Neutral Citation No: [2020] NICA 11 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **STE11157** ***Delivered:*** **30/01/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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QUEEN

v

SD

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Before: Stephens LJ, Horner J and Colton J

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STEPHENS LJ (delivering the judgment of the court)

Introduction and reporting restriction

[1] This is an appeal against conviction with the leave of the Single Judge, McCloskey J in relation to three grounds of appeal and a renewed application for leave to appeal in relation to 20 other grounds together with an application to amend the Notice of Appeal to include and for leave to appeal in relation to a 24th ground. The identity of the complainants is protected by section 1 of the Sexual Offences (Amendment) Act 1992. No matter shall be published which might lead to their identification. This means that the appellant must not be identified as he is in effect the stepfather of one of the complainants.

[2] We shall refer to:

(a) The appellant and applicant for leave to appeal as "SD" who at the time of the alleged offences was aged between approximately 33 and 35;

(b) The principal complainant, who was effectively his step daughter as "A." At the time of the alleged offences she was aged between approximately 14 and 16; and

(c) The other two complainants as "B" and "C." They were female childhood friends of A and mutual friends of each other who at

the time of the single incident giving rise to the alleged offences involving them were both then aged approximately 16.

[3] On 16 July 2018 following a retrial SD was convicted at Omagh Crown Court before HH Judge Fowler QC ("the judge") and a jury by majority verdicts (9/1: two jurors having been discharged) on 12 counts of either gross indecency with or towards a child contrary to section 22 of the Children and Young Persons Act (Northern Ireland) 1968 or indecent assault on a female child contrary to section 52 of the Offences Against the Person Act 1861. The offences involving A were alleged to have been committed between 8 December 2003 and 10 December 2005. The offences involving B and C involved one incident which was alleged to have occurred on some date between 8 December 2004 and 10 December 2005. The allegations were not reported to the police until 2011.

[4] The indictment contained 13 counts the first 11 of which related to offences in respect of A only. Those 11 counts comprised 5 counts of offences of gross indecency and 6 counts of offences of indecent assault ("counts 1–11"). SD was acquitted on count 10 (a specimen count of indecent assault) and convicted on all the other counts relating to A. The other 2 counts on the indictment of gross indecency with or towards a child related to B and C only ("counts 12-13"). SD was convicted on those counts.

[5] On 27 November 2018 SD was sentenced to a total of 11 years' imprisonment.

[6] As we have indicated there are 23 grounds of appeal against conviction together with an application to amend in order to add a 24th. The only grounds upon which the single judge gave leave to appeal were (i) the non–severance of counts 12 - 13 from numbers 1–11; (ii) the admission of bad character evidence though the single judge added the qualification that leave in relation to this ground was "barely" given and (iii) the fairness of the trial judge's charge to the jury. The single judge then stated that the "multifarious other grounds of appeal, which display much imagination and resourcefulness, are excluded from this grant of leave of appeal as (he considered) that they (suffered) from one or more of the following infirmities: repetition/reconfiguration of the three core issues identified above; the recitation of consequences flowing from the three core grounds; lack of particularisation and obfuscation; the peripheral and makeweight; and lack of arguability." He went on to make a suggestion stating that "Counsels' awareness of the need to present this appeal to the Court of Appeal in a focussed and streamlined way can only enure to their client's advantage."

[7] SD, as he was entitled to do then renewed the application for leave to appeal to this court in relation to all of the grounds in relation to which the single judge had refused leave and has made an application to add an additional ground of appeal. In support of the appeal and in support of the application for leave to appeal a 130 page "skeleton" argument was submitted. This was accompanied by six lever arch files of documents together with a seventh lever arch file containing some 37

authorities but without any of them asterixed and without any indication as to which paragraphs or pages should be read in advance of the hearing by the members of this court. Emphatically the skeleton argument was not a document which assisted this court. It was prolix. It did not bring focus but rather, to adopt the description of the single judge it continued to "obfuscate" the issues. Also it caused delay as time was needed to attempt to bring order and focus to the issues. In short we consider that it was the antithesis of what was required. The seventh lever arch file contained a large number of authorities that were not referred to during the hearing of the appeal. Those authorities should not have been included. The relevant authorities should have been asterixed and the relevant paragraphs or pages identified. Emphatically the preparation of that bundle of authorities could not be justified. This court directed that the appellant should provide a summary of the skeleton argument and that the parties should agree a joint bundle of authorities properly marked and with the relevant paragraphs or page numbers identified.

[8] On behalf of SD a document entitled "Executive Summary of Appellant's Skeleton Argument" was then provided which extended to some 13 pages and did bring greater focus to the issues on this appeal. However, we consider that the points made in the Executive Summary could have been confined to some 6-7 pages. That much shortened version of some 6-7 pages is the sort of document that ought initially to have been provided to this court. We emphasise that what is required in a skeleton argument is clinical analysis and that we deprecate the use of emotive language and certainly the repetitive use of such language. An eighth lever arch file containing the joint authorities relied on by the parties was prepared and made available. It did have the relevant authorities asterixed and the paragraphs or pages identified but it did not have the relevant statutory provisions in it. Rather in order to consider incomplete extracts from the statutory provisions one had to return to the 130 page skeleton argument.

