai, a consultant gynaecologist and forensic medical examiner with Gloucestershire Hospitals NHS Trust, is the director of the Sexual Assault referral centre for Gloucester. She has been a medical practitioner for 29 years.

8. In each appeal it is agreed that the relevant fresh evidence renders neutral the medical evidence.

B

9. On 21st December 1994 in the Crown Court at Preston the appellant B, 66, was convicted of buggery contrary to s.12 Sexual Offences Act 1956 (Count 1), indecency with a child contrary to s. 1 Indecency with Children Act 1960 (Count 2), and indecent assault contrary to s.14 of the Sexual Offences Act 1956 (Count 3). On 20th January 1995 at the same court he was sentenced to 7 years' imprisonment on Count 1, and to 3 years' imprisonment on Counts 2 and 3, all the terms concurrent. On 20th August 1999 the Full Court dismissed an appeal against conviction.

10. He appeals against conviction upon a reference by the CCRC under s.9 Criminal Appeal Act 1995 on the basis of a real possibility this court will receive fresh evidence both from Dr Bassindale, the Crown's medical expert at trial, of a retraction of her evidence, and of post-trial developments in medical knowledge of and approach to physical signs of anal abuse. The court is invited in light of the nexus between Counts 1, 2 and 3, to quash the convictions.

11. A, born in August 1985 the daughter of MH with whom the appellant lived, was seven in 1993 when the offences were said to have been committed. Her mother and the appellant lived together for about a month. MH said the Appellant had told her he had a previous conviction in 1984 for a sexual offence.

12. The Crown's case was that he had anal intercourse with A, made her lick his penis, and touched her indecently. A in an ABE interview said the Appellant used to put his willy up her poo hole and had asked her to lick his willy. Dr Christine Bassindale the examining Police Surgeon felt there had been chronic anal abuse. The Crown also relied upon A's 21st May 1993 complaint to her mother which had led to social services becoming involved. Arrested on 24th June 1993 the Appellant said he had done nothing wrong. In interview he declined to answer questions. At trial his case was denial. He called Dr Miles Clarke who considered Dr Bassindale's findings and concluded that what she found might amount to a congenital condition.

13. Dr Bassindale examined A on 10 June 1993. She found nothing abnormal about the vaginal area. In the anal area between half past five and eight o'clock the skin was smooth and shiny. Between seven and eight o'clock on top of the smooth area was a thick, more prominent fold which was scar tissue. Just after six o'clock there was a smaller, pale, raised area. These findings were consistent with chronic repeated anal intercourse. There were no abrasions or cuts indicating recent buggery. She disagreed with Dr Clarke that the smooth area was common in certain children and she disputed that it was a congenital variation. What had happened could have been weeks or months but not days before her examination. It would have been a painful injury. She had never seen findings so striking ("I remember this child's bottom but cannot now remember her face")

14. Dr Clarke's opinion was that the smooth area of skin observed by Dr Bassindale was known to occur naturally and could be a congenital variation. He accepted that the more prominent fold could be the result of substantial injury. His resting position was to disagree with Dr Bassindale's findings and to consider them to be within normal variations but he did not exclude the possibility of buggery.

15. The appellant told the jury he denied any sexual abuse of A. He had no idea why she should make false allegations.

Grounds of Appeal

16. Fresh evidence is found in reports of 2nd April 2010 and 7th November 2010 by Dr Bassindale in which she retracted salient features of her evidence, and from Mrs Pillai and Dr Price. Post-trial developments in medical knowledge regarding the physical signs of anal abuse support the consultants' conclusions. It is agreed inter partes that the evidence given at trial by Dr Bassindale was incorrect and that the

opinion shared by the two consultants as to good practice is correct. Dr Bassindale herself, in a letter of 5th February 2010 to the CCRC said that her current view would not be as stated in the summing-up, viz that her findings were consistent with chronic repeated anal abuse. In her report of April 2010 she added that it was not possible reliably to opine on whether the findings were scar tissue or a developmental variant or a combination of the two.

The opinion of Dr Price

17. Dr Price considered that Dr Bassindale carried out an appropriate examination (although Dr Price did not have access to photo-documentation). Two problems arise. First, Dr Bassindale changed her opinion from her first statement "these findings are consistent with a history of trauma in the past to the anal area by anal intercourse" to a far firmer position in evidence "[the clinical findings were] scar tissue and…were consistent with what one would expect of chronic repeated anal intercourse."

18. Dr Price agrees that the issue is whether what was seen were or were not scar tissue. If it were, then, absent a history of major trauma to the anus, it would in 2003 have been diagnostic of anal abuse but in 2008 only supportive of anal penetration. The 2008 RCPCH reads that "good evidence suggests that anal scars are associated with anal abuse". However, in the absence of photographs it is impossible to say whether A had experienced anal penetration or whether the clinical findings were normal variants. As Dr Price puts it, reviewing experts and thus this court are dependent on Dr Bassindale's description and interpretation of her clinical findings and interpretation.

19. The descriptions are not clear. Dr Bassindale does not describe the thickening or more prominent fold at 7-8 o'clock specifically as scar tissue but refers to the whole area between 5.30-8 o'clock as scar tissue. For such a large area of scar tissue to occur there would have to have been a significant injury with considerable pain and some bleeding. No such history had been established. If the clinical findings are to be accepted as scar tissue then the evidence supporting this being the result of penetration has not changed from 1991 until the present day. However, it appears that Dr Bassindale at trial gave insufficient credence to the possibility that her findings could have amounted to no more than a normal variant, fortified by her concession in her more recent statements. Dr Price concludes that it is impossible to say with any accuracy that A experienced anal penetration with resultant damage leaving scar tissue, or whether what Dr Bassindale said she saw was a normal variant. Mrs Pillai agrees with Dr Price.

The appellant's developed argument.

20. The appellant submits that cases of this type are often difficult for juries as the offences are usually committed in private, and come down to the word of one person (often vulnerable by virtue of age or otherwise) against that of a defendant. In such circumstances the Appellant suggests juries are wont to give great weight to any evidence, particularly science, which has the appearance of certainty, as a rock to cling to in a rough evidential sea. As to Count 1 this jury was told in striking terms that medical evidence was that the state of A's anus was consistent with chronic penetrative abuse. The Appellant submits that it is impossible to say that

without that evidence the jury would have convicted. Though, as postulated by the Crown, the possibility exists that it disregarded the medical evidence and convicted on the uncorroborated evidence of A, that is improbable. In any event this court cannot be confident that it happened.

