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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

Respondent

v

MUHAMMAD AKBAR NABI

Appellant

Girvan LJ Coghlin LJ and Gillen LJ

GIRVAN LJ (delivering the judgment of the Court)

Introduction

[1] This is an application by Muhammad Akbar Nabi for leave to appeal against his conviction on 19 December 2013 at Downpatrick Crown Court for oral rape and sexual assault.

[2] On 21 May 2013 the appellant was committed for trial at Downpatrick Crown Court on a total of 3 counts, alleging one offence of rape and two sexual assault offences. At his arraignment at Downpatrick Crown Court on 20 June 2013 the appellant pleaded not guilty to the three counts. At the trial before the learned trial judge, Judge Grant, ("the trial judge") sitting with a jury the appellant was found guilty of counts 1-3 inclusive.

[3] The trial judge sentenced the appellant to a sentence of three years on count 1 (sexual assault), nine years on count 2 (rape) and two years on count 3 (sexual assault). The court ordered indefinite sex offenders registration and a sexual offences registration order.

[4] The appellant lodged a notice of appeal against conviction on 9 January 2014 and his appeal against sentence on 17 February 2014. Leave to appeal conviction was granted by the single judge, Weatherup J on 30 September 2014. Leave to appeal against sentence was refused.

[5] Mr Kieran Mallon QC and Mr Byrne appeared for the appellant. Mr Weir QC appeared with Mr Magee for the Crown. The court is grateful to counsel for their submissions.

Evidential background

[6] On 22 August 2010, the complainant, B, attended a barbecue party at the home of her friend in the Moneyreagh area of Ballygowan. She consumed a substantial amount of alcohol. Sometime close to 2.00 am she decided she would leave and she asked her friend to phone a taxi. She wanted to go home. She set off down the long driveway to meet the taxi. Others at the party tried to persuade her not to go but she insisted on leaving. On arriving at the entrance to the property instead of pausing there or waiting she continued to walk on and arrived on the main road between Ballygowan and Belfast. It was dark and she was using her mobile phone as a form of torch. At one point she stumbled forward, she injured her arm and she lost her glasses at that time.

[7] A short time later the appellant's vehicle arrived on the scene. It had a taxi sign on the roof. A short time before this her friend had telephoned her to say that a Fonacab taxi had arrived at the house and he was sending it down to her. She thought that this was the taxi that had been sent for her. She asked the appellant if the taxi was for her and she averred that the appellant told her that it was.

[8] The complainant gave evidence that after getting into the taxi, she was handed a bottle with the words "water" on it and told to drink. The appellant held the bottle to her mouth and in the complainant's words the appellant made her drink. She described the liquid as sweet and syrupy and she said that it had a significant effect on her. Her mouth felt weird and her head was heavy and she slouched in her seat. She indicated that she could not speak. She closed her eyes and she then felt the appellant fumbling at her chest. When she opened her eyes, she said that the appellant had by this stage removed his hand from inside her clothing where it had been on her breast. She tried to pull herself up but again the appellant put his hand down her front into the cup of her bra, touching her breast, flesh to flesh with his hand directly on to her breast. It was the complainant's evidence that the appellant then removed his hand and then put it down over the right breast. The complainant stated that she was helpless at this stage and could only whimper. The complainant said that this touching of her breast lasted for a period of time. The appellant then put his hand between her legs, rubbing his fingers over and between the lips of her vagina and he put his hands down inside her leggings and rubbed her vagina over her pants. She said that this lasted for a few minutes but it seemed a long time at that point. She tried to close her legs and tried to tell the appellant to stop but she was not able to speak and throughout all of this the car was moving slowly.

[9] Shortly after this the car stopped. The complainant said that she wanted to get away but she could not move and then the appellant asked her what she needed.

When she did not reply the appellant said to her "Daddy knows what you want." The complainant asserted that although she tried to move away the appellant pulled her over the console. The appellant then pressed her head into his crotch area. His trousers were down and his penis was erect. The complainant tried to move away but the appellant forced his penis into her mouth and moved in and out over a couple of minutes. The complainant stated that he ejaculated in her mouth. After that the appellant started driving again. He produced the bottle of liquid and tried to pour it over the complainant's face as if attempting to wash it.

[10] At this point the car was moving very slowly and on a second occasion the appellant pulled the complainant back on to his side of the console. He had his penis out and he pushed his penis against her lips and her cheek and wiped his penis covered in ejaculate across her lips and cheek grabbing her hair with one hand and holding her head in position. She said that she was terrified and disgusted and wanted to get away. The complainant then threatened the appellant in an effort to try and get him to desist and said that others would attack him and he would end up in a wheelchair.

