Neutral Citation Number: [2020] EWCA Crim 777

Case No: 201900881 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM The Crown Court at Ipswich
His Honour Judge Levett
T20170197

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2020

Before:

LORD JUSTICE IRWIN
MR JUSTICE HOLGATE
and
MR JUSTICE LINDEN

- -

Between:

ALEC JOHN SMITH	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Benjamin Douglas-Jones QC and William Douglas-Jones (instructed by **EBL Miller Rosenfalck**) for the **Appellant**
Richard Potts (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 10 June 2020

- -

REASONS FOR JUDGMENT

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Lord Justice Irwin:

1. On 6 November 2017 the appellant was convicted following a trial before His Honour Judge Levett and a jury in the Ipswich Crown Court of an offence of indecent assault contrary to section 14 (1) of the sexual offences act 1956. He was sentenced to two years imprisonment, suspended for two years. He appeals against the conviction by leave of the single judge.

2. The Provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. There must be no reporting of the case which is likely to lead to the public identification of the victim.

3. On 10 June 2020 we quashed the conviction of the appellant. We now give reasons.

4. The appellant was represented before us by Mr Ben Douglas-Jones QC and Mr William Douglas-Jones. They did not appear below.

Summary of Evidence

5. The conviction related to events taking place in 1969, and thus 48 years before the trial. At that time the appellant and his then wife, with their two young sons, lived next door to the complainant KH. She was eight years old. The appellant was then in his late twenties. The two families were friendly. There was frequent contact between them. On the evening in question, both of the complainant's parents had to go out, as did the appellant's wife. The complainant came by arrangement to the appellant's house and he was her babysitter. The prosecution case was that in the course of the evening the appellant touched her vagina, initially outside her knickers and then inside. The Crown went on to allege that the complainant had told her mother that evening, that the complainant's family told the story to the appellant's wife later that evening and, in terms which we shall examine more closely in the course of this judgment, he admitted what he had done. It is the hearsay evidence of this alleged admission which is the central bone of contention in the appeal.

6. It was agreed there had never been a complaint to the police at the time.

7. The appellant denied the offence throughout the investigation and the hearing. On his account it was correct that the complainant had been in his house and that he was in sole charge of her on that evening. She had been upset that her parents had both gone out. At one point in the evening he had moved from his chair to the sofa on which she was sitting and, as part of an effort to comfort her, he had patted her leg.

8. In his case statement, the appellant said that:

> "the following morning the defendant's wife went next door to speak to the [H family]. When she returned, she did not speak to the [appellant] about what was spoken of, but she appeared quiet."

9. In the course of his interview under caution, the appellant gave a slightly different account of the aftermath. He said that his wife went to meet the next door neighbours late the same evening (rather than the next morning) and that when she returned she was in tears. He denied that he had ever admitted a sexual touching.

10. It was common ground that the families had maintained a close social relationship for many years after the relevant date.

Hearsay Evidence

11. In the witness statements and record of interview served on behalf of the Crown, there was fairly extensive hearsay material. Since some of this is at the heart of the appeal, it is helpful to quote from the material as follows, setting the contested evidence in context.

12. Early in her ABC interview in February 2016, the complainant said this:

> "Well, then she got his wife in who was obviously home by then. I then had to say in front of her again what happened and again, they kept saying – you, you know, my mum kept saying, "Are you telling the truth?". His wife apparently went in – I mean I'm only going by mum now and my mum said that he admitted it to her, his wife, erm, which he could have lied at. He could have made something up, I was – because I... I'd let him know that I was gonna tell my mum but he didn't and he admitted it. …. And, erm, and they – my mum said, "Oh, we can't – I'm not going to the police. We – the boys will lose their father" – that's his boys and I just grew up feeling totally bloody worthless, you know, because she put them before me –…..and, erm, (crying) … I wanted my dad to go and beat him up and I wanted my mum go to the police and nothing, nothing."

