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| **Neutral Citation No: [2023] NICA 93** | *Ref:* **FOW12095** |
| | *ICOS No:* |
| *Judgment: approved by the court for handing down (subject to editorial corrections)** | *Delivered:* **06/03/2023** |

**IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE KING**

**v**

**KEVIN BLAKE**

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**Mr Des Hutton KC with Mr Connor Coulter BL (instructed by GCS Solicitors) for the Applicant**
**Mr Samuel Magee KC with Mr Ian Tannahill BL (instructed by the Public Prosecution Service) for the Prosecution**

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**Before: Keegan LCJ, McAlinden J and Fowler J**

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**FOWLER J (*delivering the judgment of the court*)**

**We have anonymised the child complainant's name to protect his identity. He is referred to by the cypher BD which are not his real initials. He is entitled to automatic lifetime anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992.**

*Introduction*

[1] The applicant was convicted on 24 September 2021 after a five-day jury trial at Craigavon Crown Court. The applicant is now 65 years and was convicted of historical sexual offences committed against a male child BD. The offences occurred between 1998/99 when the applicant was in his 40s, and BD was between 10 and 12 years old. His conviction relates to twelve counts of indecent assault, contrary to Section 62 of the offences against the person Act 1861 and three counts of gross indecency with or towards a child, contrary to Section 22 of the Children and Young Persons Act (NI) 1968. This is the renewal of leave to appeal conviction following the refusal of leave by the single judge Horner LJ. There is no appeal against the sentence.

[2] The applicant was sentenced on 17 November 2021 to a total sentence of seven and a half years imprisonment on the indecent assault counts and twelve

months imprisonment in respect of the gross indecency counts, with all sentences to run concurrently with each other. The learned trial judge (LTJ) deemed Article 26 licence appropriate, along with a Sexual Offences Prevention Order and the applicable notification requirements. The sentence is as follows:

| Counts | Offence | Sentence |
|---|---|---|
| 1-7 & 10-14 | Indecent Assault | 7½ years custody |
| 8,9&15 | Gross Indecency | 12 months custody |

[3] The test to be applied by this court in exercising its appellate jurisdiction has been set out by Kerr LCJ in *R v Pollock* [2004] NICA 34. In para [32] of that judgment, he set out the applicable principles established by the authorities:

> "1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe?'
>
> 2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
>
> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
>
> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[4] We proceed based on this appellate test to analyse the facts of this case.

***Factual Background to the Offences***

[5] The background facts of this case are as follows. When the complainant, BD, was between 10 and 12 years old in 1998/99, the applicant, 31 years his senior, befriended him and several other children. It was alleged that the applicant kept an open house for children, and many young boys and girls attended his home regularly to play music and games. BD was at that time particularly vulnerable, with no significant male influence in his life. It was alleged that the applicant engaged in grooming BD over a period of time. He allowed BD to steer his car while BD sat on his lap in the driver's seat in secluded areas. Despite the applicant not being interested in snooker, he took BD to a private room at a snooker hall. The

applicant created and took opportunities in such remote locations to sexually abuse BD.

[6] The nature of the abuse perpetrated on BD ranged from rubbing BD's penis to oral sex and masturbation. In terms of indecent assault, this involved the applicant touching or rubbing BD's penis over his clothing, touching BD's penis skin on skin, under his clothing, placing BD's penis in his mouth and placing BD's hand on his own penis and getting him to masturbate himself. Concerning gross indecency, this included acts of oral sex and masturbation.

[7] BD made disclosures concerning this sexual abuse in August 1999 at the time it was taking place. When talking to another child who frequented the applicant's home, KL, he disclosed to her that the applicant had performed oral sex on him. This was reported to KL's mother, and the police were contacted. This complaint was not taken forward at this time. In 2016 BD, now an adult, renewed his complaint of sexual abuse perpetrated by the applicant. On 30 June 2017, the applicant attended a voluntary interview with the police. During the interview, the applicant denied wrongdoing or sexual abuse on BD. He claimed to have no sexual attraction to children. When asked about his previous convictions, he stated that he had one conviction for indecent behaviour a long time ago. When asked if that was about 'a boy as well', he replied it was about 'nobody but myself.'

[8] The applicant was charged and returned to the Crown Court on the present 15-count indictment. He was arraigned before Craigavon Crown Court on 2 February 2021 and pleaded not guilty. His trial was fixed for 20 September 2021 and commenced on that date. BD gave his evidence on the first day of the trial. The sole evidence of offending presented at trial was essentially that of BD. While there was evidence of disclosures by BD to others at the time of the alleged offending, there was no other direct independent evidence.

[9] The prosecution sought to adduce Bad Character evidence concerning the applicant's previous convictions for five instances of indecent behaviour committed on 1 June 1987 and dealt with in Belfast Magistrates' Court on 9 March 1988. This was a contested application with no relevant factual circumstances of these previous convictions agreed. The prosecution at trial relied upon entries on the police Niche computer record system to evidence the factual circumstance giving rise to the convictions. The LTJ granted this bad character application. Subsequently, after giving evidence before the jury, the defendant was convicted on all counts on the bill of indictment.