[11] It was the complainant's case that sometime later the appellant stopped the car close to some stone pillars. He got out, opened the door and pulled the complainant out of the car. He told her that this was the point at which he had picked her up and this is where she would find her glasses. He then pulled her down a driveway. The complainant continued to threaten the appellant and to make serious threats to him that he would suffer in terms of an attack by other people. The appellant brought the victim back towards the car. He then took the taxi sign off the top of the car, put that into the car itself and drove off. The complainant then contacted the police.

[12] The appellant at the trial completely denied that events happened in this way. The appellant claimed that the complainant had been the author of sexual activity and that it was she who had in fact started to assault the appellant. Although he had told her to stop she continued to sexually assault him and proceeded to eventually masturbate him to ejaculation. After he was arrested by the police during police interviews on 15 January 2013 the appellant did not refer to any of the events. There were seven interviews on that day. On the last or second last he said that he did now recall what happened in that he remembered the complainant getting into the taxi, starting to touch him and that he told her to stop and pushed her away. The appellant stated that he had thought carefully about what had occurred and he then remembered all that had happened. He was interviewed three further times on 22 January. It was on the last of the three interviews the he made any mention to the police of the version of events which he presented at the trial. The police had put to the appellant that DNA analysis had established that semen had been detected on the face, neck and breasts of the complainant. That DNA analysis established that the semen on the complainant's face belonged to the appellant. It was at this point that the interview was suspended to allow the appellant to consult with his solicitor.

A further interview commenced. It was not until then that he gave the police for the first time the version of events as he described them during the trial.

The H Incident

[13] Before the appellant was arrested in 2013 on 1 December 2012 the police had received a complaint of sexual assault from a separate complainant. It was this allegation that led to the appellant providing a DNA sample as a result of which he became a suspect in the complaint made by B. The complainant in the later incident was H. She was from England and had been attending Ollies Nite-Club in Belfast. The appellant who was at this stage employed by Stranmillis Taxis was directed by the office dispatcher in that firm to collect a fare at that location. H alleged that some short period into the journey she realised that she did not know where her friends lived and she had no money or mobile phone. This resulted in the appellant driving around for several hours seeking to identify a landmark to assist her recollection. She stated that the appellant at one point stopped the vehicle and got into the rear beside her where he proceeded to stroke her hair and shoulders before stopping when she shouted. She also alleged that he offered not to charge a fare in exchange for sex. The appellant denied this. He claimed that he told her the size of the accumulated fare and said that he offered to stop at various police stations which she declined. She also declined to return to the original point of departure. The appellant was arrested on 1 December 2012 and charged with sexual assault on H. He appeared at Belfast Magistrates' Court and following a contest he was convicted. However, his appeal to Belfast Recorder's Court was successful following a full hearing.

The admissibility ruling

[14] At the trial in the present case the prosecution made an application under Article 6 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order") to adduce evidence of the appellant's bad character arising from the events which were the subject of the proceedings relating to the alleged assault on H. The application was opposed by the appellant. The trial judge in his ruling on the bad character application said:

> " ….. there are a number of matters which are in my view very similar. Both occasions occurred during a taxi, the use of a taxi, he purported on each occasion to be collecting the complainants as a fare. In the first case the complainant says no, I didn't order a taxi, I came out, this individual came over, I was looking for a taxi and I availed of that taxi. It is quite clear from the information that we have been provided that he was sent to get a specific taxi at Waring Street. He did not get the fare that had been booked, he did not seek, on the evidence that is presently available, to find the individual who had

booked his taxi, but seems to have picked up on a random basis this young woman. Well, the question inevitably that will arise whether it was random in that sense. She was alone and he was alone when they were picked up. It was a lone female passenger. It is quite clear in both instances that each of the complainants had consumed alcohol, each of them was in an area which they did not know and indeed H made it perfectly clear she did not know where she was going and did not know the address to which she was to be delivered. There was, in both cases, a reasonably lengthy journey and a confused journey and it occurred over some considerable time. The defendant on each occasion, according to the allegations, stopped the car and there were allegations of touching. In what I will call 'the H case' it was a significantly lesser degree of touching than in this case, and indeed the level of assault alleged in each of the sexual assaults is at a much lower level, but nevertheless in the H case there was a clear allegation that she was being asked to pay for her taxi by way of sexual favour, and in this case there was quite clear talk on the part of, according to the allegations of course, by the defendant of quite clear sexual talk towards the complainant in this case. She was in a vulnerable condition, as was the first young woman, H, in the sense that she had alcohol consumed and she didn't know where she was, neither did this young woman. Neither of them knew where they were going, neither of the taxis had been booked for either of them and it is of significance in terms of a similarity that no payment was obtained from either of them in either case. In the first case, whilst the defendant says he told the police that he wasn't paid, he didn't at the time go and seek to get a payment. He could have followed her to the house or the flat of her friend. The arrangement that was purported to be made was one to the effect that when you get to my friend's flat you will be paid because I will have money there, I will have access to money here. In that regard he didn't do that, he didn't seek to get any payment, and in the second occasion he didn't seek any payment either. He did undoubtedly ask in the first, in the H case, he said that he had not been paid and sent a text message apparently to that effect. But how it was going to be paid is difficult to imagine.