21. Although the medical evidence was corroborative only of count 1, as the Judge directed, there are two routes by which the jury might have viewed it as supportive of the Crown's case on counts 2 and 3. It may have had regard to the evidence itself notwithstanding the direction. If considering the case in indictment order it could have reasoned thus; A tells us these three events occurred, there is medical evidence to corroborate count 1, therefore she is telling the truth on count 1. If she is telling the truth on count 1 she is a truthful witness, therefore we can regard her (corroborated) truthfulness in relation to count 1 as supporting what she tells us in relation to counts 2 and 3 (where the nature of the acts makes medical corroboration impossible) so as to convict on those counts. Nothing in this second line of reasoning is inconsistent with the Judge's directions. It is, the Appellant submits, an affront to common sense to suggest that the jury would not have had regard to its own finding of fact in relation to the truthfulness of A on count 1 in considering her truthfulness in relation to counts 2 and 3. Consequently the erroneous medical evidence contaminates all three counts.

The Respondent Crown

Previous Behaviour

22. As we have explained, the Appellant was said to have told MH of his 1984 conviction for incest. The Crown invites consideration both of the fact and of the facts of that previous conviction in relation to the safety of these convictions. The Appellant argues that this would be inappropriate for a number of alternative reasons: It is not fresh evidence since it was in the possession of the Crown and was led at trial, so that it falls at the hurdle of Section 23(2)(d) Criminal Justice Act 2003 ("the CJA 2003"). Next, it would have been open to the Crown under the rules then in force to apply to lead evidence of bad character and at this distance, absent a full transcript and counsel's papers, it is pointless to speculate as to the exact form of such notional application, the Defendant's response, the Judge's ruling and any consequential effect on the jury. In the alternative the Appellant submits that the provisions relied upon by the Crown (the CJA 2003) were not in force at the time of the trial. Part 11 was brought into force on December 15th 2004 and has no effect on criminal proceedings begun before December 15 2004. Subsequent legislation does not remove the need to satisfy the established test in Section 23(2)(c) which requires that the evidence would have been admissible at trial.

23. Further, in the alternative, to admit this evidence is said to amount to a new basis for conviction, i.e. the propensity of the Appellant to commit offences of this type: *R v Fitzgerald* [2006] EWCA Crim 1655 at paragraph 35;

> "*While this court can receive fresh evidence from the Crown, not only in rebuttal of the appellant's fresh evidence but also to demonstrate the safety of the conviction generally (see Hanratty [2002] EWCA Crim 1141; [2002] 3 All ER 534), it is*

> *not open to the Crown to seek to put in fresh evidence so as to enable it to advance an entirely new basis for a conviction which was never put before the jury. That would require this court to act as if it were the jury and would run counter to the House of Lords' decision in Pendleton [2001] UKHL 66; [2002] 1 WLR 72, where it was said by Lord Bingham of Cornhill that the Court of Appeal "is not and should never become the primary decision-maker."*

24. Whilst the fact of the Appellant's previous convictions was in evidence at trial, no admission is made as to their founding facts and, absent such, the Appellant contends that the material provided by the Crown would not be admissible.

25. At our invitation Mr Price QC set out the purpose for which the Crown seeks to rely on the facts of the convictions. The incests involved penetration of children, the children were female, they were aged nine and eleven, and the context was father/daughter. The Crown seeks to rely upon them not to establish propensity, but to support the correctness of the complaint since they were so similar. Additionally, had the facts been led the Appellant would have been entitled to a careful direction as to the permissible, and, more importantly, the impermissible use of the conviction. His position would have been considered and appropriately explained to the jury.

26. For reasons which will become apparent it has not proved necessary for us to reach a settled conclusion on the Crown's application, so we say only that we might have been minded to view it as well made.

Discussion and Conclusion

27. Parties addressed us on the basis that this appeal turns upon the sufficiency of evidence once the medical evidence is seen as Dr Price has explained. We would distill the issue differently. This appeal turns on whether, once the medical evidence is seen through the eyes of Dr Price, this court can be confident of the safety of the conviction.

28. We have concluded that we cannot. Though it is true that the jury heard the evidence of Dr Clarke, whose opinion finds an echo in that of Dr Price, nevertheless the evidence of Dr Bassindale is unlikely to have been less that compelling. We remind ourselves of how graphically she put it – "I remember this child's bottom but I cannot remember her face". We think there is force in the submissions of Mr Lyons. The jury would instinctively have looked for dispassion within the evidence, indeed obedience to the Judge's directions would have made such a course sensible. Though a technically correct approach may be as the Crown advances – even if the conviction on Count 1 is unsafe, the balance of the convictions survives – we agree with Mr Lyons that this is to expect a purity of reasoning which experience teaches us would not be likely. Once the jury had found Count 1 proved, it would not be surprising if it deduced reliability and truthfulness in the victim and applied those conclusions to the remaining counts. It follows that we cannot be certain that, without the evidence of Dr Bassindale, the jury would still have convicted and for that reason, on these facts, these convictions must be quashed.

C

29. On 17th February 2005 in the Crown Court at Inner London C was convicted of two counts of indecent assault (counts 1 & 2), of attempted rape (count 3) and of rape (count 4). On the same date he was sentenced to concurrent terms as follows: Ct 1 (indecent assault) 4 years, Ct 2 (a like offence) 6 years, Ct 3 (attempted rape) 9 years and Ct 4 (rape) eleven years. On 14th December 2010 the Full Court refused his renewed applications for leave to appeal against conviction and sentence. He appeals against conviction upon a reference by the CCRC on the basis of fresh evidence arising from developments in medical knowledge which undermines a significant aspect of the case for the Crown.

Facts

30. S born 9th January 1993 was the appellant's daughter. She lived with her mother in Jamaica until 2002 when she came to the United Kingdom to live with the appellant who had remarried. He and his then wife had a baby and he had a stepdaughter, T, by a previous relationship. On 6th May 2004 S told a teacher she had itching, lumps and a powdery white discharge in her genitals. The teacher asked if anyone had touched her genital area. S first said no, but after the third enquiry said the appellant had touched her on a number of occasions.