***Grounds of Appeal***

[10] The grounds of appeal can be summarised briefly as follows:

(i) The convictions are unsafe.

(ii) Evidence was admitted to the jury which should have been excluded, in particular, evidence of the applicant's five convictions for indecent behaviour in 1988.

(iii) Police 'Niche' records were admitted to explain the facts that underlay those convictions. The records refer to the applicant exposing himself to young boys, which the police claimed would assist the jury in its search for the truth. These records should have been excluded because it is claimed that they are inaccurate, misleading, and contain information which the applicant could not challenge.

(iv) The applicant's previous convictions and conduct was allowed to become a satellite issue.

(v) The convictions and records were not probative but instead were prejudicial and should never have been admitted. It was impossible to conclude that the jury's deliberation would not have been affected by this evidence.

***The Bad Character Evidence***

[11] This appeal centres on the decision by the LTJ to admit bad character evidence under Article 6 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order"). Turning to the provisions of the 2004 Order, Article 6(1)(d) provides that:

> '(i) In criminal proceedings, evidence of the defendant's bad character is admissible if, but only if -
> …
> (d) it is relevant to an important matter in issue between the defendant and the prosecution.'

[12] Rule 44N of the Crown Court Rules (NI) 1979 provides that where:

> "A prosecutor who wants to adduce evidence of a defendant's bad character or to cross-examine a witness with a view to eliciting such evidence, under Art 6 of the 2004 Order, shall give notice in writing which shall be in Form 7F in the Schedule."

[13] The prosecution served a notice to adduce evidence of bad character on 6 October 2020. The application was in the standard form 7F under Rules 44N(4) and (6) of the Crown Court Rules (NI) 1979. By this Notice the prosecution sought to admit particulars of the applicant's convictions as per his edited criminal record, which detailed five indecent behaviour convictions having been committed on 1 June 1987 and sentence passed in Belfast Magistrates' Court on 9 March 1988. The grounds for admission of the convictions were stated to be on the basis that they

were relevant to an important matter in issue between the defendant and the prosecution in accordance with Article 6(1)(d) of the 2004 Order. Specifically, they were evidence of a propensity to commit offences of the kind with which the applicant was charged, particularly the defendant's sexual interest in children. The Notice stated that the circumstances of these convictions were that the applicant was detected sitting in his car at the roadside near where children were playing. In addition, he then exposed his genitals to the children comprised of boys up to the age of 14.

[14] The only evidence accompanying the Notice was a copy of the applicant's edited criminal record. No evidence was served to support the factual background or elicit the surrounding circumstances to the previous convictions for indecent behaviour.

[15] The applicant was arraigned on 2 February 2021. At that stage, it was indicated that the determination of the defendant's bad character application could be left to the trial date. The defence served no Notice of objection to this evidence.

[16] On 21 September 2021, the second day of trial and after the complainant had given his evidence, it was indicated that the bad character application would be argued the following day. That evening the prosecution forwarded a written submission on their bad character application and what purported to be evidence to substantiate the factual background to the applicant's convictions. This comprised three documents:

(i) Document one was an entry from the PSNI's Niche computer system. The entry records:

> "6 2 1988 – D Sergeant Stewart, Grosvenor Road, I/V
>
> Subject was arrested and taken to Grosvenor Road Police Station for interview re indecent exposure. Up until December 1987, he drove a silver Fiat Strada (VRM redacted). He now drives a blue/grey Fiat Regatta (VRM redacted). Subject's MO is sitting in his car with his trousers pulled down, waits for children to pass and exposes himself to them.
>
> Description – 5'11', well built, black thick collar length short hair, black goat type beard."

(ii) Document two was the applicant's edited record.

**Court name** **Belfast Magistrates' Court Number 2** **court date** **9 Mar 1988**

**Sub- div Reference** **officer in charge STEWART**

**OFFENCES**

| Date | Qual Offence | Description | Res | con | offence status | result |
|---|---|---|---|---|---|---|
| 1 Jun 1987 | 4210003 | INDECENT BEHAVIOUR | 1 | Y | Resulted | Conditional Discharge 2 YEARS |
| 1 Jun 1987 | 4210003 | INDECENT BEHAVIOUR | 1 | Y | Resulted | Conditional Discharge 2 YEARS |
| 1 Jun 1987 | 4210003 | INDECENT BEHAVIOUR | 1 | Y | Resulted | Conditional Discharge 2 YEARS |
| 1 Jun 1987 | 4210003 | INDECENT BEHAVIOUR | 1 | Y | Resulted | Conditional Discharge 2 YEARS |
| 1 Jun 1987 | 4210003 | INDECENT BEHAVIOUR | 1 | Y | Resulted | Conditional Discharge |