What is significant in relation to each of these two cases is the description of these two young women in an

> extremely distressed state, that is common and a significant factor in both cases, particularly the level of distress that is stated. In relation to Ms H she was noted to be extremely distressed at the time. In relation to Ms B she was extremely distressed and indeed very concerned when the police encountered her some short time later.
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> I take the view that there are very marked similarities in each of these cases, that there are significant material and relevant facts which are common to each case, and in those circumstances I am of the view that there is sufficient similarity to qualify these circumstances as similar fact and these features as similar fact evidence common to both cases. I have considered of course very carefully whether the prejudice of admitting such evidence would outweigh its probative value. I think it is of substantial probative value. I have also considered under the principles of the English '78 of PACE, our own '76 of PACE, whether or not in the circumstances it would prevent a fair trial if such material was admitted. I reject that submission and I am satisfied that the evidence should be admitted in the course of this trial."

Grounds of appeal

[15] The appellant's grounds of appeal against conviction are as follows:

1. The trial judge was wrong and/or wrongly exercised his discretion to permit the prosecution to adduce evidence of the appellant's bad character arising from the circumstances relating to H's allegations which had led to his acquittal on a charge of sexual assault.

2. The trial judge was wrong and/or wrongly exercised his discretion in permitting the prosecution to re-open the Crown case after it was closed to adduce evidence from H in relation to the alleged sexual assault of which he was acquitted.

3. The trial judge failed to adequately direct the jury on the issue of similar fact evidence arising from the subsequent alleged offence of sexual assault in respect of which he had been acquitted.

4. The trial judge's charge to the jury was unbalanced in dealing with what in the context of this particular case was clearly a potentially and extremely prejudicial issue.

5. The convictions should be set aside on the grounds that in all the circumstances of the case they were unsafe and unsatisfactory.

The admissibility of evidence relating to the alleged H incident

[16] Although the appellant was acquitted of the charge of sexual assault arising out of the allegations made by H the Crown in the course of the trial sought to obtain leave to call evidence of the appellant's conduct in relation to H to negate his defence that he was not the sexual aggressor in the present case but rather the victim of sexual misconduct by B. The fact that a defendant has been acquitted of an offence does not preclude the calling of evidence of alleged misconduct underlying the charge which led to the acquittal. In R v Z [2000] AC 483 the trial judge had ruled, correctly according to the Court of Appeal, that the evidence of three additional complainants in respect of whom the defendant was acquitted was inadmissible as similar fact evidence. Ultimately, however, the House of Lords allowed the Crown's appeal holding that while the principle of double jeopardy prevented a defendant from being prosecuted for an offence on the same or substantially the same facts on which he had been acquitted, evidence was not inadmissible merely because it tended to show that the defendant had in fact been guilty of an offence of which he had been acquitted. The similar fact evidence which the Crown sought to rely on in that case was held not to be inadmissible merely because he had been acquitted. Since the Crown sought to adduce the evidence not for the purpose of showing that he was guilty of the offences of which he was acquitted but to show by similar facts his guilt of the offence for which he was being tried, the principle of double-jeopardy was not infringed in those circumstances. The judge had to weigh the prejudicial effect of the evidence against its probative force. Lord Hobhouse stated the position thus:

> "Similar facts are admissible because they are relevant of the proof of the defendant's guilt. The evidence relating to one incident taken in isolation may be unconvincing. It may depend upon a straight conflict of evidence between two people. It may leave open seemingly plausible explanations. The guilt of the defendant may not be proved beyond reasonable doubt but when evidence is given of a number of similar incidents the position may be changed, the evidence of the defendant's guilt may then become overwhelming. The fact that a number of witnesses come forward without collusion and give a similar account of the defendant's behaviour may give credit to the evidence of each of them and discredit the denials of the defendant. … On the first occasion and maybe on some subsequent occasions as well the defendant will not have been prosecuted, or if prosecuted and tried, may have been acquitted. There will not have been enough evidence to convince a jury of his guilt. This

> is proper but there will come a time when the accumulating evidence does suffice and a jury which can hear all the evidence now available should convict the defendant."

