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**ICOS No: 21/061665**

**Delivered: 07/02/2024**

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

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**THE KING**

**v**

**PHILIP HALL  
and  
DENNIS ALLEN**

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**Mr McKay KC with Mr Moriarty (instructed by McAtamney Solicitors) for the Appellant  
Hall**

**Mr Kelly KC with Mr Barlow (instructed by HHD Solicitors) for the Applicant Allen  
Mr Duffy KC with Ms Gallagher (instructed by the Public Prosecution Service) for the  
Crown**

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**Before: Keegan LCJ, O’Hara J, Fowler J**

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**KEEGAN LCJ (*delivering the judgment of the court*)**

***Introduction***

[1] This is an appeal against conviction of co-accused Philip Hall (“the appellant”) and Dennis Allen (“the applicant”) in a case of historic sex abuse. The complainants are Sara Allen (now Sara Potter) and Gordon Allen who are siblings. Dennis Allen is a stepbrother of the complainants and Philip Hall was his childhood friend.

[2] The complainants are entitled to automatic lifetime anonymity in respect of this matter by virtue of section 1 of the Sexual Offences (Amendment) Act 1992 however we have been informed that both complainants have waived their right to anonymity.

[3] Philip Hall’s appeal against conviction is brought with leave of the single judge, Madam Justice McBride, on the sole ground that His Honour Judge Greene KC (“the judge”) failed to discharge the jury when the complainant, Sarah Allen,

gave evidence that she felt she may have been raped on more than one occasion by the appellant. A renewed application for leave to appeal was also advanced on additional grounds namely that the judge erred in his direction to the jury in respect of the presumption of *doli incapax*, that the judge erred in preventing applicant's counsel pursuing a legitimate line of questioning and that the judge erred in admitting evidence under Article 10 of the Criminal Justice (NI) Order 2004 ("the 2004 Order") to correct a false impression.

[4] Dennis Allen's appeal against conviction is brought without the benefit of leave from the single judge. His appeal notice raises two grounds namely that a fair trial was prevented by reason of the trial judge's interruptions during cross-examination and that the trial judge erred in failing to give an adverse inference direction to the jury regarding the applicant's failure to disclose a matter raised in the defence during police interview. Mr Kelly KC on behalf of this applicant (who did not represent Allen at trial) abandoned the second point and tepidly argued the first. Instead, he concentrated on an additional ground that if Hall succeeded in his primary ground of appeal relating to discharge of the jury, then Allen should similarly succeed and have his convictions quashed. Allen also has an appeal against sentence which we have not heard yet.

#### *Summary of court proceedings*

[5] On 28 September 2022, after a trial by jury:

- (a) Philip Hall was convicted of two historical sexual offences; one count of rape (count 17) and one count of indecent assault on a female (count 20). The complainant was Sarah Allen, a young child at the time of the offending. The appellant was also a minor when the offending occurred.
- (b) Dennis Allen was convicted in relation to 13 counts of historical sexual offending. These included a catalogue of assaults including buggery against Gordon Allen and several sexual assaults including rape against Sarah Allen.

[6] Both defendants were committed for trial in the Crown Court on 30 September 2021. Both appellants pleaded not guilty to all counts.

[7] The trial commenced on 8 September 2022 and concluded on 28 September 2022 when the jury returned unanimous verdicts of guilt in relation to the counts with which each appellant was convicted.

[8] Both appellants were sentenced on 19 December 2022. Hall was sentenced to four years' imprisonment in respect of the rape charge with a concurrent sentence of six months on the indecent assault charge. Allen was sentenced to a number of concurrent sentences totalling 14 years' imprisonment.

### *Appellate test*

[9] At the outset we remind ourselves of the appellate test which is whether or not the conviction is safe. The test is found in the case of *R v Pollock* [2004] NICA 34 where the Court of Appeal considered the proper approach to be taken when considering a verdict and the following principles were established:

- (i) The court should concentrate on the single and simple question: does it think that the verdict is unsafe.
- (ii) This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence is being introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against the background.
- (iii) The court should eschew speculation as to what may have influenced the jury or judge to its verdict.
- (iv) 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 reasonable analysis of the evidence, it should allow the appeal.

### *Factual background*

[10] Dennis Allen abused his stepbrother for around two years and then abused his stepsister for around five years. The offending included buggery, attempted buggery and indecent assault of Gordon Allen. The offending against Sarah Allen included four rape charges when she was aged under 16 years. This included a rape charge on a date unknown between 25 November 1988 and 26 November 1988 when Allen and Hall entered Sarah Allen's bedroom when she was aged about five years old. The circumstances of that offending are that Philip Hall kept watch while Allen raped her.

[11] The other charges against Allen include inciting Sarah Allen to commit an act of gross indecency by encouraging her to masturbate him while he promised her something nice if she did it and threatened her not to tell anyone. Another indecent assault charge related to encouraging the complainant to give him oral sex and a further indecent charge related to the appellant giving the complainant oral sex. These events are said to have happened at least weekly from when Sarah Allen was aged 6-7 years up to nine years of age.