31. S told the jury that when the abuse started the appellant would get into bed with her. Between Christmas 2003 and New Year 2004 one morning he pushed his hands through her pyjamas past her bum to her private parts (count 1). This took place daily except for some Saturdays and Sundays. She would tell him to stop and that he was hurting her (count 2). On one occasion he grabbed her and put his hand over her mouth. She bit him. He placed her on the sofa, opened her legs and, wearing a condom, put his penis into her vagina (count 4). He had on a previous occasion tried but not succeeded.

32. Ms G her teacher gave evidence of recent complaint. Nutley a fellow-prisoner gave evidence that whilst in custody the appellant admitted sexually abusing S on at least one occasion.

33. T told the jury that shortly before Christmas 1989, when she was 11, the appellant tried forcibly to pull off her jeans whilst holding her legs in the air. He said he was trying to show her how to be a woman. On two other occasions he, naked, questioned her inappropriately about sexual matters. She had not told her mother. She did not want her mother upset and wanted to prevent her being assaulted by the appellant. She could not remember describing the incident as "horseplay" to a social worker and denied discussing the incident with S. She accepted that her father and the appellant had argued, and accepted that the appellant once complained about her, T, to the police regarding an alleged theft of his mobile telephone.

34. The Crown's case therefore was that the appellant committed a series of sexual assaults of escalating seriousness against S. It relied upon S together with T's similar account, on Nutley, and on Dr Mary Rees**,** a consultant community paediatrician, a Fellow of the Royal College of Paediatrics and Child Health who held a Diploma from the Royal College of Obstetricians and Gynaecologists. She had over 20 years experience of working on child sexual abuse cases in the courts.

35. Dr Rees examined S on 6 May and on 21st June 2004 when a video recording was made. She diagnosed thrush. S was post-pubertal and well developed for her age. Unusually for a post-pubertal girl of that age, there was a clear view into the vagina. The posterior part of the hymen which would normally have been thick, curved and intact was worn away, a remnant remaining. The rubbing away was typical of abuse on more than one occasion and was caused by digital penetration or insertion of a penis or penis-sized object.

36. S appeared to have suffered repeated abuse because where abuse occurred only once there tended to be one or two clear tears but tissue remained. Victims might describe abuse as happening once when in fact it had lasted for a longer period. It was impossible to date the abuse because S's tissue had healed. Depending on the type of trauma, healing could be within 2 weeks. The abuse could have been either during or pre-puberty because it was more typical to see complete attenuation of the tissue if the abuse started at that time. Dr Rees dated the abuse to around summer 2003, inconsistent with S's evidence which suggested it was between November 2003 and May 2004.

37. The defence case was that the allegations were fabricated, S's mother behind them. The Appellant said he had never behaved improperly towards S. There was tension between S and her stepmother. S was jealous of the baby. She reacted badly to the Appellant's attempts to impose discipline, and from 2003 he began threatening to send her back to her mother. Similarities in the accounts of S and of T were in all likelihood due to collusion. The appellant had never been charged in respect of T's allegation and she returned to live with him. Nutley was a liar.

The Fresh Evidence

38. Mrs Pillai and Dr Price not only speak with one voice but also with significant confidence since there exists a video recording of Dr Rees's examination, her written report, and a transcript of her evidence. The two consultants agree that the evidence of Dr Rees is reflective of past practices where attenuation of the posterior rim of the hymen was suggested as an indicator of sexual abuse. In current practice "attenuation" should describe only the position when examination of the hymen prior to alleged abuse establishes presence of a greater amount of tissue. There had been no previous examination of S such as to afford a comparison. The 2008 RCPCH describes "attenuation," and "rubbing/tearing away" as "not helpful" terms.

39. The consultants are also agreed that increased knowledge has undermined the bases upon which Dr Rees explained her conclusions. It is now known that a girl's oestrogen levels affect the thickness of the hymen, and that the amount of hymenal tissue can vary widely and can overlap between abused and non-abused girls, as can the size of the hymenal orifice, which Dr Rees described as "dilated".

40. A complete cleft or notch in the posterior rim of the hymen (suggested by Dr Rees's diagram) would be very supportive of penile penetration. However Dr Rees did not describe it as such when giving evidence. The video recording did not show a hymen consistent with the diagram, rather it revealed a distant rim of hymen throughout the posterior 180 degrees. The opening was not dilated but normal. The edge of the hymen was slightly irregular but had no deep or superficial notches. It did not meet the vestibule wall at 6 to 7 o' clock as described by Dr Rees. 2008

RCPH guidance indicates that a narrow hymen or slight irregularities are non-specific findings. Not only is a number of the statements made by Dr Rees in evidence no longer accurate from a scientific standpoint but also several were not supported by the examination itself. Dr Rees also in many of her descriptions assumed abuse had taken place.

41. Dr Rees was cross-examined on two bases. First, as to when events leading to identified abnormalities occurred and secondly as to with what frequency they had occurred. The defence case was that whatever she found was explicable by an earlier assault by a man named GF. In Jamaica in late November 2001 he had it was alleged assaulted C just before she left to join the Appellant in the UK. This was not without difficulty as a line of defence. C's own account of the "incident" involving GF did not admit of such a possibility. The Appellant told the jury that whilst in Jamaica he had himself investigated it. In his submission to the CCRC he pursued it as a complaint.

42. SC was also challenged about possible other sexual involvement before arriving to live with the Appellant. The foundation was something she was said to have said to the Appellant's wife (who did not give evidence). SC denied both the behaviour put and having made the comment.

43. It now appears that a defence expert was instructed but not called. Dr David Rouse a forensic pathologist in a report dated 4th October 2004 considered the findings of Dr Rees "consistent". Quite what this means is not clear to us, but there is no doubt that it ruled him out as a potential witness for the defence. Dr Rouse has since been asked whether he viewed the video of the examination. He did not.