[17] As is apparent from the extract from his ruling set out above the trial judge ruled that there were sufficient striking similarities between the cases involving the complainant in this case and H to qualify the circumstances as giving rise to admissible similar fact evidence. He ruled that the evidence had substantial probative value and he considered that the omission of the evidence would not prevent a fair trial for the purposes of Article 76 of the PACE.

[18] Mr Mallon identified what he argued were significant differences between the cases alleged by B and H. In the case of B she alleged touching of the breast under the bra, the touching of the vaginal area, the placing of the hand down her leggings and the pressure of a finger against the vagina lips. There was no oral sex. There was no exposure of the penis. There was no ejaculation and no reference to "Daddy" or "Daddy knows what you want". No liquid was presented to the complainant to drink and the appellant desisted from touching H when she refused his attempted advances. As a result of those significant differences in the two different scenarios Mr Mallon argued that the trial judge was wrong to admit the evidence of the alleged misconduct towards H.

[19] The question of the admissibility of similar fact evidence depends on the degree of its relevance. If it goes further than merely suggesting propensity and can be shown to be relevant to or probative of a particular issue on the case it is admissible provided its probative value outweighs it prejudicial effect. In DPP v P [1991] 2 AC 447 the law was freed from the notion of an all-purpose test "striking similarity" as the touchstone of admissibility. Lord McKay observed at 462(f)-(g) that:

> "It is not appropriate to single out striking similarity as an essential element in every case. The essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused intending to show that he was guilty of another crime …
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> Once the principle is recognised that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial

> effect must in each case be a question of degree. … where the identity of the perpetrator is an issue and the evidence of this kind is important in that connection obviously something in the nature of what has been called in the course of argument a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed rather than who did commit it is to impose an unnecessary and improper restriction upon the application of the principle."

[20] In the present case the question in issue is not one of identity but rather whether the appellant was the sexual aggressor rather than the victim in the encounter between him and B. Assistance can be derived from the case of R v Venn [2002] EWCA Crim 236 where at paragraph [35] Potter LJ said:

> "[35] In R v Musquera [1999] Criminal Law Reports 857 at 858 this court observed in general terms that, while the decision in DPP v P had eliminated the necessity to identify a striking similarity, it was still necessary to invoke some identifiable common feature or features constituting a significant connection and going beyond mere propensity or coincidence. It has to be observed that broad tests of the kind propounded in John W and Musquera to little provide an easy guide to admissibility from case to case. That is perhaps inevitable, bearing in mind the infinite variety of factual situations which may be involved and the fact that the prosecution may legitimately seek to draw upon "similar facts" in a variety of different "issue" situations. The classic examples are: (i)where the question is one of identity (ii)where mistake, accident or innocent association is an issue (iii) where the defence is based on an assertion that two or more complainants are lying or mistaken … In all these cases the nature of the identifiable common feature or features which may constitute a significant connection is bound to depend upon the context and on the circumstances which cannot be prescribed. Where, as in this case, the prosecution witnesses are alleged to have made up those stories in a situation where collusion or cross-contamination can be discounted, the existence of common features in the nature or context of the separate offences which are the subject of complaint, may, whether separately or cumulatively be more readily regarded as non-coincidental and therefore probative on the issue of lies then would be the case of identity were the issue.

> That is because, in a case of this kind, the similar facts relied on are the making of similar allegations and not the events which are described in the allegations. See the commentary of Professor Sir John Smyth at [1999] Crim L R 859. As observed in R v Ryder [1994] 98 Crim App Rep 242 at 250:
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> > "The rational of similar fact evidence is that two or more people do not make up or mistakenly make up similar allegations against the same person independently of each other.""

Potter LJ stated in that case that the features of similarity were that in each case the defendant was a close family friend, each girl complained of an assault in her own home in the course of a visit and each made a similar accusation of a squeezing or feeling of the breasts, save that the interference with LM went further on occasions than with RB in that it also involved digital penetration. The engineering of the opportunity, the initiation of the interference, the nature of the assault and the breach of trust were all similar in character. Nonetheless, the judge was rightly careful to direct the jury that the weight to be given to such matters was entirely for them and to be balanced against countervailing points of distinction.