13. In addition, in the course of her ABC interview, as well as outlining her own complaint against the appellant, the complainant retailed a hearsay complaint concerning another girl who suggested inappropriate sexual behaviour by the appellant. This complaint was not within the knowledge of this complainant. It was never investigated or prosecuted. It was not the subject of any charge against the appellant.

14. [BH] (the complainant's sister said):

> "I remember that in 1969, I believe it was a Saturday, but I cannot recall what time of year, I had gone to Mum and Dad's house with my young children who would have been both under 2 years old. I think I had been asked to go round by Mum because she had something to tell me. When I got there, Dad wasn't there and I don't think KH was there either – although she may have been in her room. I remember walking through to the kitchen and Mum said "I'VE GOT SOMETHING TO TELL YOU. WE LEFT KH WITH ALEX WHILST T WAS OUT AND SHE'S TOLD ME THAT HE'S INTERFERED WITH HER". I asked her to clarify with me at this point what she meant. Mum said "HE PUT HIS HAND DOWN HER KNICKERS AND FONDLED HER". Mum's tone was very "hush hush" as though she was telling me something on the quiet. When she told me I remember being overcome with anger. I was ballistic. I couldn't believe anyone could have done

> that to my sister, a six year old girl. I was deeply shocked. Mum saw me getting worked up and was quick to say "OH IT'S ALRIGHT, WE'VE SORTED IT, I'VE TOLD T AND ALEX (THE APPELLANT) HAS ADMITTED IT". Mum's tone was still very hush hush. Mum went on to explain that there was no longer a problem – ALEX had admitted it and Mum didn't want to upset T and her two sons any more. Mum said "WE DON'T WANT A FUSS. ITS FOR KH'S GOOD – THERES NO POINT IN DRAGGING HER THROUGH THE COURTS""

15. The parents of this witness (and of the complainant) were both dead by the time of the police investigation.

16. [JK] (the complainant's cousin):

> "I visited CLACTON when I was 18 years old to see KH and my auntie and uncle. I remember this occasion like it was yesterday because KH just wasn't herself, she seemed very downbeat. I remember asking if KH was ok and she said something to the effect of "SOMETHING HAPPENED WITH THE NEXT DOOR NEIGHBOUR". KH then burst into tears. I asked KH or words to the effect of "HAS HE DONE SOMETHING TO YOU" KH said "YES, HE TOUCHED ME". I then asked KH if her Mum and Dad knew and she said they did but they were doing nothing about it. KH said her Dad had been to speak to the neighbour but that was all. KH said she was told by her Mum to never talk about it again."

17. [AC] (niece, BH's daughter):

> "I am aware of the allegation that KH has made to Police. I have known about the incident since I was between 16 and 18 years old. Me and KH have always spoken about everything – I remember that I used to speak to her on the work phone for hours and get in trouble. This was when I worked in a pet shop. KH first told me about the incident over the phone when I worked at that pet shop. I can't remember the conversation exactly, but KH brought up the topic of her anger towards my NAN. KH then explained that her neighbour Mr SMITH "TOUCHED ME. HE FIDDLED WITH ME – BUT IT WASN'T INTERCOURSE" or words to that effect. After that, whenever we spoke about the incident it was mostly to discuss how angry KH felt towards NAN and GRANDAD. KH and I discussed quite a lot how she felt NAN and GRANDAD didn't do anything and made her feel unimportant."

18. The prosecution did not serve any hearsay application before the trial, in breach of criminal procedure rule 20.2 (2).

19. The defence did serve a hearsay application and an allied non-defendant' s bad character application. The substance of both these applications was the same, namely

that the complainant KH had been noted by her general practitioner (presumably on the information of her mother) to have "told lies as a child". The relevant note was made when the complainant was 13, many years after the alleged offence.

Admission of the Hearsay Material

20. Two transcripts exist of oral submissions and dialogue with the Bench concerning this evidence. On 1 November 2017 the transcript begins with a rather unstructured discussion of the hearsay evidence which the defence sought to admit. However, the discussion moved to the evidence of confession given by the complainant: as the appellant terms it, the first hearsay statement. The Crown sought to rely upon that as support for there being an immediate complaint by the complainant. It was the judge who pointed out that the material was hearsay. The judge also pointed out that there had been no application. The Crown responded by informing the judge that the defence agreed that the material could go in for the jury.

