Neutral Citation Number: [2019] EWCA Crim 1225

Case No: 201803228 C5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CARDIFF
His Honour Judge Gaskell
T20180031

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2019

Before:

LORD JUSTICE FULFORD
MRS JUSTICE MAY DBE
and
MR JUSTICE SWIFT

- -

Between:

PR	**Appellant**
- and -	
THE CROWN	**Respondent**

- -
- -

Mark Cotter Q.C. (instructed by **Richard Nelson solicitors**) for the **Appellant**
Caroline Rees Q.C. (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 6 June 2019

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Approved Judgment

Lord Justice Fulford:

The Issue

1. This appeal concerns whether the trial judge was right to allow the case to proceed when evidence gathered by the police in 2002, relevant to the appellant's defence, was destroyed by water damage and was unavailable for the trial in 2018.

2. The appellant submits that the judge wrongly refused his application, which was renewed following the prosecution's evidence, to stay the proceedings as an abuse of process.

Background

3. On 6 July 2018 in the Crown Court at Cardiff the appellant, now aged 72, was convicted (by a majority of 10 to 2) of four counts of indecency with a child, contrary to s.1(1) Indecency with Children Act 1960.

4. On 9 August 2018, the trial judge, His Honour Judge Gaskell, sentenced him to concurrent special custodial sentences under section 236A of the Criminal Justice Act 2003 of eight years, comprising a custodial term of seven years' imprisonment and an extended licence period of one year (on counts 1, 2 and 3), and two years' imprisonment concurrent (on Count 4).

5. On 25 October 2018 the Court of Appeal Criminal Division (Sir Brian Leveson P., Baker and Goss JJs) allowed an application by the Attorney General under section 36 Criminal Justice Act 1988 to refer his sentence to the Court of Appeal. The sentences on Counts 1, 2 and 3 were quashed and the court substituted concurrent sentences of 10 years', comprising a custodial term of nine years' and an extended licence period of one year. The concurrent sentence of two years' imprisonment on Count 4 remained undisturbed.

6. He appeals against conviction by leave of the single judge.

7. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. No matter relating to the victim shall during her lifetime be included in any publication if it is likely to lead members of the public to identify that she is the victim of any of these offences. Given the familial relationships, which are relevant to a proper understanding of this case, it has been necessary to anonymise this judgment.

The Evidence

8. SR, the complainant, was born in December 1995; she was aged between five and six during the indictment period. She lived with her parents. The appellant was her natural uncle. At the relevant time he was in his mid-fifties. The appellant lived with his mother (the complainant's paternal grandmother) at her home Cardiff. The complainant and her mother regularly visited the home of the complainant's grandmother. The appellant developed a close relationship with the complainant, and she received gifts from him. She regularly played in his bedroom where he kept colouring books, a children's play tent, an exercise bicycle and various videos for her entertainment.

9. The prosecution's case was that while the complainant played in his bedroom, the appellant incited her to perform oral sex on him (Counts 1, 2 and 3) and he masturbated in front of her

(Count 4). The complainant was aged six at the time. The offences were committed, in part, within a small play tent in the appellant's bedroom while the complainant's mother and grandmother were downstairs.

10. SR's first memory of anything sexual occurring was when the appellant got his penis out over his jeans, while sitting in an armchair, and she touched it. On his instruction, she remembered her lips coming into contact with his penis, which she put in her mouth. She went on to describe it as wrinkly, weird and long. She could not recall seeing anyone else's penis prior to this.

11. They sometimes played in the tent together, when she was topless. He had a musty scent. They sat on the exercise bicycle together, the appellant touched her "down there" and they used to kiss. She performed oral sex on him, on a number of occasions.

12. She recalled a particular occasion when the appellant masturbated to ejaculation whilst she was sitting next to him; she watched because it was something she had not seen before. Generally, she recalled the appellant would "come", resulting in him being "wet". She asked him what it was. She allowed this activity to continue although she did not understand what was happening. She got used to the normality of it.

13. She said the appellant would take his penis out of his trousers rather than take his trousers off, so he was able to quickly put his penis back in if anyone were to go upstairs.

14. She thought she remembered an occasion when the appellant pushed her head down while she was performing oral sex. This hurt the back of her throat. As a result of that experience she reported – she believed to her mother – what had been happening, particularly given she did not want to go back to the appellant's address.