The Respondent Crown

44. The Crown invites a review of the entire medical background. Dr Rees had described the appearance of the hymen as typical of abuse on more than one occasion and caused by digital penetration or insertion of a penis or penis-sized object. That what is now known to be an error was not challenged by defence expertise is, the Crown remarks, the more surprising given events close to S's recent complaint to her teacher. That same day Drs Alexander and Adeyemi examined her and found the appearance of her hymen normal, and that it appeared intact and without defect. Their reports were served by the Crown at trial. This neutral finding, added to the instruction of an expert, and the existence of a reliable tool (the video) against which to test the conclusions of Dr Rees, renders the more surprising the course taken. The Appellant is under a duty to use his best endeavours to inform the court why evidence he now seeks to lead was not at trial adduced: Archbold 2012 7-205, *R v Trevor* 1998 Crim LR 652.

45. The Crown submits that the fresh evidence goes only to the safety of the conviction on Counts 2 and 4, the only counts pleading penetration, both by its nature and as a consequence of the Judge's directions to the jury, which, necessarily, reflected the conduct of the defence case as we have set it out. The medical evidence arguably therefore went not to the question "was it done at all?" but to the question "whodunnit?"

46. Finally the Crown argued that Ts evidence was capable of being highly supportive, that other evidence inadmissible at trial (pre-CJA 2003) is now admissible, and that the evidence of Nutley that the Appellant had described SC as "11…but…looked more like 13-14, with nice tits, well developed" was information which could only have come from the Appellant and it was inconsistent with the defence case.

The Appellant's rejoinder

47. The Appellant on the other hand argues that the fresh evidence goes to the safety of all the convictions. Since it shows that penetration either did not or may not have occurred, SC was either untruthful or, at the very least, gave an account which was not reliable. Whichever were the case, her credibility is fatally undermined, so the submission goes, and since every count upon which the Appellant was convicted depended upon her account, all convictions should be quashed.

Discussion and Conclusion

48. In our judgment the medical evidence in this case was highly likely substantially to have influenced the jury and to the disadvantage of the Appellant. So far as we can tell, Dr Rees was firm in her findings and conclusions, and not susceptible to challenge in cross-examination. More importantly we can be certain she was not challenged by a fellow professional called for the defence. Dr Rees was a highly experienced paediatrician. The Crown, understandably, emphasised her qualifications and the significant numbers of examinations of this type which she had undertaken. It may be that the evidence of T was capable of supporting the case for the Crown, and we accept that the evidence of Nutley was not without usefulness to the Crown, but the sharpest strongest arrow in the Crown's quiver here was Dr Rees. Once the credibility of SC was so firmly bolstered by an independent expert, importing into an area often clouded in uncertainty the apparent certainty of science, that advantage to the Crown remained when the jury considered each count. We are not confident that these convictions are safe and they are all quashed.

S

49. On 15 February 2002 in the Crown Court at Truro S (44) was convicted of rape (count 4), attempted rape (count 5) and 10 counts of indecency with a child (counts 1-3, 6-11, 14).He was sentenced to imprisonment of 8 years on count 4, 7 years concurrent on count 5, 2 years on counts 2, 3, 6 and 7, concurrent with each other, but consecutive to the sentence on count 4, 2 years on counts 8, 9, 10, 11 and 14, concurrent with each other, but consecutive to the sentence on counts 2-7, and 18 months on count 1, concurrent. The total period of imprisonment was 12 years. On count 4, an extended licence was imposed under s86 Powers of Criminal Courts (Sentencing) Act 2000 for the whole of the 12-year sentence.

50. The allegations were that he sexually abused his partner's daughters, E (born 14/05/1988) and K (born 24/11/1990), from 1992 to 2001. On 1 August 2001, E, then 13, disclosed the abuse to her father who called the police. ABE interviews with the two girls followed.

51. The Crown's case was that he abused them in the family home whilst their mother Mrs H was at work or at bingo. Sometimes he abused both girls together. Save for

Counts 1, 7 and 14 all counts pleaded specimen offences as follows: Count 1 – he exposed himself to E; Count 2 – he made E touch his penis; Count 3 – he made E suck his penis; Count 4 – he vaginally raped E; Count 5 – he attempted the anal rape of E; Count 6 – he rubbed his penis against E's vagina and anus; Count 7 – he involved SB in sexual abuse of E; Count 8 – he made K touch and suck his penis; Count 9 – he licked K's vagina and anus; Count 10 – he made K touch his testicles while E masturbated him; Count 11 – he made K stand to urinate while he watched; Count 14 – he rubbed K's bottom and vagina with his penis.

52. The Crown's case was that the evidence of the complainants was supported by their similar accounts, the evidence of SB, the findings of the examining doctor, Dr Galbraith, and the similarity between their evidence and that of their mother on one particular issue. The defence case was that the allegations were either a fabrication or a description of what was done by someone else. E might have wanted to get back at the Appellant for grounding her. He started a relationship with their mother in 1993 and when he visited E was usually present. He did not move in until 2000. There was no opportunity to commit these offences without detection.

53. E (13) told the jury that the applicant began abusing her when she was 5, always at home, usually in the girls' bedroom and a couple of times in the front room. It also happened to her sister K. He would often begin by saying he wanted to play a game. He had made her cousin SB touch her, E, whilst he watched. She was annoyed with the Appellant because he had stopped her going out on her bike and she asked her father if she could live with him. She was fed up with her siblings. It was an unhappy time in her life. She had not made up her allegations so as to get at the appellant.

54. K (11) told the jury that over years the appellant had abused her in her mother's bedroom when her mother was out, often in the context of a game. He had abused E and the sisters had discussed it. K did not mention SB.

55. Their cousin SB (27 but with the mental age of a child) stayed with them during a summer holiday and told the jury he saw the appellant rub the girls' private parts. He himself, he said, had never touched the girls. KF, a schoolfriend of E, told the jury that in January 2001 E said the appellant had abused her during the holidays.

56. The detail of Dr Galbraith's examination is conveniently dealt with infra, when we turn to the opinion of Dr Price. In short, Dr Galbraith examined E's vagina, and found evidence of damage consistent with repeated penetration with something larger than a tampon. K had suffered similar injuries. The appellant pointed out that K did not allege vaginal penetration

57. The complainants' father told of an hysterical telephone call from E who said she wanted to live with him and that the appellant was sexually abusing her and her sister. Their mother SB told the jury that during intercourse with the Appellant "one of his testicles used to go up inside". She agreed that the walls and doors were thin in the house.