[9] The trial before the judge was not the appellant's first trial in relation to these matters. An earlier trial had taken place before HH Judge McReynolds and a jury in 2013, at which time there were 14 counts on the indictment all involving the same complainants. On 17 October 2013 the appellant was acquitted of the first count which was of the offence of committing an act of gross indecency towards A, in December 2002 but by unanimous guilty verdict he was convicted on the remaining 13 counts. The appellant appealed against those convictions and this court (Girvan, Coghlin and Gillen LJJ) under citation [2015] NICA 50 allowed the appeal, quashed the convictions and ordered a retrial.

[10] At the retrial before the judge and in this court Mr Kearney QC and Mr McGuckin appeared for the appellant and Mr Mateer QC and Mr McAleer for the prosecution.

Factual Background

[11] A had met SD, her mother's new boyfriend, when A was aged approximately 12 in the summer of 2002. The relationship between SD and A's mother developed and a baby daughter was born to A's mother in late 2002. Around this time a family unit effectively formed and, later, in the autumn of 2003, A came to live in a two parent, two child family unit.

[12] In January 2003 SD sustained serious injuries in an accident, causing him to be hospitalised until February 2003. After the accident SD, A's mother and the baby daughter stayed with a relation for about a month before moving to a different house. In the autumn of 2003 when A was aged 13 and going into her 3rd year in school, she joined them.

[13] The prosecution case involved an allegation that in 2003 SD had groomed A. In relation to grooming and at page 3 of her deposition A recounted that:

> "I remember he used to tell me stories of a sexual nature. He told me that when he lived in (a particular city) (which we anonymise as "City D") in his early 20s that he was stocious drunk one night and masturbated when he was sleep walking in front of some girls who were in the house. He would also have talked to me about boys and what they expected of girls sexually and that girls should do what the boys wanted. I can't remember the exact things he said but he talked about masturbation and sex and said that I should please boys and do what they said. As this time I saw SD as a father figure who I totally trusted." (We will refer to A's evidence as to what she was told by SD in relation to City D as "*the City D account*.")

It was the prosecution case that in this way SD who was in a position of trust and authority was conditioning A to accept that public masturbation was acceptable behaviour and that sexually she should do whatever pleased boys and also by extension do whatever pleased him.

[14] As we have indicated the allegations were not reported to the police until 2011. The police interviewed SD who denied that he had committed any offences and also denied grooming A or recounting to her anything that was sexual or anything about masturbation in City D (the City D account).

[15] A brief summary of the offences as contained in the evidence of A at trial is as follows:

(i) Count 1 – Gross Indecency - a *specimen count* which relates to those occasions A said she had been in bed asleep and was awakened to find the defendant in his boxers, standing masturbating at the side of her bed.

(ii) Count 2 – Gross Indecency - a *specific count* which relates to one time she said she awoke to find he had taken her hand when she was sleeping and placed it onto his penis with his hand over her hand, moving her hand to masturbate him.

(iii) Count 3 – Indecent Assault - a *specific count* which relates to the occasion she said that having had a nightmare, she had got into bed with her mother and SD. Her mother sent her to SD's side of the bed and he tried to put his hand down her pyjama bottoms. She told him to stop but she woke up subsequently and her pyjama bottoms were down and SD's fingers were inside her vagina.

(iv) Count 4 – Gross Indecency - a *specific count* which relates to the same incident but covers A's evidence that SD also took her hand and placed it on his penis making her hand masturbate him. Her evidence was that during this SD called her "a little horn-ball."

(v) Count 5 – Indecent Assault - a *specimen count* which relates to A's evidence that SD would summon her by telephone call, text or shouting to come into the bedroom and get into bed beside him. He would then insert his finger or thumb into her vagina sometimes causing her to bleed.

(vi) Count 6 – Indecent Assault - a *specific count* which relates to A's evidence that SD requested her to get into bed with him and with her mother, whereupon he tried to insert her finger into his anus.

(vii) Count 7 – Gross Indecency - a *specimen count* which relates to A's evidence that on a number of occasions SD called her into the ensuite bathroom where he would be naked, masturbating and that he would get her to touch his penis and masturbate him.

(viii) Count 8 – Indecent Assault - a *specific count* which relates to A's evidence of sexual intercourse with SD (that is vaginal penetrative sexual intercourse). This count relates to the first time this happened in A's bed.

(ix) Count 9 – Indecent Assault - a *specimen count* which relates to A's evidence that SD had sexual intercourse with her *as many* as 10 times.

(x) Count 10 – Indecent Assault - another *specimen count* which relates to A's evidence that sexual intercourse with SD occurred *at least* 10 times.

(xi) Count 11 - Gross Indecency - is a *specific count* and represents an incident in a Dublin hotel where he made her perform oral sex on him and he performed oral sex on her. This was alleged to have happened in 2005. Although it had occurred outside the jurisdiction, it was accepted that there was a legal basis for dealing with it in this jurisdiction.