[12] Philip Hall's offending relates to Sarah Allen only and includes one rape charge and one indecent assault charge. The rape (count 17) occurred after he kept watch while his co-accused raped Sarah Allen and when he had finished Hall then

raped her. The indecent assault charge (count 20) relates to an incident which Hall volunteered as having occurred at police interview. He described that he had inappropriately groped Sarah Allen's bottom when he estimated he was 11 or 12 years old.

[13] The ages of the appellant and applicant and the complainants at the time of offending are obviously relevant to the appeal. Sarah Allen was aged around five years of age at the time of the alleged rape. Philip Hall had to have been aged over 14 years to be convicted of this offence. At the date of the alleged indecent assault Sarah Allen was aged between one and four years of age and Philip Hall was aged under 14 years.

[14] Dennis Allen, at the date of the offending against Gordon Allen was aged between 8 and 11 years of age. In relation to his offending against Sarah Allen he was aged between 14 and 18 years; in respect of one rape offence, he had attained the age of 18 years and was therefore an adult.

[15] Neither Allen nor Hall has any relevant previous convictions. In the past Hall had been asked to attend a police station in relation to a neighbour dispute and was cautioned. This was introduced in evidence to correct a false impression as we will discuss.

### *Appeal against conviction by Philip Hall*

[16] Hall submits that he did not receive a fair trial, that the convictions are against the weight of evidence and that they are unsafe on the following grounds:

- (i) The judge erred in failing to discharge the jury after the Crown led evidence from the complainant that she felt she may have been raped by the appellant on other occasions.
- (ii) The judge erred in relation to the directions given as to the presumption of *doli incapax*:
  - (a) Relating to count 20 (groping). The judge also erred in relying on the solicitor's input at page 5 of the police interview that the appellant was admitting count 20.
  - (b) Relating to count 17 (rape) and the imprecision of the age of the complainant at the time of offending and consequentially creating doubt as to whether the *doli incapax* presumption was engaged.
- (iii) The judge erred in preventing the appellant's counsel from pursuing a line of questioning relating to:

- the complainant's evidence that "three real incidents stick out" in her mind, one of which pertained to the appellant and erred in failing to summarise this "striking anomaly" to the jury in his charge.
  - the complainant's account was "inherently anomalous and unworthy of belief" in that she stated the first incident she remembered was when she was aged about five but "even by the age of five it was so normal."
- (iv) The judge erred in acceding to the Crown's application under Article 10 of the 2004 Order to admit evidence that the appellant had been interviewed by police for alleged harassment after a dispute with a neighbour. The jury received a *Lucas* warning but nonetheless it was incorrectly presented with evidence to doubt the appellant's honesty and credibility.

***Ground 1 - Evidence of the complainant's feeling***

[17] In this appeal hearing the emphasis of Mr McKay KC was upon ground (i) above to the effect that the Crown led evidence from the complainant, Sarah Allen, as to what she felt, or thought may have happened to her when she was a very young child. The gravamen of this argument is to the effect that the complainant gave evidence that she had a feeling the appellant raped her on other occasions.

[18] In support of the argument the appellant maintains that the above-named evidence was clearly bad character evidence within the definition of Article 3 of the 2004 Order and highlights the fact that no bad character application was made. The appellant submits that, if a bad character application had been made, the evidence would not have been admitted as it was manifestly deleterious to the fairness of the proceedings.

[19] The appellant submits that the judge should have acceded to the defence application to have the jury discharged once this evidence was led. That is because it is said that the complainant's evidence had an irredeemable adverse impact on the proceedings applying *R v Dolan* [2003] 1 Cr App R 281.

[20] Therefore the appellant makes the case to this court that applying the general principles derived from paras [28] to [33] of *Arthurton v R* [2004] UKPC to the current appeal compels a conclusion that the convictions are unsafe and concurs with para [26] of the single judge's determination which reads:

"The context of a single rape charge where the Crown case consisted largely of the uncorroborated evidence of the complainant and the learned trial judge's failure to give any direction to the jury regarding the complainant's evidence, (something Archbold considers is necessary), I grant leave on this ground. I do not consider that the

ability of the appellant to cross-examine the complainant satisfactorily addresses the potential unfairness to the appellant by the introduction of this evidence.”

[21] The competing argument made by the prosecution is simple. The prosecution case is that evidence in dispute is not bad character evidence but is evidence that is very common in cases of this type and is material to the facts of the case. The prosecution agrees with the judge’s ruling and submits that “for the evidence to be given without reference to the broader account of her memories would be artificial. The judge considered the material to be part of the facts of the case and therefore not bad character.”

[22] Accordingly, the prosecution submits the disputed evidence is not bad character evidence and falls within the exception in Article 3(a) of the 2004 Order as it is relevant and admissible as part of the background facts. The prosecution submits that *Dolan* and *Arthurton* are of little assistance due to the specific issues therein and notes both cases pre-date the enactment of the 2004 Order. The prosecution cites *R v Kearney* [2014] NICA 21 at [33] and [34] and references *Blackstone’s Criminal Practice* 2024 ed at Section F 13-21 to 13-22 in relation to the meaning of the phrase “has to do with the alleged facts” which discusses a purposive interpretation.

[23] The prosecution contends that the evidence in question was not bad character evidence and that its introduction caused no improper or undue prejudice to either defendant. On the prosecution case the judge properly exercised his discretion when he decided not to discharge the jury. The prosecution maintains that there is no basis upon which to conclude that the convictions were unsafe.