58. In interview and evidence the appellant denied the allegations. He was not often alone with the complainants, but sometimes babysat. Their mother also asked him to discipline them and his main punishment was grounding. As to his having only

one testicle, he did recall their mother saying something about it. He could not think of a reason for what were false allegations save perhaps that the complainants had taken the groundings to heart. He had no idea why E had said what she did to KF in January 2001, especially as he had gone away for Christmas. He denied that any sexual activity took place in the presence of SB.

The submissions of the Appellant

59. Mr Barlow for the Appellant submits that the original findings as to E are no longer supportive of repeated penetrative injury and those in relation to K are also unreliable. Dr Galbraith's was the only independent evidence before the jury and must have determined the outcome of the E counts and, given the direction on similar fact evidence, of the K counts. The fresh evidence renders the convictions unsafe. The Crown accepts that the evidence of Dr Galbraith is incorrect and that the medical evidence should be considered entirely neutral.

60. In a scrupulously fair and balanced summing-up as to which no complaint is made the Judge directed the jury that whilst Dr Galbraith's evidence was not conclusive it did establish damage by repeated penetration. There was independent evidence supportive of the girls' evidence: similar accounts of the two sisters, the evidence from SB, the medical evidence, and Mrs H's evidence that the Appellant liked his testicle held before ejaculation.

61. The Judge highlighted the mental difficulties of SB and warned the jury to consider whether he may have been consciously or unconsciously influenced by knowledge of what the girls might be saying. If he had been influenced at all by what he may have heard, as distinct from what he himself experienced or witnessed, the jury should take that into account in deciding what weight to attach to his evidence. The Judge also highlighted the clear differences between what SB said and what the girls said about the incident. He also gave a carefully structured warning in respect of similar fact.

The Medical Evidence

62. Dr Primavesi. Counsel for the Appellant had in his possession a report by Dr Primavesi which was a mixed blessing. As to K his conclusions were capable of supporting the case for the Crown, whereas as to E his conclusions were capable of supporting that for the Appellant. K was the complainant in Count 12, an allegation of penetration. That count was withdrawn from the jury, probably at the conclusion of the case for the Crown though this cannot be established with confidence. Parties are agreed that the prompt for withdrawing the matter was almost certainly that K did not in evidence speak of penetration or even attempted penetration. In other words she did not come up to proof. Consequently, the Crown argues, Dr Primavesi was thereafter available to be called for the Appellant.

63. The Appellant argues that the decision of trial Counsel not to call Dr Primavesi should not be criticised.

The Crown

64. Dr Price helpfully reviewed the evidence and/or reports of Dr Galbraith and of Dr Primavesi. Her conclusions with which Mrs Pillai agrees are as follows:

E was examined in the supine, frogs leg position. This revealed early oestrogenisation of the inner labia, the labia minora being fairly prominent. They hymenal orifice appeared triangular and asymmetric in outline and it was difficult to establish its actual size due to thickening in the posterior and lateral part of the hymen.

E was unable to tolerate Dr Galbraith's use of a cotton wool swab further to define the outline of the hymen. Dr Galbraith reported "anal examination in the left lateral position revealed no abnormality and no sign of injury". She concluded "both these girls showed evidence of hymenal damage, which in my opinion would be consistent with repeated episodes of penetrative injury".

Dr Primavesi commented: "the findings of the hymen were thickening and distortion between 2 to 6 o'clock. These are not generally accepted signs of child sexual abuse. If the implication is that the thickening and distortion were due to oedema from acute trauma, then a follow up examination should have been performed to look for evidence of hymenal resolution. The hymenal diameter was not measured (a hymenal diameter of greater than 1cm is considered suggestive of sexual abuse in a pre-pubertal child) and the reflex anal dilatation test was not performed (also suggestive of anal penetration if positive). He concluded "in my opinion, examination of E did not show definitive findings of child sexual abuse".

The 2008 RCPCH does not describe thickening of the hymen in the finding of abused children, it states rather that as puberty approaches, the hymen thickens, may assume a fimbriated appearance and hymenal elasticity increases. Neither distortion nor asymmetry of the hymen is referred to as a sign of sexual abuse.

Thickening and distortion must however be considered in the light of both the examination technique and positions in which the child was placed. Whether the thickening were to do with oestrogenisation could in the opinion of the two consultants have been clarified had E been examined in a different position and/or a follow up examination carried out.

That E's hymenal orifice was described as "appearing triangular and asymmetric in outline" may simply indicate that she was not relaxed.

Dr Galbraith found "it was difficult to establish the actual size of the hymenal orifice due to this thickening in the posterior and lateral part of the hymen." Measurement of the hymenal orifice is no longer recommended. The 1997 guidance recommended the supine "frog leg" position. By 2008 both supine and prone positions were recommended, and as to E might have produced very different clinical findings.

In Dr Price's opinion it is difficult to argue that the clinical findings described by Dr Galbraith viewed in the light of current practice provide clear indicators that penetration of E occurred, resulting in damage to her hymen.

65. Scar tissue on K's anus which would appear to be both at 6 and at 12 o'clock could be indicative of penetration. However the examination of K Dr Price also finds questionable, given that she too was not examined in the knee-chest position. Those comments do not negate the possibility that some sexual activity, including vaginal and anal penetration, did occur. Medical literature includes a wealth of reference to the majority of examinations for suspected child sexual abuse revealing normal or non-specific findings. Indeed the key message within RCPCH 2008 is "normal/non-specific findings have been reported in up to 99% of children referred for evaluation of sexual abuse"

The Respondent Crown

66. The Crown contends that the fresh evidence is relevant only to the safety of the conviction on Count 4, a specimen allegation of vaginal rape of E. The Judge had already directed an acquittal on the equivalent Count [12] in respect of K. The Appellant was also acquitted, necessarily, on the judge's direction, on Count 13.

67. The Crown accepts that the medical findings neither support nor undermine the complaint of rape. However, it invites attention to whether there is a reasonable explanation for the failure to adduce the evidence of Dr Primavesi. Whilst acknowledging the difficulty for defence counsel whilst the rape and attempted rape counts remained before the jury, it argues that after directed acquittals the landscape changed. Dr Primavesi was then available to give evidence of the balance of his opinion because questions which might otherwise have been put by the Crown had become irrelevant. The Judge could have been asked, in advance, so to rule and would surely have done so. In the absence of any specific explanation to the contrary, the inference for which the Crown contends is that it was considered unnecessary to call Dr Primavesi because medical evidence in respect of E was discredited as a consequence of the acquittal on Count 12.