[16] B and C were friends of A and, although children at the time were slightly older than her. They gave evidence that they were coming out of A's bedroom in the family home onto the landing on an occasion when they saw SD, clearly visible, masturbating in front of a mirror with his reflection on view to the girls. These offences formed counts 12 and 13.

[17] SD has 3 previous convictions for indecent exposure involving two incidents. The first incident occurred on 16 June 1997. Two 18 year old females where walking on a public street when the driver of a car which was pulled up in front of them said something to them which they could not comprehend. The females went to speak with the driver of the vehicle and noticed that he had an erect penis in his hand and was masturbating. The male then drove off leaving them shocked. In respect of this incident SD pleaded guilty to two counts of indecent exposure with intent to insult a female and was fined £100 in respect of each count. The second incident occurred on 3 May 1998 on another public street when three female pedestrians aged 20, 19 and 17 years walked past SD's vehicle and heard him call out "look girls." Two of the females looked into the vehicle and observed SD touching his exposed private area. He was subsequently arrested, interviewed and charged with indecent exposure. In respect of this incident on 13 January 1999 SD pleaded guilty to indecent exposure with intent to insult a female and was fined £175 at a Magistrates Court. We shall refer to these convictions as "the three criminal convictions."

Aspects of the first trial and of the re-trial

[18] The prosecution witnesses at the retrial were the three complainants A, B and C together with the investigating police officer who gave evidence as to SD's police interviews and as to the three criminal convictions. SD did not give evidence. A consulting engineer was called on SD's behalf who gave evidence as to whether B and C could have seen SD in the mirror from the position on the stairs where they remembered being when they stated that they saw his reflection in the mirror whilst he masturbated. In our estimation this was not a complex case.

[19] In advance of the retrial an application was made on behalf of SD that counts 12 and 13 had been misjoined with counts 1-11 on the indictment. In the alternative an application was made on behalf of SD for severance of those counts so that there should be two trials. The first in relation to counts 1-11 and the second in relation to

counts 12-13. In relation to those applications Mr Devine appeared on behalf of SD. On 29 June 2017 the judge ruled that there had not been misjoinder and he ruled against the severance application. The judge did not give any reasons but stated that "if required" he could "give written reasons for that at a suitable time," "if necessary." None of the parties requested any reasons from the judge.

[20] At the first trial the prosecution made a comprehensive bad character application so that in effect all the evidence on each of the counts was sought to be admissible as bad character on all the other counts under Article 6(1)(d) Criminal Justice (Evidence) (Northern Ireland) 2004 ("the 2004 Order"). That application included the City D account on the basis that if the jury were satisfied that SD had told her about that incident and also were satisfied that the incident had taken place it was also evidence of propensity. At the first trial the prosecution made a second bad character application in relation to the three criminal convictions under Article 6(1)(d) of the 2004 Order.

[21] The prosecution approach at the first trial in relation to bad character was not replicated at the retrial. The initial application at the retrial was limited to specific limited parts of the depositions of A, B and C together with an application in respect of the three criminal convictions. There was no application in relation to the City D account. At the outset of the retrial the prosecution stated that it was not seeking to rely on any evidence in respect of counts 1-11 in respect of counts 12-13 and vice versa. On this basis the bad character application in relation to the limited parts of the depositions of A, B and C did not proceed. It proceeded solely in relation to the three criminal convictions.

[22] An issue arose at the start of the retrial as to the admissibility of the City D account. On behalf of SD it was submitted that this was bad character evidence and that absent a successful application under Article 6 of the 2004 Order it should not be admitted in evidence. The prosecution approach to the City D account was that this evidence did not constitute evidence of bad character within the meaning of the 2004 Order even though it showed SD in a bad light because it was admissible on the normal principles of relevance being evidence to do with the alleged facts of the offences with which SD was charged. The prosecution submitted that it was admissible on this basis and that there was no requirement to exclude it under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE"). In the alternative the prosecution asserted that if the City D account was bad character evidence within the meaning of the 2004 Order that it was admissible either as explanatory evidence under Article 6(1)(c) or relevant to an important matter in issue between the parties under Article 6(1)(d) namely propensity. It was submitted that it was important explanatory evidence because the grooming of A by a man whom she trusted as a father figure conditioned her to consider as acceptable sexual misconduct and to comply. This it was asserted was evidence explaining why she did not report or resist but rather complied.

[23] In relation to the City D account the judge ruled that:

> "As far as the evidence is sought to be adduced by the prosecution, I am of the view that it is part and parcel of the facts of the case. Accordingly, it does not require a bad character application and I allow the prosecution to lead the evidence."

It can be seen that the judge ruled that the City D account was evidence of grooming and he also ruled that the details of how A alleged that she had been groomed were relevant and admissible being evidence to do with the alleged facts of the offences with which SD was charged.

[24] The trial proceeded with evidence on behalf of the prosecution being given by A, B and C. That evidence included A's evidence as to the City D account.