[24] We have considered these arguments having read the transcripts of evidence where this evidence arose and the judge’s ruling upon an application to discharge the jury made by Mr McKay. Our analysis focusses on key features of this trial and is as follows. First, we can see that this issue was raised before the judge, that there were significant exchanges between counsel and the judge during which Mr McKay robustly argued that this evidence was highly prejudicial and that the judge made a ruling on the issue on 12 September 2022. This is therefore a case where the issue of unfairness and prejudice was placed front and centre by the defence and where an application to discharge the jury was made.

[25] Next, it appears clear to us from the judge’s ruling that the prosecution did not intend to introduce evidence that Sarah Allen had a strong sense that the appellant had raped her other times. That position was helpfully confirmed by Mr Duffy KC in this appeal.

[26] Further, it is clear that the judge concluded that the evidence was part of the background facts of the case and if any prejudice to the appellant arose from the

complainant's evidence that she had a "strong sense" that the appellant raped her a few more times but she has no memory of it, it could be properly dealt with by way of strong judicial direction to concentrate on the complainant's evidence of what happened in the bedroom (count 17). The judge also noted that the defence team may wish to address this issue in cross-examination.

[27] The judge concluded that there was not a high degree of need to discharge the jury arising from this issue. In this regard he stated in his ruling that "I've indicated to the defence if they wish it not to be raised it won't be raised. If they wish it to be raised and a strong judicial direction given, then that is what will happen and by those means my view is that there is not a high degree of need to discharge this jury arising from this point."

[28] On 13 September 2022, which was the day after the judge's refusal to discharge the jury, counsel for the appellant raised the issue of previous potential rapes in cross-examination. However, the appellant contends that this questioning was by necessity limited given the objection made to it. That point is made out after consideration of the relevant transcripts.

[29] The single judge granted Hall leave to appeal on this ground noting:

"[24] I consider that it is at least arguable the evidence given by the complainant was inadmissible as it was bad character evidence. To be admissible as background information the evidence must be both relevant and necessary. I consider that it is at least arguable that the evidence given by the complainant about [previous] potential rapes was neither relevant nor necessary to explain the charge with which the appellant was charged. It was not "part and parcel" of the facts of the rape charge but rather evidence of separate [previous] offending of a serious sexual nature. Accordingly, I consider it is arguable that such evidence was inadmissible."

(It is more accurate to say other potential rapes)

[30] The argument as to admissibility and prejudice must of course be placed within the context of this case. In simple terms, Hall was charged with one rape alongside Allen and Allen was charged with a series of abuse. Hall's other alleged offence of indecent assault was volunteered by him and is not at the more serious end of sexual offending comprised in the rape charge.

[31] Also, without reciting all of the evidence and exchanges in this judgment, a short but highly significant portion of the complainant's evidence which was led

before the jury highlights the issue. The simple question and answer reads as follows:

“Q. In terms of Phillip Hall, do you have any memory of any other incident involving Philip Hall?

A. I don’t have any memories that I can remember in any detail, but I have a strong sense that it possibly happened a few more times after that.”

[32] We are quite clear that the complainant’s statement and subsequent evidence as to having felt that Hall may have abused her after the single episode of rape comprised in count 17 relates to rape. We think that in circumstances where Hall was charged with one rape this is not simply background and should have been edited out of the statements along with associated references. It is not productive to conduct an audit as to how the statements were edited pre-trial or to consider the exchanges that took place at the time over email that we have now been provided with. We are satisfied that both sets of counsel were conscientious in this task, however, with the benefit of hindsight this issue needed more attention.

[33] We are satisfied that the introduction of this evidence by the prosecution was accidental. However, it may be necessary to discharge to a jury notwithstanding such inadvertent adduction of evidence if prejudice is caused. In *Brown (Alan)* [2006] EWCA Crim 827, the Court of Appeal held that an assessment of the consequences of the jury hearing inadmissible material, whether by oversight or deliberate deployment, did not start with the presumption that the jury would be discharged. The same approach was taken in *R v Lawson* [2005] EWCA Crim 84.

[34] *Blackstone* at F13.21-F13.22 refers to the distinction between this type of evidence being categorised as background facts or bad character as follows:

“It will be seen that there is often a fine line between evidence of this kind and evidence which is admissible only via a specific gateway. In many of the cases in which section 98 is invoked, the point is made that the evidence, and the submissions, would have been admissible under section 101(c) and (d), and in cases where the nexus linking the evidence to the offence charged may be difficult to prove, alternative applications under section 101 are generally made. (See *McGowan* [2023] EWCA Crim 247, where knives discovered in a search of D’s home could not be shown to have been used in the attack with which he was charged. A bad character application, based on propensity, should have been made, and would also have had the advantage of

clarifying how the prosecution proposed to put the case.)”

[35] It follows that it may be necessary for a jury to be discharged where prejudicial material is inadvertently adduced. The way in which this most commonly arises is when a witness refers to the accused’s bad character during the trial, where character has not been put in issue. Whether or not to discharge the jury is an evaluative exercise. See *R v Montassar Ghaghdadai* [2016] NICA 43 applying *R v Lawson* [2007] I Cr App R 20, CA.