21. The judge then asked if the whole of the hearsay evidence had been agreed to be admitted including the alleged confession, to which the defence advocate Mr Donegan replied that the admission into evidence of the confession was not agreed. The judge then suggested that "the fact of the complaint being made immediately can be unpacked from that comment", meaning hived off from the confession. Mr Donegan then submitted that there was no clear evidence of complaint happened immediately by reference to the period on the indictment. However, the judge returned to the evidence of the admission and tied matters together in the following way:

> "JUDGE LEVETT: ...this is the difficulty – I think if one goes in the other bit goes in, the admission goes in, because this is explaining why nothing was done about it over the years because there's a world of difference between – and we're talking about the standards 40 years ago, where things were a lot different …….But this is the point that the prosecution will make because the defence say, "'Well, hang on, let's delay'. And there's got to be a reason for it, and the only reason there's a delay is because she's a liar and she didn't want to do anything about it." So that – that's the defence. To counteract that the prosecution will say, "No, no, no, no. The reason why nothing's done is because first of all, when she did have a complaint she told her mother; her mother then told T [the appellant's wife]; T then confronted the defendant; the defendant then admitted it and therefore, as there had been an admission, we didn't want upset things any further." So that's the prosecution's point.
>
> MR DONEGAN: Yeah.
>
> MR POTTS: And in fact, if I may, it goes further than that because the defendant, in his interview, recalls the night that this is alleged to have happened. …. he recalls that there was a banging on the joint wall, which was the signal for neighbours to meet, and his wife went to meet the next door neighbour late in the evening and came back in tears. He remembers that and

> in my submission, when one looks at that it puts the context of the reporting in terms of immediacy."

22. Thereafter, the judge asked the Crown if they intended to rely on the evidence of confession coming from the complainant's sister – the "second hearsay statement". Mr Potts indicated that the Crown did intend to rely on that.

23. The judge stated that he would reach no conclusion then and he made no ruling on the hearsay on that day.

The Complainant's Evidence

24. Later that day, the complainant gave her evidence. She adopted her ABE interview, in the version which included the multiple hearsay confession evidence. In cross-examination by Mr Donegan, she said that she immediately told her mother what had happened following her parents return that night. She said that the appellant's wife was summoned and that she repeated her allegation in front of the appellant's wife. She put it this way:

> "Q. And what did you have to say in front of T?
>
> A. I told her what he'd done, same as I'd told my mum.
>
> Q. And what did T do?
>
> A. She went back in and then ap (sic) - only hearsay, my mum saw her the next morning and she told my mum that he'd admitted it to her.
>
> Q. But you weren't present at that conversation?
>
> A. No.
>
> Q. That's just what your mum's told you?
>
> A. Yes.
>
> Q. And that was the next day?
>
> A. Yes, that was."

Further Discussion on Hearsay Confession

25. On the following day, there was a further discussion between the advocates and the Bench as to the hearsay evidence of confession to be given by the complainant's sister. The judge had clearly considered the evidence to some degree before these exchanges. He had formed the view that the evidence was "triple hearsay" and observed that "there is no way in which the testing of 'Alex has admitted it' can be carried out". To this observation Mr Donegan responded that the same argument applied to KH saying it. However, that evidence had been given. Paraphrasing what he said, the judge indicated that on first principles he would not admit the triple hearsay evidence. But he questioned whether the defence "were taking a point". Mr Donegan indicated that the

appellant's wife was due to attend court later that day in response to a summons and that he did not yet have a signed witness statement from her. He was unaware of what that witness had said to the police. Prosecution counsel then produced his copy of the interview with the appellant's former wife confirming her evidence would be that the appellant had denied the offence not admitted it.