[25] Cross examination established that there were a number of frailties in A's evidence. The most compelling of which was that there was evidence of A having reported being raped by a boyfriend in July 2007 and then withdrawing the allegation of rape. In evidence in the first trial she said that the original complaint was true and that it was the withdrawal of the complaint that was a lie. In the retrial she said that she had not been raped. Another illustration of frailty was that she denied that her previous boyfriend beat her by stating that "he never lifted a hand to her" yet in her statements to the police she said that he assaulted her and on occasions described him as an animal.

[26] There were also frailties in the evidence of B and C in that for instance in relation to B potentially there were differences between her evidence in the retrial and in the first trial and also differences between her evidence and her accounts to a social worker and to the police.

[27] At the retrial the bad character applications in relation to the three criminal convictions were made after A, B and C had given evidence and before the last prosecution witness, namely the investigating police officer was called. The application was under Article 6(1)(d) and Article 8(1)(a) propensity or alternatively under Article 6(1)(g) in that an attack had been made on the character of A. In response to the application SD relied on a number of points including Article 6(3) and (4) and Article 76 PACE. The judge heard extensive submissions on behalf of both the prosecution and SD. One of the points on behalf of SD was that this was a weak prosecution case so that the evidence of the three convictions ought not to be used to bolster it, see *R v Hanson* [2005] 1 WLR 3169 at paragraphs [10] and [18] and *R v Darnley* [2012] EWCA Crim 1148 obiter at paragraph [32]. During the course of submissions and in response to an assertion that this was a weak prosecution case based on inconsistencies in the evidence of A, B and C the judge initially stated that this was a matter for the jury to determine. This led to a submission to this court that on an application to admit bad character evidence it was a matter for the judge to determine whether this was a weak prosecution case and that by adopting this

approach the judge had failed to take into account a matter which he ought to have taken into account so that the decision in that sense was *Wednesbury* unreasonable. However, we note that subsequently the judge identified the point that was being made as being simply going to bolster a weak case. We consider that too much was being read into the earlier exchanges and we are content that the judge did identify one of the relevant factors bearing on the question of the admissibility of this evidence as being his own assessment as to whether it was bolstering a weak prosecution case.

[28] At the conclusion of the submissions in relation to the bad character application the judge stated:

> "Thank you. Now, because I have a jury waiting, I will give a ruling at this stage and, *if necessary*, I will give a detailed written ruling subsequently. In relation to this case, I am satisfied that the convictions that the defendant has should be admitted and I would intend to admit them under 6(1)(d), as to propensity. That being the case then, it is unnecessary for me to go on to consider 6(1)(g)" (emphasis added).

We have emphasised the words "if necessary" as it was the duty of counsel to draw to the attention of the judge the provisions of Article 15 of the 2004 Order which required him not only to give a ruling but also to give reasons. The obligation to give reasons was regardless as to whether they were requested. It is a particular feature of this case that no counsel drew the provisions of Article 15 to the attention of the judge and that no request was made to the judge to give reasons. It is also a feature of this appeal that not having asked the judge to give reasons a matter of complaint to this court on behalf of SD was that no reasons were given.

[29] On Friday 6 July 2018 at the conclusion of the evidence and prior to closing speeches the judge invited counsel to make submissions as to the directions to be contained in his charge to the jury. He indicated without any application being made to him that this was a case for a significant *Makanjoula* warning in relation to A's evidence, see *R v Makanjuola* [1995] 1 WLR 1348. The prosecution indicated that this was accepted. There was then discussion about directions in relation to bad character and the judge indicated that he would make available his proposed draft direction which subsequently was provided to the parties on Monday 9 July 2018. On that date and again in advance of closing speeches the judge heard submissions in relation to the draft making consequential amendments. The City D account was referred to in the draft as bad character and was specifically referred to by counsel on behalf of SD during the course of submissions on 9 July 2018. No suggestion was made to the judge that this could not amount to bad character if the jury were sure that the conversation took place and also were sure that the incident actually occurred. It is one of the grounds of appeal that the judge should not have directed the jury that the City D account could amount to bad character evidence. It is

asserted that the judge ought to have directed the jury that the sole purpose of that evidence was whether SD had groomed A.

[30] Another feature of the submissions on Friday 6 July 2018 and on Monday 9 July 2018 as to the contents of the judge's charge is that no suggestion was made by counsel on behalf of SD that the judge should direct the jury that the evidence in relation to counts 1-11 should not be used in relation to counts 12-13 or vice versa. The authority of *R v Drake* [2002] NI 144 was not brought to the attention of the judge and in this court the authority of *R v Adams* [2019] EWCA Crim 1363 was not brought to our attention.