[36] *Blackstone* D13.62 helpfully distils the applicable legal test as follows:

“The test is whether any conviction would be unsafe in view of the revelation (*Lawson* [2005] EWCA Crim 84, followed in *Dicks* [2013] EWCA Crim 429). This involves consideration of the nature of the prejudicial material, the circumstances in which it was revealed, the strength of the respective cases and the extent to which the harm is otherwise remediable.

How the judge should act will depend on the facts of the particular case, and the court ‘will not lightly interfere with’ what the judge does (see Sachs LJ’s judgment in *Weaver* [1968] 1 QB 353 at page 359G).

In *Weaver*, D’s previous convictions were revealed during incautious cross-examination of the police officer who had interviewed him. Sachs LJ said that every decision turned on its own facts and depended especially on ‘the nature of what has been admitted into evidence, the circumstances in which it has been admitted and what, in the light of the circumstances of the case as a whole, is the correct course’ (at page 360B). The factors which particularly weighed against discharge were (a) that defence counsel had himself been responsible for inviting the answers which he then complained of, and (b) the degree of prejudice had been minimised by the judge’s wise summing-up.

By contrast, in *Blackford* (1989) 89 Cr App R 239, D was convicted of possessing cannabis with intent to supply after a police officer in cross-examination had gratuitously revealed that he had a previous conviction for a similar offence. The Court of Appeal concluded that this had been ‘a deliberate attempt by the police to queer

the appellant's pitch.' In those circumstances, the trial judge should have discharged the jury and ordered a retrial."

[37] We bear in mind the legal principles summarised above. We take the point that discharge of a jury involves an exercise of discretion by a judge. Also, evidence may be background facts or bad character and that this may be a fine line. The outcome in any case will depend upon the facts.

[38] We do not view the categorisation of the evidence as on the borderline given the overall context of the case. Rather, we find that this is a clear case which falls outside the sphere of background facts. That is primarily because of the nature of the evidence in play, namely a "feeling" or a "strong sense" on the part of the complainant that she had been raped on another occasion rather than a direct allegation or something in connection to the single rape charge that the appellant faced. To our mind such evidence had the potential to be highly prejudicial.

[39] Therefore, we are entirely satisfied that the introduction of this evidence required a bad character application. Otherwise, bad character could effectively be introduced by a back door without argument as to whether it is relevant or necessary to be admitted or so prejudicial as to be excluded. Why we say an application was required in this case is simple. It is intricately related to the facts of this case namely that Hall was only charged with one rape and could have been associated with Allen's more persistent offending by association. Therefore, this is not a straightforward situation where an appellate court can say that the evidence would be admitted anyway under the 2004 Order and so no prejudice arises.

[40] We cannot accept Mr Duffy's submission that such an outcome is out of kilter with established law. In reaching our conclusion we have considered the sections in the text *Evidence of Bad Character, JR Spencer, 2016* which he referred us to. We can see the point he makes however we come back to the fact that the exercise we are engaged in is intensely fact specific. None of the authorities we have read prevents a judge reaching the conclusion we have reached.

[41] We agree that the decision of a trial judge in this area requires an evaluative exercise and so should not be interfered with lightly. However, if a decision is wrong it is for the appellate court to correct a mistake to avoid an unsafe conviction.

[42] The further discussion in *Blackstone* at F.22 is also key to an understanding of this issue as it highlights the procedural safeguards that a bad character application provides not least clarity as to the prosecution case and the ability of the defence to make submissions on the fairness of admission.

[43] On the particular facts of this case we conclude that the evidence was not simply background facts and that a bad character application was required to

establish whether the evidence should be admitted. It follows that the judge should have discharged the jury. Having failed to do so the problem was compounded because the evidence was admitted, and the judge therefore did direct the jury on the potential prejudicial effect. In the circumstances we cannot be satisfied that irredeemable prejudice has not occurred as the jury heard the evidence which the appellant complains about. Accordingly, we cannot be satisfied that the conviction of rape on count 17 is safe applying the appellate test found in *R v Pollock*.

[44] In addition, we consider that there is a knock-on impact of the prejudice suffered by Hall in his defence of the indecent assault. This conclusion is driven by the way the prosecution used the purported confession to try to explain the feeling held by the complainant that something else (rape) had happened. The jury were told in closing:

“Now Philip Hall, in his police interviews, eventually confessed to an incident of indecent assault against Sarah when she was a child. And whilst Sarah has no specific evidence to give about that, the prosecution say that this earlier incident would in fact indeed explain Sarah’s sense that something had happened before. What she said about her feelings are certainly consistent with Philip Hall perhaps having committed some act of indecency against her.”

[45] The above quoted passage illustrates the point that prejudicial evidence which should not have been introduced as to the complainant’s feelings that something else happened, was used to support the alleged confession to indecent assault. Therefore, we cannot be satisfied as to the conviction for indecent assault comprised in count 20.

[46] Accordingly, given the prejudice that has been occasioned to the appellant, this is a rare occasion where the appellate court must interfere. This ground of appeal succeeds.