[21] As in that case, so in the present case, the engineering of the opportunity, the initiation of sexual interference and the breach of trust were all similar in character. If the jury accepted the evidence of H the appellant committed a sexualised assault on her and sought to sexually profit from the opportunity of having a single intoxicated female in his taxi although the alleged assault in B went very much further. While the evidence which the Crown sought to introduce would probably not have qualified as evidence of a "striking" similarity under the previous understanding of the law and might not qualify as being sufficiently relevant to prove identity (if identity had been the real issue in the case) the evidence did have material relevance on the issue whether the appellant was the instigator of sexual activity in the case of B and materially relevant to his defence that he was an innocent victim of a random sexual assault by a female passenger. The trial judge was properly entitled to conclude that, if the Crown sought to introduce it, the evidence was admissible. If the evidence was adduced by the Crown, the trial judge would have had to carefully direct the jury in due course and set out the countervailing points of distinction.

[22] In the circumstances we see no error on the part of the trial judge in his ruling that the evidence which the Crown at that stage indicated it was proposing to call was admissible.

The re-opening of the Crown case

[23] Following the trial judge's ruling the Crown and the defence reached agreement on the form of the material to be put before the court on the alleged sexual assault on H. As a result a written statement was read to the jury on the last day of the Crown case. It was in the following terms:

> "Subsequent to this incident of 4 August 2010 there was a further allegation of sexual assault in December 2012 made against Mr Nabi. This allegation centred on the accused picking up a female fare outside Ollie's Nightclub in Belfast City Centre to where he had been dispatched by his then employer Stranmillis Taxis. The female alleged that Mr Nabi had stopped the car after a sustained journey and stroked her right arm. The defendant was prosecuted and found not guilty by a judge sitting alone."

According to both counsel the trial judge was shown the terms of the statement before it was read to the jury and he did not at that stage raise any concern or issue as to its content. Having then read the statement to the jury and dealt with some other matters not relevant in his appeal, the Crown then formally closed its case on Friday 13 December 2013.

[24] After the Crown's closing of the case and notwithstanding his earlier agreement to the admission and reading of the statement the judge raised some concerns about the statement in the absence of the jury. The jury could not sit on the Monday but the judge again raised his concerns on Monday 16 December. According to the transcript of 17 December 2013 the judge was concerned firstly because the statement did not reflect what he was told was the complete evidence of H which he had used as the basis for his ruling on admissibility. Secondly, he considered that in the absence of evidence from H the jury were being placed in an impossible position. They were

> "going to be told that here is the material which you should hear, you are not going to see it tested, it is not agreed by the defence as such, the truth of it is not agreed by the defence as such, and in the circumstances I took the view that it was impossible for the jury to make any assessment of the quality of that evidence and to determine whether or not the incidents described in the manner in which they are described by H took place and whether they could properly be regarded as similar fact evidence and, in many respects, evidence of bad character because if what was being purported here was that in December 2012 an allegation was made of sexual assault and on the basis of that allegation it was quite clearly being put forward that the defendant had

> engaged in reprehensible conduct, in my view, for the jury to take any account of the adverse material they would have to have been satisfied to the appropriate standard by the prosecution that these incidents had occurred and occurred in the way in which they were described by H."

[25] The judge went on to state his view that the material would end up being before the jury in a purely prejudicial form and there was a real risk that the jury would conclude that "because the material was admitted in this way that in terms the defence were accepting the truth of what was being put forward in that (*there then followed an inaudible passage in the transcript*) and this was being over simplistic and I took the view that this would be highly prejudicial to the interests of the defendant notwithstanding agreement between the parties that this is the way in which it should be presented."

[26] The trial judge rejected the idea of directing the jury to completely ignore the statement which would be prejudicial to the defendant. In his view the only realistic solution was to hear the evidence of the witness who would be exposed to cross-examination.

[27] It was common case between the Crown and the defence that the trial judge indicated that he would be minded to discharge the jury unless the Crown sought to re-open the case and call evidence from H.

[28] It is not the function of the trial judge to direct the proofs of either the Crown or the defence or to give directions to the Crown as to how it should fill a possible lacuna in the Crown case or to direct evidence that might assist or detract from the defence case. A trial judge should be very slow to go behind a course of action in the trial in relation to the calling of evidence which is agreed between the Crown and defence. Proper respect should be given to the judgments reached by experienced counsel in the conduct of their respective cases. While in exceptional cases the court may itself call a witness this is a power which on the authorities must be very carefully exercised. As stated by Erle J in R v Edwards [1848] 3 Cox CC 82:

> "There are, no doubt, cases in which a judge might think it a matter of justice so to interfere; but generally speaking we ought to be very careful not to overrule the discretion of counsel who are, of course more fully aware of the facts of the case than we can be."