26. There then followed this exchange:

> "MR DONEGAN: Yes. That's why your Honour both this and KH's evidence ---
>
> JUDGE LEVETT: Mmm.
>
> MR DONEGAN: --- are both multiple hearsay ---
>
> JUDGE LEVETT: Mmm.
>
> MR DONEGAN: --- and both should have been excluded. It's the same argument.
>
> JUDGE LEVETT: Mmm.
>
> MR DONEGAN: Now one is in ---
>
> JUDGE LEVETT: Mmm.
>
> MR DONEGAN: --- It's - it's my tactical strand has to be to attack it as nobody knows that she - what - what she meant by that.
>
> JUDGE LEVETT: I agree entirely. So you don't - you - you do not object to it being adduced?
>
> MR DONEGAN: I don't think I can now, no.
>
> JUDGE LEVETT: Very well, that's OK - I - I just wanted to check because when I looked at it - I wanted to see what - I wanted a test by which route it was going in and you know if - if that is the case because as I say I think that there's a little bit of a difference between this part and KH's part. A different - slightly different test.
>
> MR DONEGAN: Very well your Honour. We would appreciate rulings no doubt.
>
> JUDGE LEVETT: Hmm?
>
> MR DONEGAN: We would appreciate rulings on - on both points.
>
> JUDGE LEVETT: I - well I'm going to but I mean - I want to press on with the case.

MR DONEGAN: Of course."

27. We have been taken to no ruling by the judge on the point. Matters appear to have rested there.

28. The complainant's sister then gave evidence of the hearsay confession. The appellant's former wife gave evidence that there was no confession.

Summing Up

29. In due course the judge summed this aspect of the case up in the following terms:

> "But when her wife came home she said she complained to her mother straightaway, and as a result of that KH's mother went to speak to the defendant's wife. As I say, we know that must be true because it's not disputed that mother, PH, did speak to T, the defendant's wife. What is in dispute, perhaps, is what was actually said but something was said because even the defendant admits that his wife came home in tears. And as a result of that we know that here T has given evidence about what the defendant said in respect of the allegation. T, the defendant's wife says, "Well, what KH said was that he put his hand up her skirt." He denied everything until, I think after some continual questioning over a period of weeks, did eventually say that he didn't do what is alleged, he'd put his hand on her knee, or thigh or leg. But one thing was clear, he didn't say that he did anything at the first part but then did say that he did something - something three or four weeks later. So I'll remind you of that, but that puts it all into context. Then over the years, as I say, she KH told BH, cousin JK, and I think it must be a cousin, AC as well, because that's her - no, her niece - yes, niece. Well, how do you approach that? The fact that you have got to assess the evidence means that you can take into account what these witnesses have said that KH told you, because it means that you can judge whether or not there's been a real inconsistency in what's been said over those years, or whether it's been pretty well consistent. You need to be careful about the evidence, as I say, because the mother is not available to give evidence about what was actually said. Equally, don't forget that when KH said that her mother came back and told her that Alec had a - had confessed, admitted it, what we don't know is what the mother said to T. Now, what we don't know is what really he was admitting to; admitting to just touching, so - so you can see what the prosecution do not rely on that as effectively a confession to the actual charge. What that evidence is being adduced for is to demonstrate the fact that there was a complaint and the reaction to it and the answers to it. And now that T has given evidence now the matter is filled in. So it may be that what was being admitted is that he confessed to only touching her leg and nothing more. So, as I say, it may not be a confession to the full allegation that KH was making, and that's why you need to be careful. The reason why you heard

> what KH said all these things to other people is to demonstrate whether she's being consistent or inconsistent in what she's said over the years. If you do rely on what she said to others well, then, you've got to consider carefully how you approach that evidence, because if she did tell them then it's evidence which you can take into account when - see how reliable she is as a witness. What you mustn't do, however, is to think that, well, because she's told one or more or several more people, it's not independent evidence coming from an independent source, it's always coming from KH herself. So it's not independent because it's always her who's the - the originator of the complaint."