### *Ground 2 - Doli incapax*

[47] In support of this ground of appeal the appellant relies upon the complainant’s evidence relating to her age at the time count 17 was committed and maintains that this was not clear and varied from her saying she was aged 4/5 to around 5 at the relevant time. The appellant submits that, when the complainant was aged 4, the appellant would have been 13 and thus able to avail of the *doli incapax* presumption. Therefore, the appellant contends the guilty verdict relating to count 17 (rape) means the jury was satisfied the appellant was aged 14 or over and the *doli incapax* presumption was not available as a defence. The appellant submits this conclusion is against the weight of the evidence.

[48] The presumption of *doli incapax* applied to count 20 (indecent assault/groping). The appellant submits his admission in police interview to “inappropriate groping” when he was aged 11 or 12 is not a basis to rebut the presumption of *doli incapax* as the appellant was speaking as an adult telescoping back to when he was a child. The point is made that the evidence does not show he knew what he was doing (when he was a child) was seriously wrong and did it regardless. There is no logical reason for concluding that, at the police interview, the appellant was doing anything other than telescoping back and describing as an adult what had happened when he was a child. The appellant submits the judge erred in using this admission in police interview as evidence that may rebut the *doli incapax* presumption. Therefore, it is contended that this was a profoundly prejudicial inference which compounded the error which is the substance of the first ground of appeal and rendered the verdict unsafe.

[49] The prosecution submissions focus upon a summary of the evidence in relation to the complainant’s age when count 17 occurred. The prosecution notes it is a matter of the jury to assess that evidence; the jury found that both appellants were over 14 at the time and that finding the prosecution say is consistent with the evidence.

[50] We turn to what actually happened at trial to determine this issue. In relation to count 20, the appellant himself used the language “inappropriate groping” in police interview thus that evidence was properly admitted. The issue of the appellant’s intelligence and being a Christian was introduced by him in his evidence in chief. The judge noted Sarah Allen’s evidence that she was aged five when count 17 occurred thus, if this is believed, the appellant was over 14 and the presumption of *doli incapax* did not apply.

[51] It is clear to us that this issue was comprehensively debated between the judge and counsel. A route to verdict was also agreed which deals with this issue. A copy of the route to verdict document is instructive. The verdict also indicates the jury found:

- (a) The *doli incapax* presumption was rebutted in relation to count 20.
- (b) The appellant had obtained the age of at least 14 when count 17 was committed and the *doli incapax* presumption did not apply.

[52] Properly analysed we take no substantive issue with how the judge directed the jury. Specifically, the judge directed the jury that, in relation to count 20, the appellant was under 14 and the *doli incapax* presumption applies. In a discussion absent the jury, counsel for the appellant queried how the *doli incapax* issue was being dealt with but the judge noted he raised the issue two weeks ago and invited counsel to come up with a better solution. It appears from the transcript, the *doli incapax* issue was settled without much controversy. The judge referenced the

appellant's evidence of him looking back as an adult and considering the inappropriate nature of the touching comprising count 20 which included the word "groping." The judge notes the prosecution submission that the appellant knew what he was doing was wrong thus the *doli incapax* presumption is rebutted. Counsel for the appellant and judge discussed *doli incapax* and count 20. The judge also agreed to issue a clarification to the jury in terms agreed by counsel for the appellant.

[53] Within the above context it can hardly be controversial to state that the jury were entitled to consider all the evidence relating to *doli incapax* in reaching a conclusion. There must be a factual conclusion reached as to the age of the complainant and defendant in a case of this nature in order to determine whether *doli incapax* applies or not. The prosecution validly note that all counsel agreed a route to verdict relating to the *doli incapax* issue and no requisition was made at the time. The prosecution conclude that this ground is without merit. In relation to count 20, there seems to be agreement that the rebuttable *doli incapax* presumption applies. Overall, we see no merit in this ground of appeal. We refuse leave and dismiss it.

### ***Ground 3 - "Three real incidents"***

[54] In support of this ground the appellant takes issue with the complainant's evidence that "three real incidents" stood out in her mind, one of which pertained to the appellant. The judge dealt with the issue of delay, but it is said erred by depriving the defence the opportunity to test by cross-examination if the complainant's memories were "real" or the extent to which they may be "real." The appellant also submits the judge further erred in failing to address this anomaly in his charge to the jury.

[55] The prosecution deals with this ground of appeal in short measure, stating it has no merit and is based on a misunderstanding of the evidence. The prosecution notes that neither the witness nor the officer agreed with the appellant's interpretation of the evidence. Continuing with this theme the prosecution points out that the evidence was that there were three incidents involving Dennis Allen that really stick out in her mind.

[56] Having considered the transcript of evidence it is not clear to us that the judge limited the cross-examination on behalf of the appellant, Hall, as alleged. It may be relevant that the judge addressed counsel for Allen, and expressly stated "I'm not going to mandate the line of your cross-examination beyond imploring you ... to be scrupulously fair to the witness ... it is not a memory exercise ... there is a greater need to be particularly fair to the witness when she is being asked a question [that] the proper context of it is ... put before her." The judge's understanding of the complainant's evidence is clear. We agree with the prosecution submission that the evidence was unequivocal. We find this ground of appeal to be weak and so we refuse leave and dismiss it.

#### *Ground 4 - Evidence to correct a false impression*

[57] In relation to this ground the appellant submits the judge incorrectly exercised his discretion in admitting the evidence to correct a false impression under Article 10 of the 2004 Order as the 2008 interview under caution for harassment was vastly different to the 2019 interview under caution for the more serious offences alleged by the complainant.