(iii) Document three was another entry from Niche which records:

> "Subject is an exe-music teacher and scout master he has five convictions for indecent exposure. When living in [redacted] subject would sit in his car at the roadside near where children would be playing. He would then expose himself to children [boys] up to the age of approximately 14 years. On 2.5.95 subject was spoken to, and house searched by Customs and Excise…"

[17] In their written and oral submissions to the LTJ, the prosecution abandoned their original propensity basis for admitting the applicant's bad character. However, they sought to have the circumstances of the applicant's convictions introduced in evidence before the jury primarily on the basis that it demonstrated the applicant's sexual disposition/proclivity towards young boys. The prosecution submitted that this should be properly admitted under Article 6(1)(d) of the 2004 Order. Failing that, the prosecution sought to admit the evidence to correct a false impression created by the applicant in his police interview on 30 June 2017 pursuant to Article 6(1)(f) of the 2004 Order. This second basis for admission was refused by the LTJ.

[18] In relation to the application, which was pursued, it was indicated by the prosecution that the original police file in respect of the applicant's prosecution could not be located. Therefore, the prosecution said that it intended to rely on the material from the police Niche computer system to establish the factual matrix of the conviction. It was argued that the Niche system documents clearly satisfied the business documents' criteria and should be admitted in evidence. It was argued that the fact of the convictions was not the primary concern of the prosecution but rather

the particularisation of the facts underpinning the convictions. The prosecution wished to establish from the available documents the following facts. On 6 June 1987, the applicant was arrested for five offences of indecent behaviour which are alleged to have occurred on 1 June 1987. He was detected sitting in his car with his trousers down, near where children were playing. He waited for the children to pass and exposed himself towards the children. The children were boys under the age of 14 years.

[19] The defence objected to the admission of the applicant's bad character described above on the basis that the application as served on them was based on propensity, whereas the application being argued before the court on the third day of trial was materially different. Due to the lateness of the application, the defence had only an evening's notice of the two new bases of application, specifically proclivity and to correct a false impression. The Niche documents that the prosecution was relying on to establish the factual background had only been served on them, and the defence had no time to take steps to determine whether the contents related to the facts of the convictions or unproven intelligence. An objection was taken to the lateness and unfairness of the application.

[20] The LTJ admitted the bad character evidence under Article 6(1)(d). He rejected the defence argument concerning the lateness of the reformulated bad character application on the grounds that an Article 6(1)(d) type application had been served before arraignment. In his view, this had no prejudicial effect on the defence. The defence was on notice of the bad character application for approximately 11½ months. The LTJ accepted that the Niche documents, adduced by the prosecution to support the factual background to the convictions, were business records and admissible. He observed that the documentary evidence of the factual circumstances of the bad character, the Niche documents, could be challenged by the defence during the trial.

***Considerations on Appeal***

[21] The main thrust of the applicant's appeal is three-fold:

(a) The LTJ erred in his treatment of the bad character application procedurally. The application was procedurally deficient because it breached the Crown Court (NI) Rules 1979.

(b) The LTJ erred in his treatment of the bad character application substantively. In accepting the relevant Niche documents as admissible business documents and in circumstances where the factual basis of the convictions was contested; and

(c) In having admitted the evidence, the LTJ failed to properly and adequately direct the jury that they should only take the evidence into account if they

were sure that the bad character evidence established a sexual proclivity towards young boys.

***Procedural Issues***

[22] On appeal, the applicant re-emphasised the lateness and evolving nature of the prosecution's bad character application. It was argued that while the defence had notice of an application under Article 6(1)(d) from October 2020, the issue then was one of propensity. It was not until after the trial had commenced in September 2021 and the complainant had been cross-examined were they advised that the prosecution was no longer relying on propensity and that the application would proceed on a sexual disposition towards young children. It was only at this stage that the background evidence of the Niche documentation was served on the defence for the first time – two days into the trial. The defence once again objected to the lateness and timing of the evolving and expanding bad character application and the delay in furnishing the defence with the purported evidence regarding the facts of the indecent behaviour convictions.

[23] Where the prosecution wishes to adduce evidence of a defendant's bad character under article 6 of the 2004 Act, the prosecutor shall give notice under Rule 44N(4) and (5) of the Crown Court Rules (NI) 1979. Such notice shall be given within 14 days of committal and in Form 7F as set out in the Schedule to the Rules.

[24] It is clear from the template Form 7F that the prosecution is required to give particulars of the bad character sought to be admitted. They are further required to indicate how such evidence of bad character will be adduced or elicited at trial with the names of any relevant witnesses given and any relevant documents attached to the Notice.

[25] It is evident that the prosecution Notice in the present case was deficient in a number of procedural respects. There was a delay in properly formulating the issues engaged, its evolving nature, and a failure to identify and serve the Niche documents which the prosecution clearly had in their possession when they drafted the original bad character application. The narrative contained in the particulars of bad character closely follows that of the 1995 document. This was compounded by the defence failing to serve notice of objection to the bad character application.