30. A little later in the summing up, the judge addressed the confession again. He had dealt with the impact of delay upon the evidence and then he said this:

> "The confession, as I say - I've said, well, it's not possible to examine what mother, PH might have meant by saying, "Well Alec has admitted it," it could be limited to touching her leg, which is not an indecent assault in the context of this case, and, therefore, you wouldn't place any weight on it. The prosecution, at the end of the day, say, well, here the ex-wife's evidence, T, is such that any confrontation towards Alec prompted him to say nothing happened, so that's inconsistent with the narrative that was being telegraphed through. And then, of course, it was a few later that he admitted only to touching her leg. So if KH was told that Alec admitted it, does that really fit in with the evidence that you heard, because it was - Alex admitted it the day PH went round there and spoke. So as I say, it - it's something which you may take into account. But take into account all these warnings, counsels' submissions."

McCook Exchanges

31. There were two requests to Mr Donegan for answers to specific questions. He was no longer employed by the firm for whom he was working at the time of the trial, and he no longer had access to the case papers or to the DCS as a consequence. Hence, he did his best to answer from memory. Some of the questions do not bear on the issue in the appeal.

32. In early 2019, Mr Donegan confirmed that no application was made by the Crown to introduce the hearsay material. He stated that the introduction of the hearsay confession material was opposed by the defence, but gave no more detail. With the passage of time, he said he was unable to describe the arguments advanced or the thinking behind them.

33. By November 2019, Mr Donegan had been provided with the transcripts as we have seen them. However, he was not asked directly about the process of editing the ABE interview nor about the transcript of the first legal discussion on 1 November 2017.

34. He was asked about the exchanges on the following day, after the complainant had given her evidence. He was asked what was his 'strategy' at that point. His answer was that since the jury had heard KH's evidence of 'what was said to have been said to the complainant by her mother, it was open to the Applicant to call his ex-wife to give evidence' about the alleged confession.

The Appellant's Submissions

35. Mr Douglas-Jones's submissions can be summarised as follows. The purported confession evidence, whether filtered through the evidence of KH or of her sister, were hearsay statements within section 115 of the Criminal Justice Act 2003. The common law exception to inadmissibility of confession evidence is preserved within section 118 (1) of the 2003 Act. However, the first hearsay statement (that referred to by KH) was a multiple hearsay statement within the meaning of section 121 (1) and (2) of the Act. It was not rendered admissible pursuant to section 121 (1) (a) or (C) in circumstances where the person to whom the original statement had been made – the appellant's former wife – was competent and indeed compellable, and available as a witness. Such evidence was not admissible by agreement.

36. There was a failure by the prosecution to make a written notice of hearsay application in breach of the criminal procedure rule 20.2 (2). The failure to give notice had the consequence that there was no considered or detailed written response from the defence. The absence of notice and response led to an unstructured and ill thought through discussion of the first hearsay statement on the first day of the trial. The judge was given no adequate submissions on the admissibility of this hearsay evidence and he never ruled on the issue (see transcript at 10 A/B). Neither prosecution counsel nor the defence advocate reminded him of the need for a ruling before KH's evidence was called. The prosecution proceeded to adduce the evidence.

37. Had the judge received adequate submissions and had he been invited properly to analyse the effect of section 121, he should and would have found the evidence was not admissible by any potential route. Further, had the judge applied his mind properly to the issue following properly presented argument, the appellant submits that in all the circumstances he would inevitably have excluded this under section 78 Of the Police and Criminal Evidence Act 1984. Triple hearsay following the passage of 48 years would have meant exclusion. The prejudicial effect of the admission would certainly outweigh the probative value of this evidence.

38. The appellant submits that the second hearsay statement was admitted "following a negligent and improper concession by Mr Donegan". This too was a multiple hearsay statement within the meaning of section 121. The Judge himself had indicated that its reliability could never be tested in the absence of the late mother of the complainant. It is submitted that it is clear from the transcript the court would not have admitted this evidence but for the "improper" concession by Mr Donegan.

39. The explanation by the trial advocate that he conceded the admission of the evidence for "strategic" reasons is challenged by the appellant. It is said that in his McCook response 5 November 2019 Mr Donegan failed to articulate his strategy "meaningfully or at all". It is said this negligent concession compounded the previous day's failure.