[58] The appellant submits the evidence he gave at trial that 'this was all new to him' was open to interpretation and equivocal. Thus, it is argued that the Article 10 gateway should not have been availed of by the judge in accordance with *R v Good* [2008] EWCA Crim 2923. The appellant notes the jury received a *Lucas* warning but submits "ineffable damaging implications" to the trial were inflicted because the appellant was presented as someone:

- (a) Who may have committed other rapes of the complainant.
- (b) Who knew what he was doing was seriously wrong and did it anyway.
- (c) Who may have tried to deceive the jury thus questioning his honesty.

[59] On this point the prosecution submit the appellant put his character into the arena by virtue of his evidence in chief. He then made the assertion noted above. The prosecution submit that it is abundantly clear that a false impression had been created. In addition, the point is made that the appellant was given the opportunity to explain this evidence and the judge applied a *Lucas* direction in his favour. The prosecution therefore submits that there is no merit in this ground of appeal.

[60] The ground focusses on a claim that the judge erred in admitting details of a police interview under caution in 2008 relating to a harassment allegation arising from a neighbour dispute pursuant to Article 10 of the 2004 Order. The appellant submits this manifestly incorrect exercise of judicial discretion resulted in an unfair trial and unsafe conviction. The appellant broadens this ground of appeal to include a submission that the *Lucas* direction was insufficient to rectify the damage of the incorrect portrayal of the appellant as someone who:

- (a) may have committed other rapes of the complainant.
- (b) knew what he was doing was seriously wrong and did it anyway.
- (c) may have tried to deceive the jury thus questioning his honesty.

[61] We have examined extracts from the transcripts relating to these issues which include the following:

- (a) 27/9/22, page 2 line 1 to page 22 line 29 – discussion absent the jury about whether a *Lucas* direction will be given. Long discussion about the date when the appellant, Philip Hall told Social Services about his recollection of touching the complainant’s bottom when he was aged 11 or 12.
- (b) 27/9/22, Page 24 line 27 to page 25 line 9 – relates to the *Lucas* direction and the appellant’s evidence (Philip Hall) that may be characterised as lies.
- (c) 27/9/22, Page 46 line 21 to page 47 line 6 – asks counsel to come to a consensus as to what potential lies they wish the judge to draw attention to and what they wish to be said as the appellant’s response in cross-examination.
- (d) Judge’s concluding remarks, 28/9/22, page 48 lines 5 to 30 – recount of the appellant’s evidence that he had never been in the position of being interviewed by the police under caution when in fact he had been so questioned in 2008.
- (f) Judge’s concluding remarks, 28/9/22, page 55 lines 15 to 23 – the appellant “made his character front of stage in this case” thus arguably Article 10 of the 2004 Order was engaged by the appellant and evidence to correct the false impression given was admissible.

[62] On 23 September 2022 the judge provided his ruling on the evidence to correct a false impression issue. In summary he found as follows:

- (a) The judge noted the prosecution’s submission that when the appellant was giving evidence under examination by his counsel relating to an interview under caution on 5 June 2019 he answered “This situation is new to me. As I said, I have no criminal convictions, I am not someone who gets into trouble with the police, so this intervention is the first time I’ve been in this situation so it’s the first time I’ve ever had this played out.”
- (b) The judge opined that this evidence created the impression:
  - (i) The appellant had never been in a police station before.
  - (ii) Had never been asked about any criminal matter before.
  - (iii) Had never had an Article 3 caution before.
- (c) The parties agree that there is an OEL document that records the appellant attended Ballymena PSNI station on 17 February 2008 and at 9:30am on that date was cautioned under Article 3 as to the offence of harassment.

- (d) The judge opined the appellant created a false impression about his appearance at the station on 5 June 2019.
- (e) The judge noted in passing that the appellant's character was put forward by him in evidence in a way that was not misleading at all, but it was very much front and centre in his opening evidence.
- (f) Returning to this issue of the appearance at the police station on 5 June 2019, the appellant said something that created a false impression in light of all the evidence and in particular the manner in which he had previously put forward his good character and thus the judge proposed to allow the prosecution to lead the evidence.

[63] From the foregoing it is clear that the judge clearly engaged with this issue at trial. However, the appellant submits that what he actually said in evidence was equivocal and open to another interpretation and the Article 10 gateway should not have been used.

[64] We agree with the appellant's submission on this ground of appeal. In doing so we have utilised two authorities in support of our conclusion. First, *R v Renda* [2005] EWCA Crim 2826 at para [19] establishes the principle that whether a defendant had given a false impression is fact specific. We have also drawn assistance from *R v Good* [2008] EWCA Crim 2923 where the court found that the judge was wrong to conclude that the appellant was answering the whole question rather than the last dramatic part of it in that case. In those circumstances the court took the view that the judge made an error.

[65] To our mind what the appellant said in evidence in relation to his good character was equivocal and open to another interpretation. Therefore, the Article 10 gateway should not have been used. In addition, considering the entire factual matrix, we consider that this issue was overplayed, and that it was unnecessary to introduce such tangential evidence of bad character in this way. Whilst this failing is not as material as that relating to Ground 1 and would not of itself have caused us to question the safety of the appellant's convictions, we also grant leave and allow the appeal on this ground.