68. As to Dr Primavesi we do not agree. Whether to call him was a tactical decision. True, once the Appellant was no longer in jeopardy on counts 12 and 13 he was technically available, but we are not surprised that counsel did not call him. Counsel was able, with force and confidence, to make the points to which we have referred. Arguably, to call Dr Primavesi would have been to risk putting back into the spotlight matters more effectively dealt with in reliance on the directed acquittals. That approach had the advantage of unassailable certainty. Nothing could further develop, nothing could go unexpectedly wrong. The decision by counsel was one with which we readily sympathise.

The safety of the convictions if the fresh evidence is admitted

69. The Crown submits that the fresh evidence is relevant only to the conviction on Count 4, both by its nature and especially as a consequence of the legal directions. Even in respect of Count 4 the significance of the evidence of Dr Galbraith and the fresh evidence of Dr Price is greatly diminished by the reason for, and consequences of, the acquittal on Count 12. The argument of Defence Counsel at trial (that the flaws in the medical opinion were apparent from the directed verdict in respect of K, with consequential damage to the E counts) was well-founded and one of which the Judge reminded the jury. The flaw, as the Crown described it, in the evidence of Dr Galbraith, when K herself did not speak of penetration, was squarely before the

jury. That the jury went on to convict of Count 4 is explicable only upon the basis that it found E an honest and reliable witness. Mr Price QC reminded us that in cross-examination the Appellant had been challenged by reference to the supporting evidence - the complainants' similar accounts, the evidence of SB and the Appellant's unusual naked appearance of which the complainants were aware - but not by reference to the medical findings in respect of E.

Discussion and Conclusion

70. In our judgment the expert evidence goes to the heart of this appeal. That a professional witness of experience gave evidence at trial supportive, putting it at its lowest, of the evidence of E is almost certain to have weighed heavily in the jury's consideration. If it did nothing else it introduced or might well have appeared to introduce dispassion. We agree with the submissions of Mr Barlow for the Appellant that to view it as going only to the safety of the conviction on Count 4 would be to adopt an approach too narrow in the circumstances of the case. Mr Barlow put it trenchantly – the medical evidence at trial "shone like a beacon". We agree. We cannot be confident that all these convictions are safe and they must all be quashed.

R

71. On 28 August 2003 in the Crown Court at Stafford R aged 26 was convicted of rape (count 1) and acquitted of rape (count 2). On 6 October 2003 he was sentenced to 3 years' detention in a young offender institution. He appeals against conviction upon a reference by the CCRC on the basis of fresh medical evidence and fresh evidence concerning the complainant's credibility, in reliance on post-trial vacillation.

72. Between October 1999 and September 2001 the Appellant, his sister M and their two younger sisters were in the foster care of the W's. The girls were then moved to another foster family, the H's. The Crown's case was that twice during this period, the Appellant went into M's bed and raped her. She disclosed this in March 2002 to Mrs H. She had not complained earlier due to threats from the Appellant and because she did not feel able to talk openly to the W's. The defence was denial and possibly fabrication. The issues were whether M were raped or whether it were a fantasy, and if she were raped whether the Appellant were the rapist.

73. CH fostered M and her sister from 25 September 2001 until the end of March 2002 when, concerned about her behaviour, she asked M whether she had had sexual contact with anyone. M told her she had been twice raped and had been threatened by the Appellant. Mrs H reported the matter.

74. M described the Appellant creeping into her bed one night and putting his hand over her mouth because she was about to scream. He told her to be quiet or he would kill her. He put his "thing" inside her and then she felt wet. It next happened before her sister's August birthday. He told her to keep it secret, as she did. Both times she told the Appellant to stop because it was hurting but he did not. The Ws' three sons included T, a similar age to the Appellant. When it was suggested to her that on the first occasion her abuser might have been one of the sons, she said that although she did not at first know who her assailant was, she realised it was her brother because he smelled of cigarettes and of unwashed hair. She agreed she had carried on as if

nothing had happened and had had opportunities to tell someone but she was afraid of the Appellant because of his threats. She denied a habit of making up stories.

75. Dr Han with the police surgeon Dr Lockhat on 22 April 2002 carried out a joint examination of M's genitalia. Her opinion was that the clinical findings relating to the hymen supported the allegation of penetration but that it was difficult to assess whether this were penile.

76. The Appellant's denials in interview found an echo in his evidence that this did not happen. He could not understand why she had made these allegations.

Grounds of Appeal

77. The opinion of the consultant(s) and the 2008 Guidelines have prompted Dr Han to alter her conclusion that her clinical findings supported the allegation.

78. Post-trial retraction/vacillation by M casts doubt on her credibility and the police investigated allegations post-conviction that M had admitted lying in evidence. The Judge failed to remind the jury fully of the cross-examination of M, particularly relevant given her post-trial vacillation.

The medical evidence

79. Dr Han's evidence was read. It included:

> "….there was no bruising bleeding laceration. There is some white discharge in the genital area. ……..The hymenal opening was not seen initially but with labial traction and labial separation the hymenal opening was 15mm in diameter. The hymen was thin, there was a cleft at 7 o'clock position. The hymen was not oestrogenised. Hymen margin was blunt from 7 o'clock to 12 o'clock and sharp from 12 o'clock to 6 o'clock. Posterior fourchette was intact. I also examined her in the knee-chest position and the clinical findings were the same." Her clinical finding was of a cleft in the hymen at 7 o'clock when the examination was conducted with M supine. The examination was then conducted with M in the knee-chest position and the finding was the same. Dr Lockhat described the hymen as "intact" but said there was a "little healed tear at ……7 o'clock."

80. Mrs Pillai and Dr Price point out that Dr Han described M's hymenal orifice as 15mm but did not describe how this measurement was achieved. Visual estimates are notoriously inaccurate and measurements will vary depending on the examination position used and the state of relaxation of the child. 2008 RCPCH guidance in regard to pubertal girls is that there is insufficient evidence to determine the significance of the hymenal diameter, so that no significance would now be attached to the described measurement.