[26] Regrettably, it is once again necessary for the court to emphasise the importance of compliance with the formalities and procedures set out in the Crown Court Rules concerning bad character and hearsay applications. In *R v King* [2007] NIJB 379 at paras [22]–[23], Gillen J stressed that "a culture of non-compliance with the Rules of Court must not be tolerated by the courts." He underlined that the objective of these rules is to ensure that cases are dealt with efficiently, fairly and expeditiously. This requires strict adherence to the rules if this objective is to be achieved. The deficiencies identified in the present case highlights once again the

need to comply strictly with the procedural rules and adopt best practice when serving notice of bad character.

[27] However, procedural failings are not necessarily fatal to an application of this nature, and the court has a discretionary power to admit such evidence in the interests of justice. In the present case, it is necessary to look at the broader context of the application. The Notice of bad character was served within time on the applicant. This indicated that a bad character application under Article 6(1)(d) of the 2004 Order would be made at trial on the grounds that an important matter was in issue between the defendant and the prosecution. This issue was identified in the served Notice as the applicant's 'sexual interest in children.' The Notice also set out the facts purporting to underpin the 1988 convictions as being:

> "… the defendant was detected sitting in his car at the roadside near where children were playing."

This appears to be an almost direct lift from the 1995 Niche document. No notice of objection was served under the Crown Court Rules. There was no application for disclosure concerning this, and the fundamental basis of the application had been made known to the defence well in advance of trial. The gateway had remained unchanged, and the evidence underlying the conviction remained broadly the same. The applicant could have been under no misunderstanding that the matter in issue was his sexual interest in children.

[28] In *Re JA's Application* [2007] NIQB 64, Kerr LCJ noted that the purpose of providing notice of bad character is to give sufficient opportunity to oppose an application and ensure that the accused is sufficiently appraised of it. The LTJ in the present case was, in the interests of justice, correct to find that the applicant had been afforded sufficient notice of the bad character application and the factual circumstance of the entries on his criminal record. No significant prejudice was occasioned by the lateness of the re-formulation of the original Notice or its content.

***Substantive Issues – reliance on Niche records***

[29] Had the prosecution simply wished to rely on the fact of the applicant's convictions for indecent behaviour at trial, they could have proved those convictions under sections 71 and 72 of the Police and Criminal Evidence (Northern Ireland) Order 1989. However, the prosecution was less concerned about the convictions themselves. It was the underlying facts that were at the core of their application. It was the facts which contextualise the convictions that are relevant to the issue of the applicant's sexual disposition towards children. The fact that the applicant's convictions related to children under the age of 14 and were male, the prosecution argued, could not be more on point. Accordingly, the prosecution sought to have documents one and three (recovered from the PSNI's Niche system) admitted as bad character evidence under Article 6(1)(d) of the 2004 Order.

[30] At trial, the prosecution stated that given the vintage of the applicant's convictions, the original prosecution file could not be located. Hence, the central evidence concerning the underlying facts of the five convictions came essentially from document one, retrieved from the Niche system. The prosecution asserted that the author of document one was D/Sgt Stewart, that he was the officer in charge of the case concerning the five convictions, and it could be inferred that he had personal knowledge of the facts reported in document one. The prosecution submitted to the LTJ that document two, the applicant's edited criminal record containing the five indecent behaviour entries, and document three, a post-1995 Niche record, were mutually supportive of the information supplied by D/Sgt Stewart in his original entry on Niche. However, it was accepted by the prosecution that the bad character application was not premised upon document three, which they accepted must have been composed retrospectively many years after the indecent behaviour incidents.

[31] The prosecution asserted, however, that documents one and three were admissible under Article 21 of the 2002 Order as business documents. The LTJ accepted this as the case without further argument and admitted both documents one and three despite not being pressed to admit document three.

[32] The prosecution called Detective Constable Andrew Garland on the trial, who gave evidence and spoke to the documents. He indicated that they were recovered from Niche and came from records related to the applicant. He relayed information in the documents relating to the applicant's convictions and his purported modus operandi. He was cross-examined by the defence and referred to the discrepancy between document one, the 1988 entry, which referred to children, and document three, the post-1995 entry, which referred to boys under the age of 14. The Detective Constable accepted that the later entry was made many years after the convictions referred to. He did not know who made the entry. He did not know whether the person who made the entry had access to the same information as the person who had made the 1988 entry.

***Business Documents***

[33] On appeal, the applicant argues that documents one and three recovered from the Niche system are not business records and should not have been admitted in evidence under article 21 of the 2004 Act. In so far as it is relevant Article 21 provides that:

> "21.—(1) In criminal proceedings a statement contained in a document is admissible as evidence of any matter stated if—
>
> (a) oral evidence given in the proceedings would be admissible as evidence of that matter,

(b) the requirements of paragraph (2) are satisfied, and

(c) the requirements of paragraph (5) are satisfied, in a case where paragraph (4) requires them to be.