40. It is then said that the "warnings" which the judge gave to the jury were insufficient to avoid a real risk of injustice. He did not direct them to place no reliance on the content of the alleged confession. Indeed, he gave them no formal directions at all on the point. In telling the jury that the reason why they had been permitted to hear the confession evidence was to assess whether or not KH had been consistent judge confused the analysis. As the appellant puts it: "if that were the case, then Mr Smith's response to the allegation was wholly irrelevant. It was not probative… It's admission [was] unfair and dangerously prejudicial". In his second warning to the jury, the judge told them that if they found that the confession had been made and was not "limited to touching her leg" they could place weight upon it. The jury was then left with the task of deciding whether the account of the appellant's former wife was inconsistent with, as the judge put it, "… The narrative that was being telegraphed through" the multiple hearsay.

41. Mr Douglas-Jones submits that those matters on their own are sufficient to render the conviction unsafe. His further complaint about the inadequacy of the cross examination by Mr Donegan he concedes would be insufficient on its own to form a ground of appeal. However, he submits that it adds to the conclusion that the conviction was unsafe, essentially by compounding the effects of the wrongful admission of the multiple hearsay confession. Essentially the criticism is of insufficient challenge to the evidence of KH addressing her motive to continue the allegations (including the fact that she was aware the appellant had a significant lottery win and has subsequently sought to sue him for damages); the risk that she had "reinforced in her mind over almost 50 years a false complaint", arising at a time when she was troubled and prone to lying to me; and the absence of a vigorous challenge to the accuracy of her memory.

The Respondent's Submissions

42. Mr Potts for the Crown did appear below. He did his best to assist the court by describing the events which led up to his appearance. As can sometimes be unavoidable (but is never desirable) Mr Potts was briefed first in the case as a return from previous council on the night before the trial. He considered the papers in the case and contacted his predecessor. We were not anxious that he should give details of what were undoubtedly privileged discussions, but Mr Potts did inform us of two or three key points he learned from that discussion. Mr Potts had noted the triple hearsay confession material, and indeed the material derived from a hearsay complaint from another. He was able to observe that there were other specific requested edits of the transcript of the complainant's a ABE interview, which had been agreed. He was therefore aware that the defence had considered the text of the ABE interview but had not requested that the material which lies the heart of this appeal should be removed. Mr Potts frankly took no further action. He further learned that the trial advocate Mr Donegan was aware of the editing that had been requested, and of the editing which had not been requested.

43. Mr Potts agrees that there was no written hearsay application in respect of the contested material. However, he argues that until the morning of the trial "it was not apparent that the defence opposed the admission of the evidence" given that it had been included in the transcript of the ABE recording which had been edited beforehand in accordance with proposals submitted by the defence.

44. The Crown rejects the submission that the evidence of recent complaint and the alleged confession could be "unpacked". Rather the contention is that the "confession" was important evidence "to give some understanding of why the complainant had taken no

steps to report the incident to police for many years" and that therefore the evidence could not be "separated".

45. The Crown also submits that it is wrong to say the judge had not made a ruling in relation to "hearsay statement one" before the evidence of the complainant. Although the judge did, as the Crown put it, "purport to defer his ruling" he had said that he would not exclude the evidence under section 78 of PACE. By implication, so say the Crown, the judge had ruled in favour of admission of the evidence. The Crown note the exchanges with Mr Donegan on the following day in the course of which he conceded the admission of the evidence from the sister.

46. The Crown go on to submit that the evidence from the appellant's former wife "substantially, but not precisely reflected what KH had said in her evidence" on the point. We return to this point below.

47. In addressing the summing up, the Crown emphasise that the judge warned the jury they must take particular care when dealing with the remarks attributed to the complainant's mother, that they must not speculate about what she or the complainant's father might have said, that the jury did not have from the complainant's mother what she had said to the appellant's wife but that they did know from the appellant's former wife what had been raised with her and which she had related to the appellant. The judge specifically pointed out that the Crown did not rely upon the "confession" as a confession to the charge and that he went on to explain why the evidence was adduced "namely to demonstrate a complaint and the reaction to it and to judge the consistency of KH over the years".