[31] Despite the failure to make any suggestion to the judge that there ought to have been a direction to the jury that the evidence in relation to counts 1-11 should not be used in relation to counts 12-13 or vice versa the proposed amended ground of appeal asserts that there was a material misdirection in failing to give such a direction and that there was a positive material misdirection in wrongly permitting the jury to find something in the evidence on counts 12–13 to assist them in reaching a verdict on counts 1-11 and vice versa. Mr Kearney on behalf of SD acknowledges that the judge directed the jury to consider each of the counts separately but he asserts that this is not a direction to exclude any of the evidence in relation to counts 1-11 in relation to counts 12-13 and vice versa. Furthermore, Mr Kearney drew our attention to that part of the judge's charge in which he directed the jury that "*there might be of course something in the evidence relating to one count that assists you in reaching a verdict on the other counts.*" Mr Kearney asserted that this was a positive misdirection in that unequivocally the prosecution had stated that they did not rely on any evidence in respect of counts 1-11 in respect of counts 12-13 and vice versa except for the bad character evidence of the three criminal convictions. Mr Kearney asserted that this positive misdirection was compounded by that part of the charge in which the judge directed the jury that "when I have completed this summing up, it will be for you to decide, for example, what actually happened in this case? Whether (A) was indeed sexually abused by the defendant (SD) and whether or not the defendant masturbated towards (B) and (C), as both of them have alleged to you. *You have to do that having regard to the whole of the evidence, to the totality of the evidence in the case*" (emphasis added). Mr Kearney asserted that the emphasised passage was a further positive misdirection in that it permitted the jury to take into account the evidence on counts 1-11 in respect of counts 12-13 and vice versa. In support of these submissions he drew our attention to the unequivocal direction that is referred to in *R v QD* [2019] NICA 7 at paragraphs [27] and [55] and to the decision of this court in *R v Drake*.

[32] In his charge the judge gave a *Makanjoula* warning to the jury in relation to A's evidence. We need not set out the entire terms of the warning except to say that the judge emphasised that this was a very important aspect of the case which the jury must consider very carefully and with extreme caution. The judge suggested to the jury that they may have little difficulty coming to the conclusion that (A) had made a false allegation of rape against another man and that they should be slow to

convict SD on the evidence of (A) in the absence of supporting evidence. The judge directed that "in this case there is evidence capable of supporting (A) in that the defendant has failed to give evidence and his previous convictions …." The judge returned to this warning in relation to A's evidence later in his charge and also subsequently added to it in that it was not restricted to A's evidence but also extended to B and C's evidence whose accounts if the jury concluded that they were inconsistent should be treated with "considerable caution" requiring supporting evidence which was again stated to be SD's failure to give evidence and his previous convictions.

[33] In relation to the three criminal convictions the judge directed the jury that the prosecution would say this involved risk taking and exhibitory masturbation towards young women. That it was a matter for the jury to determine whether SD had a tendency to commit offences of this type and to determine whether SD had a sexual interest in exposing his penis to females and masturbating towards them.

[34] The judge in his charge rehearsed the evidence in relation to each of the counts and in doing so only referred to the evidence of the particular complainant in relation to each count. He did not amalgamate or roll up together the evidence of the three complainants but rather the evidence was compartmentalised into what each complainant said that she saw or experienced in relation to each specific count.

Misjoinder and severance

[35] SD asserts that the judge was incorrect to refuse the applications for misjoinder and for severance.

[36] The joinder of counts on an indictment is governed by section 4 of the Indictments Act (Northern Ireland) 1945 which provides that "(subject) to the provisions of the rules under this Act, charges for more than one misdemeanour may be joined in the same indictment." The relevant rule is rule 21 of the Crown Court Rules (Northern Ireland) 1979 which provides that "(charges) for any offences may be joined in the same indictment if those charges are founded on the same facts or *form or are a part of a series of offences of the same or a similar character*" (emphasis added).

[37] We were referred to a number of authorities in relation to this aspect of SD's appeal including *R v Assim* [1966] 2 QB 249 at page 261B and C and page 262 B and C; *Ludlow v Metropolitan Commissioner* [1971] AC 29 at page 38(d)-42(b); *R v Cannan* [1991] 92 Cr App R 16 pages 23-24; *R v Christou* [1997] AC 117 page 128(f)-129(g); *R v W (Paul)* [2003] EWCA Crim 2168 pages 15, 16 and 20; *R v Drake* [2002] NI 144 page 149(a-h) and *R v Taylor* [2016] NICA 10.

[38] For the purposes of this appeal it is only necessary to set out part of the judgment of this court in *R v Drake*:

> "To make a series there has to be some nexus between the offences. The rule should not, however, be given an unduly restricted meaning. Lord Pearson, with whom the other members agreed, at page 40 approved a statement of the Court of Appeal in *R v Kray* [1970] 1 QB 125 at 131 that –
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> > "All that is necessary to satisfy the rule is that the offences should exhibit such similar features as to establish a prima facie case that they can properly and conveniently be tried together."
>
> It is not restricted to cases where the offences are so connected that evidence of one would be admissible on the trial of the other, though that would be a sufficient nexus to justify joinder. Both the law and the facts should be taken into account in determining whether the requisite nexus exists."