(2) The requirements of this paragraph are satisfied if—

…

(b) the person who supplied the information contained in the statement ("the relevant person") had or may reasonably be supposed to have had personal knowledge of the matters dealt with, and

…

(4) The additional requirements of paragraph (5) must be satisfied if the statement—

(a) was prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation, …

(5) The requirements of this paragraph are satisfied if—

(a) any of the five conditions mentioned in Article 20(2) is satisfied (absence of relevant person etc), or

(b) the relevant person cannot reasonably be expected to have any recollection of the matters dealt with in the statement (having regard to the length of time since he supplied the information and all other circumstances).

…"

[34] It is submitted on behalf of the applicant that D/Sgt Stewart could not be regarded as the 'relevant person' under article 21(2)(b) as he did not have or may reasonably be supposed to have had personal knowledge of the factual basis of the indecent behaviour offences. The applicant relies on *R v Humphris* [2005] 169 JP 441 a case in which the appellant was convicted of a series of violent sexual assaults against a number of women. At his trial, the prosecution sought to adduce evidence of his previous convictions for similar offences and his modus operandi in terms of the factual background to his offending. It was held that details held on the police national computer concerning the methods used or modus operandi in connection with his previous offending were inadmissible under section 117 of the Criminal

Justice Act 2004 (a direct analogue of article 21 of the 2004 Order). At para [15] of *Humphris,* the court held:

> "… in regard to the entries dealing in the case of each previous conviction which described the method used, Mr Smith contended that the details of what the appellant is alleged to have done in order to commit the previous convictions was information dependent upon the complainant involved in those offences. The complainant was the relevant person under s 2(b) but she did not apply the information; a police officer personally did so. That affair does not fall within subs (2)(b)."

[35] Similarly, in *R v Ainscough* [2006] 170 JP 517 where the court considered evidence of alleged facts underlying recorded convictions, which were relayed to the court by a police officer from the police national computer. In para[18] the court stated that in cases of dispute of this nature "it is not enough for the prosecution simply to rely on the police national computer." At paragraph 19 the court went on to state:

> "[19] It is clear from the passage in *Humphris* that the way in which the alleged facts supporting the previous convictions were laid before the jury in the present case was inappropriate. It is to be hoped that, when there is a dispute about the facts supporting previous convictions, in most cases, it should be possible for the matter to be dealt with in accordance with *Humphris.* However, one appreciates that there may be cases where the position is simply too complicated. Whatever the complainant may have said in a statement at the time of the earlier conviction, or may say now in evidence to the court, it may be that a current defendant was sentenced on a different basis as a result of a basis of plea proffered and accepted by the prosecution and by the judge. In other words, where these matters are in dispute there is a need for caution, there is a need to have regard to what was said in *Humphris* and there is a need to ensure that a current trial does not give rise to numerous satellite issues about what did or did not happen in some cases many years ago. It goes without saying that this is particularly to be avoided where what is taking place now is a relatively short trial on a simple issue."

[36] The prosecution in their skeleton argument and initially in their oral submissions before this court maintained the position that the LTJ was correct to find that each of the documents, and in particular document one from the Niche system with D/Sgt Stewart's name attached, were admissible hearsay business

documents. That D/Sgt Stewart for the purposes of document one at least, was the 'relevant person' under article 2(1)(b). This submission was premised on the basis that D/Sg Stewart authored document one, he was not a stranger to the facts of the convictions, had oversight of the original investigation, would have been present during interview and appeared before the Resident Magistrate when the applicant was convicted. However, when asked by the court on the level of involvement in investigating the actual incident that the D/Sgt would have had, Mr Magee KC conceded certain matters as follows: it was accepted that it was unlikely he would have been present at the scene or have taken a statement from any complainants. This would have been the responsibility of a constable given the low-level nature of the offending. It was also accepted as unlikely that he would have interviewed the applicant for the same reason. Finally, it was accepted that his role would have been limited to, in essence, a supervisory role and the recording of information into Niche and little more.

[37] Article 21 of the 2004 Order allows a statement contained in a business document to be admissible of any matter stated if:

(i) Oral evidence would be admissible as evidence of the matter;

(ii) The document was created or received by a person in the course of their occupation, or as the holder of a paid or unpaid office; and

(iii) The relevant person who supplied the information contained in the statement had personal knowledge of the matters dealt with.

There is also a discretion under article 21(6) and (7) to exclude evidence if the court is satisfied that the statement's reliability is doubtful after having considered - its contents; the source of the information contained in it; the circumstances in which the information was supplied or received, or; the circumstances in which the document was created or received.