48. For those reasons, the Crown submits that there was no error of law in admitting this evidence and that the conviction is safe.

Analysis and Conclusions

49. The relevant provisions of the Criminal Procedure Rules are as follows:

> "20.1. This Part applies—
>
> (a) …….in the Crown Court;
>
> (b) where a party wants to introduce hearsay evidence, within the meaning of section 114 of the Criminal Justice Act 2003 (a)
>
> **Notice to introduce hearsay evidence**
>
> 20.2. — (1) This rule applies where a party wants to introduce hearsay evidence for admission under any of the following sections of the Criminal Justice Act 2003—
>
> (a) section 114(1)(d) (evidence admissible in the interests of justice);
>
> (b) section 116 (evidence where a witness is unavailable);

(c) section 117(1)(c) (evidence in a statement prepared for the purposes of criminal proceedings);

(d) section 121 (multiple hearsay).

(2) That party must—

(a) serve notice on—

(i) the court officer, and (ii) each other party;

(b) in the notice—

(i) identify the evidence that is hearsay,

(ii) set out any facts on which that party relies to make the evidence admissible,

(iii) explain how that party will prove those facts if another party disputes them, and

(iv) explain why the evidence is admissible; and

(c) attach to the notice any statement or other document containing the evidence that has not already been served.

(3) A prosecutor who wants to introduce such evidence must serve the notice not more than—

(a) 28 days after the defendant pleads not guilty, in a magistrates' court; or

(b) 14 days after the defendant pleads not guilty, in the Crown Court.

(4) A defendant who wants to introduce such evidence must serve the notice as soon as reasonably practicable.

(5) A party entitled to receive a notice under this rule may waive that entitlement by so informing—

(a) the party who would have served it; and

(b) the court…….

……..

20.4. — (1) This rule applies where—

(a) a party has served notice to introduce hearsay evidence under rule 20.2; and

> (b) no other party has applied to the court to determine an objection to the introduction of the evidence.
>
> (2) The court must treat the evidence as if it were admissible by agreement."

50. The Criminal Procedure Rules are not decorative. They are there for a reason. The structure and language of the rules, if complied with, should ensure that tricky questions of procedure or evidence are addressed by the parties in time, so that, where dispute arises, the parties have developed positions which can be laid clearly before the judge who must resolve the problem. That is the point of the Rules. This court is acutely aware of the pressures upon practitioners. But in our judgment this case represents a good example of the problems which can arise when the rules are not complied with.

51. It is simply not sufficient, where complex hearsay evidence is sought to be introduced, for the Crown to remark that the evidence was in a record of an ABE interview or in a witness statement and that no explicit objection has been taken by the defence upon whom such evidence has been served. The notice requirement on the Crown is not implicitly waived by defence silence, or even where, as here, the defence have made suggestions for editing the ABE interview. The purpose of the rules is to ensure that both sides give their minds properly to what can be technical and difficult issues of admissibility. Here it is clear there was a procedural failure by the Crown, compounded by less than rigorous thinking by whichever defence representative considered the text of the ABE interview, left uncorrected by Mr Donegan.

52. These failures left the judge in a difficult position. As he recognised, there were a number of knotty problems of admissibility. Had he been presented with clearly articulated argument, it is in our view are unlikely he would have admitted the confession evidence. He could not have done so in reliance on Crim PR 20.4. There had been no notice to introduce the evidence. Sensibly, he asked the defence advocate what the position was, but we are bound to say the response was less than clear.