[39] All the offences against A (except for two counts) were alleged to have been committed by SD in the family home. That was also the location of the alleged offences involving B and C. Those latter offences were alleged to have occurred during the same timeframe as the alleged offences involving A. The fact that the prosecution stated that it was not relying on the evidence in relation to counts 1-11 in relation to counts 12-13 and vice versa is not determinative. However, we note that in the event the bad character evidence in relation to the three criminal convictions was admissible in relation to the alleged offences involving A and those involving B and C. Counts 12-13 were the same in their legal nature as counts 1, 2, 4, 7 and 11. Factually counts 1 and 7 involved exhibitory masturbatory activity by SD as did counts 12 and 13. Factually, counts 2 and 4 involved masturbation though there were points of distinction in that they involved SD masturbating by proxy using A's hand which was not a feature of counts 12 and 13. Other points of distinction were that counts 3, 5 and 6 involved SD masturbating A and counts 8, 9 and 10 involved vaginal penetrative intercourse as opposed to masturbation. However, there was further factual similarity in that SD's intent in relation to counts 1, 7, 12 and 13 was to either cause alarm or distress or it was to corrupt young females. We consider that there was a clear nexus of exhibitory risk taking masturbatory behaviour in relation to young females occurring in the same time frame at the same location. There are numerous ways in which these charges are a part of a series of offences of a similar character. They were similar both in law and in fact.

[40] On that basis we consider that the counts were properly joined on the indictment and we dismiss the appeal from the judge's ruling in relation to misjoinder.

[41] The judge exercised his discretion in refusing to sever counts 1-11 and 12-13. This court will interfere with the exercise of that discretion only if it can be shown that the judge took into account irrelevant considerations, or ignored relevant ones, or arrived at a manifestly unreasonable decision. Not only do we consider that it was well within the judge's discretion to refuse the application but also we consider that the exercise of discretion was entirely appropriate. We dismiss this ground of appeal.

Bad Character

[42] The appeal focused on two aspects of bad character. The first was the admission in evidence of the three criminal convictions. The second was the direction to the jury in relation to the City D account so that the jury could rely on that account as evidence of propensity if they were sure that the conversation took place and also were sure that the incident actually occurred.

[43] The main point taken on behalf of SD in relation to the admission of the three criminal convictions was that the judge incorrectly failed to take into account that this was a "weak" prosecution case given that by the stage of the application the frailties in the evidence of A, B and C had emerged so that already the judge must have considered that there should be a *Makanjoula* warning to the jury particularly in relation to A's evidence.

[44] The questions are (a) what is meant by a weak prosecution case (b) under which provisions might the weakness of the case be considered and (c) on the facts of this case was it considered?

[45] In *R v Hanson* at paragraph [10] Rose LJ delivering the judgment of the court stated (adapted to the provisions of the 2004 Order) that "in a conviction case, the decisions required of the trial judge under (Article 6(3)) and (Article 8(3)), though not identical, are closely related." Rose LJ went on to state that "when considering what is just under (Article 8(3)), and the fairness of the proceedings under (Article 6(3)), the judge may, among other factors, take into consideration" certain matters to which he then referred. Those included that the trial judge "must always consider the strength of the prosecution case." Rose LJ then went on to state that "if there is *no or very little other evidence* against a defendant, it is *unlikely* to be just to admit his previous convictions, whatever they are" (emphasis added). The concept of "no evidence" is straightforward see *R v Galbraith* [1981] 1 WLR 1039. The question arises as to what is meant by "*very little other evidence*" and what if any is the connection between a weak case and (b) of *Galbraith* at page 1042 letters C - D. Professor John Spencer has addressed that issue in paragraph 4.58 of his book "Evidence of Bad Character" (2nd edition) and at paragraph 1.70 of the 3rd edition. The Court of Appeal in England and Wales obiter in *R v Darnley* agreed "with the observations of Professor John Spencer … where he suggests that the concept of weak evidence referred to in *Hanson* should be limited to evidence which links the defendant to the offence but which the courts would normally treat with caution,

such as a "fleeting glance" identification or a "cell confession." In this case it is submitted on behalf of SD that another example of evidence to be treated with caution is evidence that is subject to a *Makanjoula* warning to the jury so that the judge ought to have but failed to take that factor into account when considering the admission of the three criminal convictions.

[46] On behalf of the prosecution Mr Mateer submitted that it is wrong to characterise cases where a corroboration warning ought to be given as a "weak case." He stated that until Article 45 of the Criminal Justice (NI) Order 1996 was brought into effect on 25 July 1997 corroboration was required as a matter of law in certain cases involving accomplice evidence or allegations of a sexual nature. He submitted that it would not have been proper to characterise such a case as a weak case merely because the law required corroboration. Mr Mateer also submitted that there was no example of corroboration cases being considered as "weak" cases in the examples given in Archbold 2020 at paragraph 13.72. Furthermore, he stated that there is no clear definition of what constitutes a "weak case" but that judges will clearly recognise it when it arises. He submitted that if it is not obvious that a case is within this category of "weak case" it cannot possess the necessary characteristics.