[38] It is accepted that oral evidence of the factual background to the previous offending would be admissible as evidence. There is no issue taken that the document was recorded on the Niche system by a person in the course of their employment. However, this court is of the view that given the prosecution concessions set out in para [36] D/Sgt Stewart cannot be regarded as the 'relevant person' for the purposes of section 2(1)(b) of the 2004 Order. In *Humphris* where the prosecution sought to establish the modus operandi of previous admissible sexual offences committed by a defendant. It was held that details of methods used to commit the offences were dependent on information originally supplied by a complainant or someone with personal knowledge of the specific details of the background facts to the convictions. Given D/Sgt Stewart's limited supervisory role, it cannot be said that he had or may reasonably be supposed to have had personal knowledge of the matters dealt with. The same difficulties would then apply with even greater force to document three, the unauthored Niche entry which

adds to the factual background that the children were boys up to the age of 14 years. Indeed, the prosecution all but conceded this point at trial and did not seek to have the LTJ place this reference to boys under 14 before the jury. On this basis alone we would be satisfied that documents one and three are not business documents.

[39] In addition, there must be a direct connection made by the prosecution between documents one and three and the actual offences of 1 June 1987. Looking at the content of document one, it arguably appears more akin to an intelligence report than an extract or summary from a prosecution file. It gives details of two vehicles the applicant was linked to over time and reports his modus operandi. It refers to an interview for indecent exposure as opposed to indecent behaviour of which he was convicted. It gives no detail as to the number or sex of the children exposed to or any specific detail, context, or location of an instance when five children (boys) were exposed to on a single day. There is no direct connection between document one and the background facts concerning the applicant's five convictions for indecent behaviour relied upon by the prosecution. It could equally be interpreted as either an intelligence document or a general complaint of behaviour in cars around 1987/88 and not specifically related to the incident of 1 June 1987.

[40] Not only is there no direct connection between documents one and three there is an inconsistency between the factual background alleged and the sentence imposed, a conditional discharge. If the factual background contended by the prosecution were as set out in documents one and three it seems unlikely such a lenient disposal as a conditional discharge would have resulted, even in 1988.

[41] Further, the frailties concerning document three are indisputable and no mention of 14 year old boys should have been placed before the jury. This document is unauthored, the date attributable is post 1995 and appears to be an intelligence document not a summary from a prosecution file relating to 1 June 1987 incident. It is inaccurate in that it indicates the applicant has 5 convictions for indecent assault. It describes a modus operandi in terms of what the applicant 'would' do and gives no context, specificity, or location as to the background facts of the conviction on 1 June 1987. The modus operandi is inexplicably expanded to refer to 14 year old boys.

[42] Accordingly, for these reasons, we consider that Niche documents one and three are not business documents under article 21 of the 2004 Order and should not have been admitted under this provision. While the fact of the convictions was not in dispute, the underlying background facts were contested. Where the only relevance of the indecent behaviour convictions was confirmation of the factual basis of those convictions and where the Niche documents evidencing the factual matrix were of uncertain provenance, inconsistent and equivocal, then the documents in such circumstances, should not have been admitted as business documents. The convictions themselves likewise should not have been admitted under Article 21 of the 2004 Order. It follows, in the circumstances of this case where there was, as we have said, such uncertainty as to authorship of the documents and the exact nature

and specifics of the convictions that the necessary foundations for admissibility of the factual background to the convictions was not laid. We stress that this is a highly fact sensitive exercise and much will depend on the circumstances of each individual case.

***Interests of Justice Provisions***

[43] The prosecution in their skeleton argument and before this court argued, in the alternative, that if the court was not satisfied that the Niche reports were business documents, then the court should consider whether or not the LTJ would in any event have admitted the Niche documents as hearsay evidence under Article 18(1)(d), the interests of justice provision. Article 18 of the 2004 Order provides:

> "18.—(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—
> …
>
> (d) the court is satisfied that it is in the interests of justice for it to be admissible.
>
> (2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)(d), the court must have regard to the following factors (and to any others it considers relevant)—
>
> (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
>
> (b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);
>
> (c) how important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;
>
> (d) the circumstances in which the statement was made;
>
> (e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it."

[44] The prosecution argues that the Niche evidence had it been considered under article 18(1)(d) would have been admitted in any event. The prosecution also contends that this court can and should look at this case in the round, bearing in mind the passage of time since the indecent behaviour offences and the loss of the police file and determine, would this material have been admitted in any event. If so, then this court should be satisfied that the conviction is safe.

[45] In the view of this court any ruling required to have been made as to whether it was in the interests of justice for the Niche documents to be placed before the jury is exclusively a matter for the trial judge to determine having regard to the factors contained in article 18(2)(a)-(i) of the Order set out above and to any other factors it considers relevant. We recognise that this is a matter properly for a trial judge who is best placed to determine this issue after having heard the available evidence and considered all the surrounding circumstances. This court would not lightly interfere with a trial judge's determination is such a fact sensitive determination. It is important to stress that this was not argued before the LTJ, who we have said is best placed to deal with the issue and this court is at a disadvantage on such an issue at a remove.