### *Appeal against conviction of Dennis Allen*

[66] This applicant renews the first ground of appeal; formally withdraws the second ground of appeal and adds a new, third ground of appeal (which mirrors Hall's first ground of appeal).

### *Ground 1 – unfair interruption*

[67] In support of this ground of appeal the applicant submits that the judge interrupted the cross-examination of the complainant too frequently and unnecessarily to the extent that the interruptions constituted a rebuke of senior counsel and interfered with the trial to render it unfair. In advancing the argument the applicant refers to extracts from the transcripts the skeleton argument and asks this court to consider the overall impression given by the judge’s interruptions. The applicant submits the judge interfered with the conduct of the trial to the extent that the Article 6 right to a fair trial was prevented. The applicant refers to Section 7-80 of *Archbold Criminal Pleading Evidence and Practice* 2023 ed to support this ground of appeal.

[68] The following principles can be extracted from the authorities to establish the test to be applied in determining an appeal of this nature. First and foremost, it can never be right for a judge to give the impression he favours the prosecution case, see *R v Bryant* [2005] 9 Archbold News 3. Where a judge effectively acts as a second prosecutor then any resulting convictions, regardless of strength of evidence, will be considered unsafe - *Michel v The Queen* [2009] UKPC 41. The question on appeal is whether the nature and extent of the interventions had resulted in the trial becoming unfair - *Binoku* [2021] EWCA Crim 48. At para [54] of that case the court said:

“Having considered transcripts of substantial parts of the trial, having reflected on the judge's statements to the jury about his comment in relation to leading the pack and the clarification that "there was no pack", and noting the terms of the summing up, we are sure that the departure from good practice in this case was not so gross, or so persistent or so irremediable that the trial was unfair. This is because the appellants were able to and did advance their respective cases in a trial where so much of the evidence was shown by CCTV and storyboards, on which all the parties relied and about which all the parties addressed the jury. It is also because the judge's interventions were not in such terms that they could not be cured. It is apparent from the verdicts that the respective cases were fully and fairly evaluated by the jury.”

[69] Of course not every departure from good practice will render a trial unfair but “there will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe” (para [27] of *Binuko*).

[70] In *CG v United Kingdom* (2002) 34 EHRR 31 the ECtHR found that despite the “excessive and undesirable” interruptions from the judge the trial was not unfair and the conviction safe. “Ultimately, the question is one of degree. Rarely will the impropriety be so extreme as to require a conviction, however safe in other respects, to be quashed for want of a fairly conducted trial process.”

[71] We have taken some time to examine the evidence in determining this ground of appeal. Having done so we can see that the judge adopted a robust approach to counsel and did make various interruptions and comment. Some interruptions relate to documents (what document is being referred to, does the witness have the document, etc). These interruptions are not problematic in the scheme of a criminal trial or indeed any trial. Other interruptions indicate to counsel that a comment is being posed rather than a question. Again, there is nothing objectionable about that as such an approach is within the judge’s remit in managing a case.

[72] Some more substantial interruptions are directed at counsel and denote some impatience with how counsel was conducting the case. We also note that interruptions by the judge relating to the cross-examination of Sarah Allen by counsel for Hall, however, no appeal is brought by him on this ground. We commend that decision by Hall’s counsel as it cannot be said that the judge’s interruptions were anything other than valid to manage cross examination of a complainant in a case such as this involving serious sexual offences.

[73] The portion of exchanges between judge and counsel to which most objection is taken occurs when the jury is out. In the absence of the jury the judge criticises the cross-examination, specifically Allen’s counsel’s cross-examination for a period of 10 minutes where he, provided an opinion on some of the cross examination where phrases such as “subjected yourself” to rape and “allow yourself to be raped” were used. The judge said this was “disgraceful.”

[74] The determination of the single judge rightly identifies the question as follows:

“The question on appeal is whether the nature and extent of the interruptions has resulted in the trial being unfair – see *Binoku* [2021] EWCA Crim 48.

“[48] I have reviewed the transcripts relating to the cross-examination of the complainants by both appellants’ counsel. Most of the interruptions by the judge are to clarify evidence or to ask counsel to pose a question rather than a comment. There is criticism by the learned trial judge of the co-accused’s counsel’s cross-examination, but this takes place in the absence of the jury.

[49] Having considered the transcripts and in the absence of the appellant identifying any specific examples where the judge departed from good practice, I do not consider it arguable that the interruptions met the threshold of being “so gross, persistent, prejudicial or irredeemable that an appellate court would have to condemn the trial as unfair or quash the conviction” – *Michel v R* [2009] UKPC 41. I further note that this ground of appeal is not relied upon by the co-accused.”

[75] We are satisfied there was nothing excessive or inappropriate about any of the judicial interventions; they were made to secure a fair trial. We accept that the judge did address counsel for a prolonged period however the criticism of counsel which did occur was done in the absence of the jury. There is no support for the proposition that the judge caused defence counsel to abandon a section of important cross-examination. Overall, we are not convinced that this ground of appeal is made out given the high threshold for an appeal to succeed on this basis.