81. Whether or not the notch in the hymen is of significance as evidence consistent with penetration depends upon its depth. It could only with certainty be regarded as such

if it were more than 50% full thickness. Had it been of such a depth Dr Han might have been expected to say so in terms. Dr Han herself accepts that she did not measure it and did not say, as normally she would were it the case that it was of such a depth. That it was still apparent in the knee-chest position might make it more likely to be of significance. However for the reasons already rehearsed it is now impossible to say with certainty what interpretation might be put on the findings described.

82. Parties agree that if Dr Han's description of the hymen be unreliable then the effect of the medical evidence is neutral.

The developed arguments of the Appellant

83. The importance of the medical evidence at trial as support for the Crown's case is said to be clear from the summing up. The Judge directed the jury that it was consistent with M's evidence that she had been raped. The absence of a clear opinion as to the manner of penetration – penile or digital – did not affect its ability to provide corroboration. The unchallenged evidence of Dr Han effectively ensured that the issue of penetration was not centre-stage in the trial, rather the main focus of cross-examination of M was misidentification and whether someone other than the Appellant were responsible. The effect of the new evidence is that there was no relevant evidence that the jury could have received in support of the complainant's allegation.

Discussion and Conclusion

84. The central evidence was that of M. In *Martin T* [2008] EWCA Crim 3229 the Court quoted Chacko in the *American Journal of Obstetrics and Gynaecology 2000* in which it was said that "….the most reliable source of evidence of sexual abuse is the complainant herself and a conclusion must be reached as a result of an assessment of her evidence".

85. The evidence of Dr. Han did no more than support M to the extent that Dr. Han was of the view that there had been penetration. Her evidence was not presented as conclusive of penile rape but as at best supportive of penetration, penile, digital or with an object.

86. The effect of the revised evidence of Dr Han and the opinion of the two consultants is as follows:

> "The clinical findings may not be conclusive of penetration but neither do they exclude it.
>
> That the notch in the hymen was persistent in the knee chest position would support the opinion that it was a healed traumatic injury."

87. Nothing in the fresh evidence undermines the evidence of M. On the contrary, it is agreed that there was evidence of a healed traumatic injury. In those circumstances, the fresh evidence does not undermine the safety of the conviction. There is nothing in this Ground.

Replaying part of the ABE video the Appellant complains that the Judge when asked to remind the jury of M's evidence in chief failed to remind the jury of cross-examination.

88. In *R v Rawlings; R v Timothy Broadbent* [1995] 1 WLR 178 the Lord Chief Justice set out the procedure to be followed if a judge permits a video of a witness's evidence to be replayed:

    i) The replay should be in court with all parties present;

    ii) The jury should be warned to guard against giving the evidence disproportionate weight;

    iii) The Judge should remind the jury of cross-examination of the witness, whether or not asked to do so.

89. The Crown concedes that the second and third steps were not taken but argues that the failures do not affect the safety of the conviction for the following reasons: Cross-examination did not produce significant new evidence. M did not retract the allegations set out in her video interview, indeed she denied suggestions that she could have spoken privately to her mother about her concerns, that she had spoken up in favour of the Appellant to social workers, and that she had made up the allegations because she was in trouble with her foster mother and wanted to gain sympathy. Had the Judge reminded the jury of those parts of the cross-examination he would have underlined her denials.

Discussion and Conclusion

90. For the Appellant arguably the most significant part of cross-examination was her comment, not previously made, that she had recognised him as her assailant by his voice and smell. This was doubtless emphasised by counsel in his closing speech which the jury would have heard shortly before it retired. The trial lasted but two days. The Appellant gave evidence on the morning of the second day, the jury retired that same day at 12.07 p.m. and returned its verdict at 4.00 p.m. It had seen M give evidence only the day before and her demeanour must have been fresh in its mind. Neither counsel suggested that cross-examination should be repeated. When the jurors had viewed a part of the video again the Judge asked if they wished to be reminded of the cross-examination. They refused the offer and neither counsel made submissions to the contrary.

91. The submission by the respondent Crown is that there was no identifiable prejudice to the Appellant in the Judge's failure to remind the jury of cross-examination. We agree. No damage could conceivably have been done by the failure. Indeed quite the reverse – the Appellant in our view was arguably better served by the absence of a summary which would inevitably once again have drawn to the jury's attention matters which were to his disadvantage.

92. The Judge also failed to warn the jury that it should guard against giving the evidence disproportionate weight simply because it had been repeated. That might be a fatal omission in some cases, particularly if the trial had been lengthy and a mass of evidence fell to be assessed. In this case, the jury had heard the Appellant give evidence only that morning. The trial was brief. The danger in failing to give

the warning set out in *Rawlings* is much reduced, if not negligible, in the circumstances of this case. There is nothing in this Ground.

Fresh evidence to the credibility of M who has, post- trial, vacillated

93. In an August 2007 letter to the Appellant, four years after conviction, M retracted her evidence. The following year, interviewed as part of the CCRC investigation she was adamant that her evidence at trial was true and she gave an explanation – family pressure - for her retraction ("the vacillation").

94. The Appellant complains that M's credibility has been severely undermined by her post-trial vacillation. Coupled with the fresh evidence and the failure to remind the jury to place M's evidence in chief into context when it was reviewed, the appellant's conviction is said to be unsafe.

95. The Crown points to the difference between a private letter as a result of family pressure and evidence to police during a formal investigation. The CCRC concluded that M was truthful in the latter context and the vacillation does not suggest she was any less truthful during the original police investigation. Further, the vacillation was 5 ½ - 6 ½ years after the original complaint, when M. was 12. She was 17 when she wrote the retraction letter and 18 when she confirmed that the retraction was not true. The Crown argues it is artificial to seek to assess the credibility and motivation of a 12 year-old by reference to her actions aged 17 and 18.

96. We agree. There is nothing in this Ground.

Fresh evidence adduced by the Respondent Crown

97. Quite apart from the medical issues, the Crown resisted the appeal by adducing fresh evidence. It is well recognised that in an appropriate case this court may admit fresh evidence at the behest of the Crown just as it can in the case of an appellant "if… necessary or expedient in the interests of justice". Section 23(2) sets out four factors to which the court must have regard. However, the essential test is set out in subsection 1, whether the evidence would assist the court to achieve justice: *R v* (*Hanratty* deceased) [2002] 2 Cr App R 419.