[46] It is by no means clear in what circumstances document one was made. The prosecution say it can be inferred that D/Sgt Stewart was the author of this entry and he interviewed the applicant. This is not explicit from document one. The prosecution suggests the applicant was arrested on 6 February 1988 and interviewed in respect of 5 offences of indecent exposure committed on 1 June 1987. Again, this is not evident from document one. Further, in document one there is no link between the suggested modus operandi and the date of the offences appearing on the applicant's record on 1 June 1987. The document describes what the applicant does towards children but makes no mention of the number of children exposed to or their sex. Arguably this cannot support or flesh out the background to what happened on a single day on 1 June 1987. The document described an indecent exposure modus operandi not indecent behaviour of which the applicant was convicted. When document three is compared with document one it is clear document three is authored at least seven years later. It gives a more developed modus operandi, identifies boys as the victims and inaccurately records the

convictions as indecent exposure. If the documents were compiled from the same original file or source, it is difficult to understand why the content is both inconsistent and wrong in material detail. We have concerns in terms of how reliable the making of document one appears, given what was accepted by the prosecution concerning D/Sgt Stewart's limited personal knowledge of events. We have even more concern in this regard in respect of documents three because it is unauthored, unsigned, created many years after the offending in 1987 and inconsistent with document one as already outlined. In relation to how reliable the maker of document three is, this simply cannot be answered. We do not know who provided the additional evidence, the state of their involvement in the original investigation, if any, and in what circumstances any additional information came to their attention. We have considerable concerns in respect of document three which in turn infects document one, by the term 'boys over 14' finding its way into the admitted evidence placed before the jury.

[47] Having regard to the above factors and the inconsistencies in the material, this is not a case where we can say with any degree of confidence that this evidence would have, in any event, been admitted in the interests of justice.

***Jury Direction***

[48] Counsel representing the applicant, Mr Hutton KC, suggests the introduction of the disputed factual circumstances of the previous bad character was critical, given its potential adverse impact on the appellant's credibility. The LTJ underlined this in his charge to the jury when he directed them:

> "… you will have to decide who is telling the truth. The fact that the accused has been convicted of several charges of indecent behaviour, all a single continuous incident it seems, may, depending on your interpretation of this case, tend to show that he has an unhealthy interest in young boys and that might help you resolve that particular question."

[49] Mr Hutton KC argues that the applicant should never have been put in the position to have to challenge or answer questions concerning this disputed bad character evidence. In the event, he was required to do so, and in such circumstances, the applicant argues that it was essential that the LTJ properly directed the jury on the burden and standard of proof in respect of such bad character evidence. Placing reliance on the Supreme Court decision of *R v Mitchell* [2016] UKSC 55, Mr Hutton argued that it was necessary for the LTJ to have included in his bad character direction, a reference to the criminal standard of proof, 'so that you are sure', in respect of the applicant's 'unhealthy interest in young boys.' Mr Hutton contends that the absence of an express direction to the jury as described amounts to a misdirection in law and has rendered the verdict unsafe.

[50] Mr Magee KC on behalf of the prosecution accepted that the LTJ must give a *Mitchell* style burden and standard of proof direction in the circumstances of the present case, where the factual circumstances of the bad character evidence are in dispute. There was a contradiction between what the defence was alleging and what the prosecution claimed the circumstances to be. Accordingly, the prosecution agreed that it was right for the jury to be directed that they 'had to be sure' of the applicant's disposition/proclivity towards young boys.

[51] However, Mr Magee drew the court's attention to a portion of the LTJ's charge to the jury where their attention was drawn to the applicant's explanation of the background to the indecent behaviour convictions, it directs:

> "… if that explanation is or may be true, then you should ignore the fact of the conviction altogether, it would seem, because you can only convict the accused if you're sure that AC is telling the truth."

It was argued by Mr Magee that taking this phrase, in the context of the charge as a whole, the jury would fully understand that they had to be sure the defendant exhibited an unhealthy interest in young boys before they could consider the extent to which the defendant's previous convictions might assist them in deciding whether the applicant or BD is telling the truth. Mr Magee suggested that this was a strong prosecution case where the defendant's background explanation of the convictions simply did not stand up to scrutiny. Also, that on a proper reading of the charge as a whole there is no material misdirection, and the conviction is safe.

[52] In bad character applications involving propensity such as *Mitchell*, where a dispute concerning the factual circumstances grounding relevant previous convictions is apparent, a direction that, overall, the jury must be sure of propensity is required. Lord Kerr at para [43] of the judgment in Mitchell said:

> "… the jury should be directed that if they are to take propensity into account they should be sure it has been proved."

[53] Both Mr Hutton and Mr Magee are of the view that a *Mitchell* direction is required in the present case. Support for this proposition is to be found in the decision of *R v Gabbana* [2020] EWCA Crim 1473. This case concerned a murder trial in which a disputed issue as to bad character under the English equivalent to Article 6(1)(f) arose for the jury to determine. The material sought to be admitted and in dispute concerned cash payments into the defendant's bank accounts. It was ruled to be admissible to correct a false impression given by the defendant in interview. On appeal, the defendant argued that, in summing up, the judge's legal direction on the bad character was in error in that it failed to direct the jury that before they could convict, they first had to be sure that the defendant had given a false impression.