[76] Further, we are quite convinced that what appears to have prompted the criticism of counsel by the judge is the failure of counsel to pay any regard to the best practice identified in sources such as the Advocate’s Gateway. The Bar generally must be aware by now that this court and all courts expect advocates to be familiar with this invaluable guide and to follow it. That point has been made repeatedly in discussions, talks and training. Repetitive questioning is no longer acceptable. Prolonged questioning is no longer acceptable. Tag questions are no longer acceptable. Victim blaming questions are no longer acceptable. Properly phrased questions are acceptable, comments are not acceptable. These are just some examples of what has changed irrevocably in this jurisdiction.

[77] Cross examination of complainants has moved on, or should have moved on, a great deal in recent years. There is nothing wrong with challenging the evidence of a complainant as that is the duty of counsel. However, the way in which cross examination is conducted must now be completely different. Counsel cannot expect anything other than criticism and intervention if they fail to meet these standards. If counsel had met those standards during this trial, the judge would not have felt obliged to intervene in the way in which he did. We consider that the judge was justified in his criticism. And to be clear counsel who do not abide by the rules can expect to be taken by to task by judges in this jurisdiction. This court will stand over judges who do no more than demand that counsel comply with what must now be regarded and enforced as basic professional standards when dealing with complainants in this area.

[78] In this jurisdiction we now have Practice Direction 2 of 2019 which is a comprehensive guide to how trials of this nature should be conducted. We remind practitioners of its contents in relation to the conduct of trials of this nature and the

questioning of vulnerable witnesses including complainants in serious sexual offence cases. Chapter 28 of *Rook & Ward on Sexual Offences – Law and Practice* 6<sup>th</sup> edition also refers. This text is essential reading for any practitioner in Northern Ireland when dealing with the cross examination of witnesses in criminal trials.

[79] In the case of *R v CK* [2008] NICA 24 Kerr LCJ observed that it is:

‘... the duty of cross-examining counsel to ensure that topics are dealt with in as economical and focused a manner as is possible, consistent with the full exploration of issues relevant to an accused’s defence. ... Judges should be ready to intervene to curtail unnecessarily long or imprecise questioning of witnesses, especially vulnerable witnesses who give evidence, as did A, in special measures conditions.’

[80] Since then three well known decisions from the Court of Appeal of England & Wales in *R v Barker* [2010] EWCA Crim 4, *R v Lubemba* [2014] EWCA Crim 2064 and *R v Dinc* [2017] EWCA Crim 1206 all reiterate the point that courts will expect adherence to good practice and that trial judges should intervene when this is not followed and that appeals will not succeed on the basis of a trial judge’s valid interventions to control and manage questioning.

[81] This approach does not in any way compromise a defendant’s right to a fair trial. Rather, it preserves the fairness of the trial process for complainants be they children or vulnerable witness and it prevents unnecessary traumatisation which the courts in this jurisdiction strive to avoid. This is also good practice in Northern Ireland which we expressly endorse and expect practitioners and judges to uphold. In summary, counsel should conduct cross examination in accordance with the Advocates Toolkit. Also, to be clear it is the view of this court that a judge should be ready to intervene in an appropriate manner to prevent improper, unnecessary, repetitive, or aggressive questioning.

[82] Finally, applying the legal test on consideration of an appeal against conviction found in *R v Pollock* and the focus on the safety of the verdict we are satisfied that the trial was fair. This ground cannot succeed and so we dismiss it.

***Ground 3 - new ground - failure to discharge jury - evidence as to complainant’s feelings of other rapes***

[83] We can deal with this appeal point shortly as we consider it opportunistic and of no relevance to Allen’s case despite Mr Kelly’s urgings. The applicant submits that the complainant’s evidence that she felt there were other occasions when she had been raped is prejudicial to both Hall and Allen. We disagree. True it is that this evidence was not represented on the indictment and was not part of the

prosecution's case. True it is that the judge refused the application to discharge the jury after this evidence was admitted and failed to direct the jury on the prejudicial evidence which had the potential to render convictions unsafe.

[84] However, these failings do not relate to Allen or call into question the safety of Allen's convictions. Mr Kelly could only make a general submission on this point to the effect that because the conviction of one accused is unsafe, so the conviction of the co-accused is unsafe. We do not accept that logic nor do we know of any authority in support of Mr Kelly's proposition. There is no nexus to him in relation to how the judge dealt with the complainant's evidence that she had a feeling she may have been raped on more than one occasion by Hall.

[85] It is telling that this ground of appeal was not raised by counsel for Allen at trial and that this was only belatedly raised as a ground of appeal before this court. Further, this ground of appeal includes reference to submitted unfair interruption by the judge during the cross-examination conducted by counsel for, Hall. Again, this point has no bearing on Allen's appeal. The argument which Mr Kelly latches onto as a new ground of appeal has been raised and successful regarding Hall who was charged with a single rape and indecent assault on the basis that the jury heard prejudicial evidence that he may have raped the complainant on other occasions. We refuse leave and dismiss this ground of appeal. We are entirely satisfied as to the safety of Allen's convictions.

### *Overall conclusion*

[86] We quash the convictions of Hall for rape (count 17) and indecent assault (count 20) based on Ground 1 for the reasons we have given. We refuse leave and dismiss all of Allen's grounds of appeal and uphold his conviction on all counts. We will hear from counsel as to whether a retrial is sought regarding Hall and any other issues that arise.