[29] The proper time at which a trial judge should be asked to rule on the form of a proposed agreed statement to be read to the jury is before the statement is read out. This presents the proper opportunity for the court to consider the matter and ventilate its concerns, if any, and to invite submissions dealing with any relevant aspect of the matter. In fact, it appears to be accepted that the trial judge was provided with the statement which the Crown purported to put before the jury and

he raised no objection to the statement being read to the jury in that form. However, that is not to say that a trial judge may not have second thoughts on an issue in the course of a trial. In deciding how he should deal with those second thoughts and concerns that have occurred to him in the intervening period he must carefully weigh the relevant factors in play when deciding what rectifying steps, if any, should be taken.

[30] Under Article 6(1)(a) of the Criminal Justice (Northern Ireland) Order 2004 evidence of bad character is admissible if:

> "All parties to the proceedings agree to the evidence being admissible."

Evidence of bad character is evidence of a disposition towards misconduct on the part of or of a disposition towards misconduct on his part. The statement agreed by the parties established that (a) a female passenger in the appellant's taxi, H, alleged that the appellant stroked her arm in December 2012 some two years after the alleged incident with B; (b)he was charged with sexual assault; and (c) he was acquitted by a judge alone.

[31] It is very questionable whether the statement as agreed constituted bad character evidence falling within the definition in Article 3 of the 2004 Order. Divorced from evidence from H a mere allegation is not in itself evidence of bad conduct. In as far as the agreed statement went its relevance to the jury lay in the fact that another female with no apparent connection to B had made an allegation of sexual assault, albeit of a considerably less serious nature. The fact of the making of an independent allegation of sexual misconduct in relation to a woman passenger in the appellant's taxi unconnected to H is evidence of an unusual coincidence which of itself is a piece of circumstantial evidence potentially relevant to the defendant's defence that he was not the sexual aggressor but the victim in the B incident. The material in the statement, being agreed between the parties, became part of the factual matrix before the jury. In deciding what weight should be put upon it the jury would be bound to take account of the agreed fact that while charged the appellant was acquitted of the offence alleged. Thus at its height the evidence in the statement was that an allegation of sexual misconduct in his taxi had been made independently some time later by an unconnected female.

[32] The fact that the statement did not reflect what the trial judge was told was the complete evidence of H, the subject of his earlier ruling, did not preclude the parties agreeing to allow the introduction of the agreed material before the jury. The judge's ruling had permitted the calling of the evidence but it did not oblige the Crown to call it. The judge's conclusion that the evidence was not agreed by the defence as such overlooked the fact that the statement was given in a form which was agreed. Indeed the defence was understandably content with the form of the agreed statement since it avoided the appellant facing evidence from a second complainant and effectively reduced the evidential content at its height to the agreed

fact that at a later date an allegation of sexual misconduct in a taxi driven by the appellant had occurred as alleged by an unconnected female. It is difficult to understand the logic of the judge's conclusion that the form of the statement was highly prejudicial to the defence. In fact the defence understandably considered that the calling of H would be much more prejudicial to the appellant since it would expose him to a second complainant and require consideration of alleged details of circumstances which, while disputed by the defence, were potentially very prejudicial to the defence case.

[33] However, we consider that the trial judge had a more legitimate concern about the form and content of the statement and about the difficulty it would create for the jury in assessing the quality of the material. It is true that the jury could take account of the fact that a separate and independent allegation had been made of a sexual assault in the appellant's taxi. However, it is not at all clear quite what the jury could properly make of that evidence, when combined with the agreed statement that the appellant had been acquitted, if they had no understanding of the actual evidence of H and no ability to understand the strength or weakness of H's evidence.

[34] In indicating that he was minded to discharge the jury if H was not called the trial judge's ruling of 17 December had the effect of exerting pressure on the prosecution to seek to re-open the Crown case and call H. The fact remains, however, that as a result of the discussions with counsel in the absence of the jury a decision was made by the Crown to seek to re-open the case and call the evidence of H. It is thus necessary to consider the principles applicable in relation to the appropriateness of the Crown re-opening its case after having closed it. In R v Francis [1991] 1 All ER 225 the Court of Appeal laid down seven principles:

> "(1) The general rule is that the prosecution must call the whole of their evidence before closing their case. The rule has been described as being most salutary.
> (2) There are, however, exemptions. The best known exception is that the prosecution can call evidence in rebuttal to deal with matters which have arisen ex improviso: see Pilcher [1974] 60 Cr App R 1.
> (3) The prosecution do not have to foresee every eventuality. They are entitled to make reasonable assumptions: see Scott [1984] 70 Cr App R 49.
> (4) Another exception to the general rule is that where what has been remitted is a mere formality as distinct from a central issue in the case Contrast Royal v Prescott Clarke [1966] 2 All ER 366 with Central Criminal Court ex parte Garnier [1988] RTR 42.
> (5) In cases within the two above exceptions the judge has a discretion to admit the evidence. Like any other discretion it must be exercised judicially and within the

> principles which have been established by the Court of Appeal. If the discretion is exercised in a way that no reasonable judge or no reasonable bench of magistrates could have exercised it, the decision will be set aside as erroneous in law: see Royal v Prescott Clark.
> (6) The earlier the application to admit the further evidence is made after the close of the prosecution case the more likely it is that the discretion will be exercised in favour of the prosecution ….
> (7) The discretion of the judge to admit the evidence after the close of the prosecution case is not confined to the two well established exceptions. There is a wider discretion. We refrain from defining precisely the limit of that discretion since we cannot foresee all the circumstances in which it might fall to be exercised. It is of the essence of any discretion that it should be kept flexible. But lest there be any misunderstanding and lest it be thought we are opening the door too wide, we would echo what was said by Edmund Davies LJ in the Doran case that the discretion is one which should only be exercised outside the two established exceptions in the rarest of occasions."

[35] In R v Munnery [1992] 94 Crim App Rep 164 Mustill LJ rejected the argument that Francis was wrong in stating that there was a discretionary power vested in the judge to admit evidence after the close of the prosecution in anything other than the two identified situations. He said at 172:

> "The authorities as would be expected, demonstrate that the judge must be left with some degree of freedom to meet the various and unpredictable problems which may arise during a trial. Our only hesitation is whether the extra cases might perhaps have led the court to state its seventh proposition in rather less restrictive terms. On balance we think not although it might perhaps be expanded by the addition, after the concluding words of "especially when the evidence is tended after the case for the defendant has begun. What matters is that the judge should have in the forefront of his mind the strictly adversarial nature of the English criminal process, whereby the cases for the prosecution and the defence are presented consecutively in their entirety. To depart substantially from the normal order of events, unless justice really demands is liable to cause confusion and hardship."

Mustill LJ went on to point out that while tactics are a legitimate part of the adversarial process justice is what matters: justice to the public represented by the prosecution as well as the defendant. The question is whether by letting in the evidence the judge created a real risk of injustice. He pointed out in that case that it was not a case where evidence was adduced after the defendant's case had begun and was only chance that the evidence for the prosecution ended before rather than after the overnight adjournment. The court concluded that in admitting fresh evidence after the close of the Crown case the judge did not step outside the bounds of his discretion and that in any case no injustice had been caused. The timing of the calling of witnesses is significant because if a witness is called after the defence case has started and *a fortiori* if the defence case has been closed, there is a substantially greater risk of injustice to the defendant. The interruption of the defence case results in the jury's focus on the defence case being undermined, its attention diverted and the prominence of new Crown evidence might be exaggerated. It is for this reason that if a judge himself decides to call a witness in the rare cases in which that power is properly exercisable it should never be after the close of the defence case (see R v Cleghorn [1967] 2 QB 584).

[36] As Mustill LJ said the ultimate question is whether the course adopted at the trial resulted in the causing of injustice. While the trial judge's approach is open to legitimate criticism, Mustill LJ makes clear that at trial various and unpredictable problems may arise and judges are called on to make decisions and rulings against the background of these various problems. A trial judge may quite properly begin to have second thoughts about the correctness of earlier decisions made in the course of the trial. Sometimes after mature reflection he may consider that he was too quick to be persuaded to allow a particular course to be followed. Sometimes the damage may not be capable of being undone. Sometimes an appropriate remedial course can be fashioned to meet the situation but any remedial action must properly balance the rights of the prosecution and defence and ensure fairness in the process.