[54] In giving the judgment of the court, Davis LJ observed at para [103] et seq that:

> "103. … the standard of proof for the purposes of evidence admitted under any gateway in section 101 (Article 6), where a disputed issue as to bad character arises for the jury to determine, surely must be the same for all gateways. And that standard, as *Mitchell* confirms (albeit specifically in the context of a propensity direction), is the criminal standard….
>
> 108. … In many criminal cases, of course, a jury may be made sure of guilt, viewing the individual strands of evidence cumulatively, even though each individual strand of itself may not suffice to justify a conviction to the criminal standard. Nevertheless, […] we accept that, as Mitchell confirms, the criminal standard can apply to an individual element of the prosecution case such as disputed bad character evidence… The very fact of this appeal on this ground thus indicates that it would no doubt have been better for the judge, even if very shortly, to have included in her bad character direction a reference to the criminal standard ("so that you are sure") in circumstances where there was an issue of whether the defendant had been trying to mislead the jury… But be that as it may, a failure to do so does not necessarily mean in any given case that a conviction is necessarily unsafe."

This approach was approved and followed in the case of *R v Peace* [2022] EWCA Crim 879. It also appears in the current version of the England and Wales Crown Court Compendium at pages 12-15, that where bad character evidence is in dispute, it is necessary to give appropriate directions as to the burden and standard of proof.

[55] In this appeal, we have examined the ruling of the LTJ. He properly directed the jury that the reason they heard evidence of bad character was because of its relevance to an important issue between the prosecution and defence, that is who is telling the truth BD or the applicant. In addition, the LTJ directed that the applicant's previous convictions were only background and not to be unfairly prejudiced against the applicant by what they heard concerning his previous convictions. He told the jury that they will have to decide who is telling the truth and gave a summary of the defendant's explanation concerning his previous convictions.

[56] However, the court does have a concern that, in the course of his charge to the jury, the LTJ gave the following direction concerning the applicant's explanation of the background to his convictions:

> "Now, if that explanation is or may be true, then you should ignore the fact of the conviction altogether, it would seem, because you can only convict the accused if you're sure that [BD] is telling the truth."

[57] Nowhere does this passage say or convey in a meaningful way that the jury must be sure of the background facts of the bad character evidence that the applicant has an unhealthy interest in young boys. The phrase 'is or may be true', if anything, may well convey to the jury the impression that the burden is on the applicant to persuade them that his explanation is or may be true, or at the very least confuse them as to the proper approach in this regard. What the direction fails to do is express to the jury, that they should only rely on the bad character evidence if they are 'sure' it establishes the relevant disposition/proclivity towards an unhealthy sexual interest in young boys. While acknowledging that no issue was taken on this point at trial and that a failure to direct the jury to be 'sure' does not in every case necessarily make the conviction unsafe, we have considered the charge in the round and in the context of the trial, consider this omission also undermines the safety of the conviction.

***Overall conclusion***

[58] In summary, we do not consider the LTJ erred in his treatment of the bad character application in procedural terms. The LTJ was correct to find that the applicant had been afforded sufficient notice of the bad character application and of the factual circumstance of the entries on his criminal record. No significant prejudice was occasioned by the lateness of the re-formulation of the original Notice or its content.

[59] However, as set out above at paras [40]-[44] we are of the view that the LTJ erred in his treatment of the bad character application in substantive terms, in admitting the relevant Niche materials, documents one and three as admissible business documents. It is not possible for this court in the circumstance set out in paras [43]–[47] above to conclude that the Niche records had they been considered under article 18(1)(d) of the 2004 Order, would have necessarily been admitted in any event.

[60] An additional feature also causes us concern. The jury were told that they had been informed of the background to the previous conviction of the applicant because it was relevant to an important issue between the prosecution and defence. That is, who was telling the truth in this case and that this evidence of previous indecent behaviour may tend to show the applicant had an unhealthy interest in young boys. Over and above the issue of the admissibility of this background material placed before the jury, the LTJ failed to tell the jury in terms, that they should only rely on such previous convictions if they were 'sure' it established an unhealthy sexual interest in young boys.

[61] Returning to the appellate test in *Pollock,* having identified the errors set out above, we cannot say that the inadmissible bad character evidence introduced has not impacted the jury's deliberations. This is particularly so, considering the failure to give an express direction to the jury that they must be 'sure' the bad character evidence establishes a proclivity towards an unhealthy sexual interest in young boys. In these circumstances we have a significant sense of unease about the correctness of the verdict and conclude that this verdict is unsafe.

[62] Accordingly, we grant leave to appeal the conviction and allow the appeal. The conviction will therefore be quashed.

[63] We will hear the parties as to the way forward and any request for a re-trial.