53. The Crown justification for introducing this evidence was said to be to support the consistency of the complainant. We fail to see how an alleged confession could possibly be thought to do that. There was no challenge to the early complaint or indeed to the content of the complaint. The defence was simply the complaint was not true. At best the confession might provide a reason why the matter was not reported to the police: and indeed that seems to have been the consideration foreshadowed by the judge in his off-the-cuff remarks which we have quoted above. In our view the proper response would have been to explore with defence whether they intended to suggest that the delay meant the complaint was unreliable, and to warn the defence to be careful of the consequences. But even that consideration, in our view, cannot carry the matter much farther. Evidence was to be given (and was given) of the terms of complaint from KH to her mother. Equally, evidence was to be given (and was given) of her anger that her parents did not do more about. She was a young child and could clearly not have been expected to take any steps herself. The jury will have understood that she was completely dependent on her parents taking the matter further if that was to happen. Both of her parents were dead. They could not be asked why they had not proceeded farther.

54. In addition, there was unchallenged evidence, to be confirmed by the appellant's former wife, that the complainant's parents had raised a problem or complaint about the appellant's actions that evening. That was surely the critical matter, capable of confirming that the complainant had said something straightaway. In the face of the capacity of the appellant's former wife to give first-hand evidence of his response to the complaint, she being available and compellable, we see no proper basis upon which the multiple hearsay evidence of his alleged admission should have been introduced. That conclusion is equally applicable to the "first" and "second hearsay statements".

55. This evidence could not possibly pass the test in section 121 (C) since it could not be said that this evidence was of such value that the interests of justice required it should be admitted.

56. Once the evidence of KH had been given on this point, there was little the defence could do. It was probably rather passive not to resist the confirmatory hearsay from the complainant's sister, and it hardly deserves the term 'strategy', but in reality Mr Donegan was then left with little room for manoeuvre. In the passage we have quoted, he did by implication tell the judge that the error lay in admitting this evidence from KH in the first place. The reminder that the advocates were expecting rulings on these decisions appears to have fallen on stony ground.

57. We accept the submission from the appellant that this was potentially very important evidence, capable of affecting the mind of the jury. We turned to the directions that were given.

58. The judge could have directed the jury in clear terms that the content of the alleged confession was irrelevant and that they must not rely upon it. He could have directed the jury that it's only relevance was to confirm the recent complaint or, if the defence sought to suggest that the delay itself pointed to dishonesty on the part of the complainant, he might have said that the alleged confession could only be relevant as explaining why the complainant's parents took no action. For the reasons we have already given, it might have been problematic even had he done so, since the reason for inaction by the complainant's parents was in the end not relevant. The important facts were that the complaint was made and that they took no action. The prejudicial effect of an alleged confession, if introduced as part of the motive for that inaction, is that it was likely to be taken as confirmation of truth of the confession itself. We consider that Mr Douglas-Jones is right when he makes stark observation of the judge in fact gave no formal direction on the point at all.

59. We reject the contention by the Crown that the evidence of the appellant's former wife can be taken as significant support for the content of KH's complaint. Her evidence was that he denied it. Her evidence could be taken as confirmation that there had been a complaint. That was not in issue.

60. It is for those reasons that we have come to the conclusion that the conviction is indeed unsafe. This was highly prejudicial evidence and, in the context in which it fell to be considered, had the capacity to act as confirmation of the guilt of the appellant. It should not have been admitted and the warnings given by the learned judge were, in our view, insufficient to remove the important prejudicial effect.

61. Although we accept the broad thrust of the criticism by counsel now representing the appellant of the cross-examination of KH, we do not believe that that is material to the safety of the conviction or, of course, sufficient to stand as a ground of appeal.

62. For those reasons, we quash this conviction.

63. We have already ruled that it is not in the interests of justice, after more than 50 years from the alleged offence and in the context of a case where a non-custodial sentence was passed and the relevant work requirement completed, for there to be a retrial.

64. When he was sentenced, the Appellant was made the subject of notification requirements under Part 2 of the Sexual Offences Act 2003 for a period of 10 years, inclusion within the relevant list by the Disclosure and Barring Service pursuant to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 (SI 2009 no 37), a restraining order pursuant to section 5 Protection from Harassment Act 1997 and an order to pay a contribution towards the prosecution costs in the sum of £4,200. The notification requirements and inclusion in the list fall away with the quashing of the conviction. The restraining order and the order for payment of costs are themselves hereby quashed.