[37] If the question of the propriety of the admission of the proposed agreed statement had been more fully analysed before it was admitted in front of the jury and if the trial judge had refused to allow it to be read because of the serious misgivings which later occurred to him it is difficult to see how the judge could have been faulted. It is difficult to see how the defendant could have suffered any prejudice if the judge had ruled that he would not allow the proposed agreed statement to be admitted and that if the Crown wished to adduce evidence in relation to H they should call her. In this case the judge, as a result of second thoughts, identified concerns which led to the same outcome, albeit after the close of the Crown case but before the defence case opened. The question is whether the technicality of the Crown having closed this case should have led the judge, who had the legitimate concern identified, to take no remedial steps to take account of his reconsideration of the issues. If the Crown had not mentioned the technical words that it was closing the case on Friday and the case had resumed on Monday it is difficult to see on what basis the Crown could be properly be prevented from calling H if it considered it proper to do so even though the parties had reached agreement

on the form of the statement to be read. That agreement could not have given rise to anything in the nature of an estoppel. If, acting in the interests of justice, the Crown considered it proper to call the witness there was nothing in the agreed statement that would make it improper or unjust for the Crown to call H to fill out what was at best a very abbreviated and, no doubt for the jury, a very opaque statement. As far as the jury in this case is concerned there is nothing to suggest that they would have been aware of the technicalities involved in the concept of the Crown's closure of the case. The witness was, to all outward appearances, a Crown witness being called before the defence case opened. The sequencing of the evidence thus produced no injustice in reality.

[38] The test of whether a conviction is unsafe as applied by the Court of Appeal is not identical to the issue of unfairness for the purposes of Article 6 of the Convention. As pointed out by the European Court of Human Rights "ECHR") in Condron v UK (Application 35718-97) the term "unfair" is to be given a broad meaning favourable to the accused. It is not limited to the safety of the conviction but encompasses the entire prosecution process. As pointed out by Lord Woolf in R v Francom and others [2001] 1 Crim App Rep 248 the court looks at all the circumstances of the case including questions of law, abuse of process and questions of evidence and procedure. He said:

> "The directions which a judge gives at a trial are designed to achieve the very fairness required by Article 6(1) as we understand the jurisprudence of the ECHR that court does not adopt a technical approach to the question of unfairness. The ECHR is interested, as pointed out in Condron, in requiring fairness of the trial in all the circumstances."

Lord Woolf went on to indicate that it is necessary to focus on the circumstances of the particular case and to consider whether what the judge did or omitted to do resulted in unfairness. The proper approach means that not only there must be no lack of safety but the judge's directions and rulings must not affect the defendant's right to a fair trial.

[39] We do not consider that the judge's ruling permitting the re-opening of the Crown case and the calling of H in itself resulted in the verdict being unsafe. Nor was the appellant deprived of the right to a fair trial. The evidence of H which was properly admissible evidence was called before the defence case. The appellant had a full opportunity to deal with her evidence and to cross-examine her. The appellant has not sought in the appeal to challenge any of the evidence of H nor has he sought to argue that he faced any unfairness in dealing with and meeting that evidence. As a result we must dismiss this ground of appeal.

The judge's charge

[40] Mr Mallon challenged one aspect of the trial judge's charge to the jury. He argued that the judge's charge did not provide a fair and balanced overview of the evidence of H; did not fairly point up the dissimilarities between the incidents involving H and B; and gave undue prominence to the Crown's reliance on alleged similarities. We have read the trial judge's charge carefully but conclude that, when read as a whole in the context of the trial, the jury cannot have failed to understand the points of distinction between the two incidents. While it would undoubtedly have been preferable for the judge to have dealt with the similarities and dissimilarities as a piece at one time he did identify the similarities relied on by the Crown and the dissimilarities to which the defence pointed. Following defence counsel's requisition before the lunch break the judge after lunch did go through the points of distinction to which his attention had been drawn by the defence. The only dissimilarity not mentioned in terms by the judge was the fact that in the case of H the appellant desisted from his actions when she objected. This was not a point raised by Mr Mallon though it was mentioned by the trial judge in the course of submissions when the requisition was being made. He did not refer to it in his charge to the jury. This point of dissimilarity could not however have been lost to the jury who heard H's evidence and defence counsel accepted that all the points of dis-similarity were fully ventilated before the jury in the defence closing address. Mr Mallon argued that the way in which the judge had expressed himself appeared to be somewhat dismissive to the defence point on the dis-similarities. We do not however consider that this is a fair or accurate reading of the way in which the judge expresses the point. We set out earlier the case that the Crown was putting forward in relation to similarities and then as a result of the requisition he set out the defence points in relation to dis-similarities. We do not see that there was any imbalance in the formulation of the points of similarity and dis-similarity.

[41] Accordingly, we dismiss this ground of appeal.

Disposal of the Appeal

[42] We have carefully considered the question whether there is any unsafety in the conviction or whether there is any lingering doubt as to the guilt of the appellant. We are entirely satisfied that the conviction was safe. The Crown case against the appellant was an overwhelming and convincing one and the defence cause lacked any plausibility. The jury had the benefit of seeing and hearing the witnesses and it is clear that they believed the complainant's evidence. Accordingly we dismiss the appeal.