[47] We consider that the strength of the case which is whether there is *no or very little other evidence* against a defendant is but one of the factors which may be taken into account by the trial judge when considering what is just under Article 8(3), and the fairness of the proceedings under Article 6(3). In relation to that factor even if there is very little other evidence Rose LJ did not state that it would never be just to admit the evidence but rather that it would be *unlikely* to be so. Furthermore, we consider that it is incorrect to create categories of cases that by definition amount to "very little other evidence." The court in *Hanson* did not seek to do so but rather left each individual case to the assessment of the trial judge as to what is just and fair. On that basis we consider that even in relation to the categories in *Darnley* of "fleeting glance" identification and "cell confession" they cannot be said by definition to amount to "very little other evidence" but rather this is a matter for judicial assessment on the facts of the individual case. On the same basis we consider that just because a case requires a *Makanjoula* warning to the jury does not mean that it is a case in which there is *very little other evidence*. Finally, where there is no evidence the admission of bad character evidence would amount to the *creation* of a case which is clearly unfair and unjust. The flavour of *creating* a case might also inform consideration as to whether there is *very little other evidence*.

[48] In *Hanson* at paragraph [18] Rose LJ raised the issue of the trial judge's directions in relation to a *weak case* which we consider to be different from the context of the admission of the evidence where there is *no or very little other evidence* against a defendant. In the context of the trial judge's directions he set out a general observation "that, in any case in which evidence of bad character is admitted to show propensity, whether to commit offences or to be untruthful, the judge in summing up should warn the jury clearly against placing undue reliance on previous convictions." In this context of the judge's direction to the jury he stated

that "evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant." So Rose LJ was considering a direction in a case which could be considered to be a weak case and in relation to which the evidence had been admitted. In *R v Kearney* [2014] NICA 21 at [45] this court stated that paragraph [18] of *Hanson* was "stating a general observation in relation to evidence of bad character admitted to show propensity *in the context of the trial judge summing up to the jury and warning the jury against placing undue reliance on previous convictions*." Again this is in the context of the evidence having been admitted in circumstances in which there was a weak case.

[49] We consider that in relation to the admission of bad character evidence a weak case is one in which there is "*no or very little other evidence* against a defendant" in the sense which we have set out. This factor might to be considered by the trial judge under Article 6(3), Article 8(3) of the 2004 Order and also under Article 76 PACE.

[50] As we have indicated at paragraph [27] we consider that the judge did consider the strength of the prosecution case. The judge failed to give reasons as he was required to do by virtue of Article 15 of the 2004 Order so it is not possible for this court to discern how he brought that factor into account in determining what was just or fair. In part his reasons can be discerned from the submissions made to him and from his charge to the jury. In *R v Osbourne* [2006] 2 All ER 553 at paragraph [60] it was stated that "with respect we would suggest that this was an over-parsimonious compliance with the duty of the court under (Article 15) to give reasons for any rulings made under (Article 6). *However, as the decision itself was correct, the absence of detailed reasons does not impinge on the safety of the conviction"* (emphasis added*)*. On that basis the appeal in that case was dismissed. We also would dismiss this ground of appeal on the same basis.

[51] We state that the judge's decision to admit in evidence the three criminal convictions was correct for the following reasons.

[52] A ground of application was that the three criminal convictions were bad character evidence relating to an important matter in issue between the appellant and the prosecution, see Article 6(1)(d). The matters in issue between the appellant and the prosecution include the question whether the appellant has the propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence see Article 8(1)(a). The Court must not admit such evidence if it would have an adverse effect on the fairness of the proceedings, see Article 6(3). In considering the exclusion of such evidence the Court must have regard in particular to the length of time between the matters to which the evidence relates and the matters which form the subject of the offence charged, see Article 6(4). The appellant's conviction cannot be used to establish propensity if the Court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust to do so, see Article 8 (3). The three essential questions identified in *R v Hanson* are:

> "(1) Does the history of conviction(s) establish a propensity to commit offences of the kind charged?
>
> (2) Does that propensity make it more likely that the defendant committed the offence charged?
>
> (3) Is it unjust to rely on the conviction(s) of the same description…and, in any event, will the proceedings be unfair if they are admitted?"

[53] We consider that the three criminal convictions had the potential to show a clear disposition towards sexual risk taking and exhibitory masturbation towards young women which involved others seeing what he was doing. We consider this to be closely aligned to inducing others to participate in masturbation. There are very little if any material differences between the three criminal convictions and counts 1, 7, 12 and 13. There are some differences between the three criminal convictions and those counts which involved SD using A's hand to masturbate but this is a difference to be considered by the jury. We consider that the tendency which we have identified made it more likely that the appellant committed the offences except for counts 8, 9 and 10. We have particular regard to length of time between the offences which gave rise to the three criminal convictions which occurred on 16 June 1997 and on 3 May 1998 and the matters which formed the subject of the offences charged which occurred between 8 December 2003 and 10 December 2005. We have considered amongst other matters the suggestion that this was a weak prosecution case and in that respect we apply the matters set out at paragraph [47] to [49]. This case did not involve no evidence. We do not consider that it involved very little other evidence and certainly did not have the flavour of creating a case against the appellant. We do not consider that the admission of the three criminal convictions would have an adverse effect on the fairness of the proceedings or that it would be unjust to do so.