98. The Crown seeks to rely upon evidence of alleged admissions by the Appellant to prison officers and/or probation officers whilst he was serving his sentence or on licence. Four witnesses each produced records they were required to make as part of the performance of their duties, created contemporaneously with the alleged admissions. In each case the witness said the record had been made either at the time of speaking to the Appellant, or immediately afterwards from notes made at the time and now destroyed.

99. Since Mr Aspinall's instructions were that at no stage had the Appellant made any admission of guilt to any prison or probation officer the witnesses upon whom the Crown relied gave evidence before us.

100. Lee Nightingale, a prison officer, in both his contemporaneous documentation and his oral evidence was equivocal as to whether any admission of guilt had in fact been made. His evidence failed to distinguish an admission of guilt from an

acknowledgement of responsibility for the consequences of his conviction. Accordingly, it cannot avail the Crown and we set it to one side.

101. Kathryn Halawin, a retired probation officer, was due to supervise the Appellant when he was released on licence in 2005. She produced a record, written whilst he was still in prison, of his 31st November 2004 admission of the offence, Since at that time a date had already been set for his release this admission cannot have been made with a view to securing release on licence. The purpose of her interview was to discuss arrangements for supervision after his release.

102. In a second document recording an interview on 3rd March 2005, the Appellant by then on licence, Mrs Halawin wrote that after an initial period in denial he was now admitting his guilt, something he did not wish his family to know. It was resistant to that notion and uncooperative and hostile towards people such as Mrs Halawin. Mrs Halawin contrary to the challenge put to her by Mr Aspinall recalled admissions made on both those occasions. She pointed out that denials of guilt by the Appellant would not in either instance have made any difference to his situation. Her witness statement also records that on occasions other than those documented he had acknowledged to her his guilt.

103. We were very impressed by Mrs Halawin who struck us as accurate, reliable, and honest. We have no doubt that her recall of events was genuine and that she was correct in stating that the Appellant had made admissions to her.

104. Next we heard Jennifer Fincher. In May 2005 when the Appellant was still at liberty and on licence she was his supervising officer. On 17th May 2005 she asked him if he had committed the offence against his sister and recorded that he acknowledged he did but could not say why. Given the passage of time she had no independent recollection of the interview, but relied on the record, made directly after it. Again, she struck us as an honest and careful witness who would not have recorded what she did unless it had actually happened.

105. The third witness was Simon Baker, a prison officer at Swinfen Hall YOI. On 11th September 2006 the Appellant was there, recalled from licence. Mr Baker recalled a prison assessment for the Parole Board and produced the relevant pro-forma document. One section deals with offending behaviour. Mr Baker said he told the Appellant he had a right to choose whether or not to answer questions. He recorded that the Appellant accepted responsibility for the offence in the sense of admitting it, and that he said his behaviour was an act of revenge for being taken away from his mother and placed in foster care.

106. Mr Baker rejected suggestions in cross-examination that the interview had not included admissions of guilt. We have reminded ourselves that it was in the context of a future assessment by the Parole Board of whether the Appellant could be released on licence yet again. There is of course a risk that in those circumstances a prisoner may give answers he thinks will secure a favourable result. However, it is clear that in other parts of the record of this same interview he showed a considerable lack of interest in undertaking courses or programmes which might have enhanced the prospect of his release and a lack of interest in cooperating with supervision whilst on licence.

107. The Appellant at a number of points is portrayed as lacking motivation and demonstrating indifference unlikely to enhance his prospects of release. Accordingly, the evidence of an admission has to be seen in that context rather than as made by one eager to please by particular answers.

108. Mr Aspinall urged us to approach the evidence with caution. He suggested it was not of quality sufficient for us to receive it and it could not assist in achieving justice. Before we could receive it we should have to be satisfied it was reliable and cogent. Mr Aspinall underlined that witnesses were asked to recall events of some years past; in no instance was a verbatim confession, rather a brief summary, recorded, and the Appellant had difficulty reading and writing. He was in a situation which could affect the weight and reliability to be attached to any admission if made. Mr Aspinall argued it would be unfair to shore up with the confession evidence what would otherwise be an unsafe conviction, and that lapse of time made it hard for the Appellant effectively to challenge the evidence relied on by the Crown.

109. Evidence of alleged admissions in circumstances where an Appellant is subject to prison or licensing regimes merits careful scrutiny. Our task is not merely to consider whether admissions were made, but also whether the Appellant's situation affects the weight or reliability to be attached to them. This is so notwithstanding the Appellant's response being denial (albeit not supported by evidence from him) of any admission. Rejection of his personal standpoint does not absolve us from objective consideration of the circumstances.

110. We were impressed by the evidence of the two female probation officers and are sure admissions of the sort they recorded were made. Those represent three occasions on which no situational pressures could have operated. We accept Mrs Halawin's evidence that the two occasions when she documented admissions represent only some of the occasions when similar admissions were made. We are particularly struck by the Appellant's desire to keep knowledge of his admissions away from his family. This has the strong ring of truth.

111. We are satisfied that admissions were made to Simon Baker, free from situational pressures which might otherwise be inherent in a report for the Parole Board.

112. Four confessions from three witnesses independent of one another were made within twenty-two months. We are satisfied that the contemporaneous documentation accurately noted the substance of what was admitted, that the witnesses were credible, and that two of the three had personal recall of the admissions. The evidence was capable of belief; would have been admissible below, and by definition could not have been adduced at trial. The interests of justice require that it should be received. This evidence from the mouth of the Appellant is compelling evidence of guilt.

113. In *Hanratty* the Crown was permitted to adduce fresh evidence in relation to DNA analysis. It was agreed that if admissible and if contamination could be excluded, it would conclusively decide guilt. The Crown submitted that confession evidence was in an analogous position. It seems to us that a distinction may be drawn between this case and *Hanratty*, first because no concession of the sort made in *Hanratty* has been made, and secondly, because evidence of a confession does not necessarily

have the same degree of certainty and absence of possible nuance as does a full profile DNA analysis absent the possibility of contamination.

114. The confession evidence now received is extremely strong evidence underpinning the safety of this conviction. Set alongside the evidence of the complainant and the medical evidence (as modified by fresh medical evidence in this court), it leaves us in no doubt that this conviction is anything other than safe. Accordingly, this appeal must be dismissed.