[54] We note that the judge did not distinguish between counts 8, 9 and 10 so that he directed the jury that the tendency did not relate to those counts. However, the jury were clearly directed in the terms set out in [33] and we do not consider that they could or would have taken the bad character evidence into account in relation to counts 8, 9 and 10. Furthermore, this was not an issue raised with the judge prior to closing speeches.

[55] The second aspect of the appeal in relation to bad character relates to the use of the City D account. This was not raised with the judge prior to closing speeches. There was no requisition in relation to it at the conclusion of the judge's charge to the jury, see *R v Hunter* [2015] EWCA Crim. 631; [2016] 2 All ER 1021 at paragraph [98] and *R v BZ* [2017] NICA 2 at paragraph [20]. It does not give rise to any concerns as to the safety of the verdicts let alone any sense of unease.

[56] We dismiss the grounds of appeal in relation to the bad character evidence.

The judge's charge

[57] At trial and in this court the prosecution did not seek to put its case in relation to counts 1-11 on the basis that the evidence relating to counts 12-13 was admissible and vice versa. It is asserted that there was a material misdirection in the manner set out in paragraph [31]. In our view this is by far the most substantial of the grounds of appeal in this case. The ground relies on *R v Drake* and *R v Adams*. Also we note and would draw attention to Chapter 12: Cross-Admissibility in the "Crown Court Bench Book: Directing the Jury – First supplement" together with Chapter 13: Cross Admissibility in the Crown Court Compendium Part 1 dated December 2019. We consider that it is important that those documents and those two cases should be considered to supplement the present version of the Northern Ireland Bench Book.

[58] In *R v Adams* the prosecution did not seek to put its case at the trial on the basis that evidence relating to any of the counts on the indictment was admissible in relation to the issue of whether the appellant was guilty on any other count. The Court of Appeal stated that as "that was the position adopted by the Crown, the jury ought to have been directed that, in considering each count, they should have regard only to the evidence which was directly relevant to that count and should ignore evidence relating to other counts." The Court of Appeal went on to observe first "that the judge did not give any direction to the jury at all with regard to whether, and if so how, they could take account of evidence relating to one count when considering other counts and in particular whether they could take account of either complainant's evidence when considering the allegations made by the other." Second, the Court of Appeal observed that the "only direction which the judge gave about how the jury should approach the different counts was a standard direction to say that they should consider the case against and for the defendant on each count separately" and that this "did not tell the jury whether they could or could not, when considering the case against the defendant on a particular count, have regard to evidence relating to other counts or other occasions." Finally, the Court of Appeal stated that "everything depends on the directions and facts of a particular case, and the danger that the jury might seek to use the evidence of one complainant as evidence of his guilt on counts concerned only with another complainant." On that basis the failure to give such a direction may not amount to a misdirection on the basis of a consideration of all of the directions in the context of the facts of a particular case.

[59] In this case the prosecution did not seek to admit the evidence in relation to counts 1-11 in relation to counts 12-13 and vice versa. Mr Mateer, relying on the requirement to consider the totality of the directions in the context of the facts of this particular case correctly referred us to those portions of the charge in which the judge had analysed the evidence in respect of each count by reference *solely* to the complainant in respect of that count. Mr Mateer submitted that the jury could not have been under any misapprehension that it was only that evidence that should be

considered. Furthermore, he referred us to the direction in respect of the *Makanjoula* warning in which the judge stated that evidence capable of supporting (A) was SD's failure to give evidence and his previous convictions. The judge did not say that supporting evidence could come from B or C. In that respect Mr Mateer submitted that the jury were again directed solely to the evidence of each complainant in relation to each count.

[60] However, we consider that the direction which the judge gave about how the jury should approach the different counts was a standard direction to say that they should consider the case against and for the defendant on each count separately. That direction did not tell the jury whether they could or could not, when considering the case against the appellant on a particular count, have regard to evidence relating to other counts or other occasions. Furthermore, we consider that in the manner set out at paragraph [31] the judge went further positively permitting the jury to take inadmissible evidence into account.

[61] We acknowledge that there is some force in Mr Mateer's submissions but as in *R v Drake* we feel constrained to accept the validity of the appellant's case on this issue. We give leave to amend the notice of appeal to include the 24th ground of appeal and we give leave to appeal in relation to that ground. Also not without hesitation, we feel bound to hold that the convictions are not safe in these circumstances and in that respect we have regard to the particular frailties in A's evidence and the potential frailties in the evidence of B and C.

The remaining grounds of appeal

[62] It is sufficient to state that all of the remaining grounds of appeal give rise to no concerns as to the safety of the convictions. We refuse leave to appeal in relation to each of those grounds.

Conclusion

[63] The task to be performed by this court was set out by Kerr LCJ in *R v Pollock* [2004] NICA 34 at paragraph [32]. Applying those principles we have a significant sense of unease about the correctness of the verdicts. We quash the convictions.