15. The police were first told of these events on 1 August 2002, and the complainant was interviewed on 5 August 2002 (a 50-minute Achieving Best Evidence ("ABE") interview), of which a video recording was made.

16. At that time, the complainant's father (ZR) was unsupportive of his daughter and of any steps taken to prosecute the appellant, his brother. The latter was arrested and interviewed, and he denied the offences. The play tent was forensically examined for the presence of semen, with a negative result. In December 2002, the Crown Prosecution Service made a decision not to prosecute on the basis that there was insufficient evidence, following a report on 9 October 2002 indicating that there was no forensic or medical evidence.

17. The police paper file from the 2002 investigation was stored in portacabins at Fairwater Police Station. In due course the file was damaged by water. Some of the documents became mouldy and, in 2008, a decision was taken to destroy them.

18. Other records survived. In August 2002, South Wales Police had made a referral to the Family Support Unit and there were Social Services documents which dealt with the

allegations, the history of the interviews and the response of the complainant's father to the allegations.

19. The available material included:

    a. A witness statement from Anthony Evans, a Police Officer employed at the Child Protection Unit;
    b. A two-page 'index of interview' ("The Index"), which summarised the principal allegations reported during the interview on 5 August 2002 (it is to be noted that in a typed copy this ends with the words "Asked if she can recall when it all happened" although in the original handwritten version the answer to that question is provided: "S is unclear, a couple of days off, way back, think it was last year".
    c. A complete copy of the transcript of the appellant's police interview; and
    d. The forensic science report which indicated a negative result following a test to determine whether there was semen on the play tent (it is unclear whether other items were seized).

20. Moving forwards in time, on 21 January 2016 SR went to the appellant's house and made a secret recording of the conversation she had with him. The appellant said to SR that she had led him on and that it was her fault. He indicated nothing sexual had occurred.

21. On 22 January 2016, SR requested the police to reinvestigate her complaint against the appellant.

22. On 30 January 2016, SR went back to the appellant's house and called him a "dirty paedophile".

23. The following day, 31 January 2016, the complainant's mother went missing and has not been seen since. During the investigation into her disappearance, the police discovered a document the complainant had written to her then boyfriend, in which she admitted that she had lied about, and exaggerated, what the appellant had done. This was in order to get her boyfriend's attention. She had put on "fake tears". When questioned on this issue during the trial, she said that her partner was very volatile and abusive, leading her to make these false statements.

24. There was a second ABE interview with SR on 5 July 2017. She described performing fellatio on the appellant, touching his penis and him masturbating.

25. SR gave evidence during the trial of these events, as summarised above [8] – [14].

26. JR, one of SR's uncles, gave evidence during the trial that approximately 12 years prior to the trial, while holidaying in Tenby, the appellant said words to the effect of: "All those years ago, when I had that trouble, if the worst came to the worst, I could have gone to jail but I didn't want to sign the Sex Register" and "I'm just saying if the worst came to the worst I could have done the time". JR described being shocked as they did not seem to be

the words of an "innocent man". The appellant made another comment which concerned him, namely that he had blanked out certain videos after he had showed them to SR.

27. In approximately 2015, JR told ZR (the complainant's father) about this conversation with the appellant. He said to ZR to tell the complainant that he believed she had been telling the truth.

28. ZR explained how he first became aware of the allegations after his son had asked him to "come and listen to this". He saw the complainant was crying. She told him, "(the appellant) put his wee wee in my mouth". ZR was in a terrible state and confronted the appellant, who grabbed the sideboard, sweated profusely but said nothing.

29. ZR testified that his brother, JR, told him the appellant admitted, "Yes, I did do it. You can F off". Following that conversation, ZR told the complainant that the appellant had made admissions to JR.

30. CR, the complainant's sister, was told of the allegations by her mother in the presence of the complainant.

31. Relevant to one of the issues that arose during the trial, DC Amanda Probert, the Investigating Officer, said she could not recall any suggestion that the complainant had been medically examined. She would have expected a record if this had happened.

32. The defence case was a complete denial that the acts reflected in the indictment ever occurred. The appellant denied touching the complainant in a sexual manner or asking her to touch him. He denied that he ever exposed himself to her.

33. The appellant gave evidence that SR and her mother would regularly visit him and his mother (the latter was in her 70s). As the complainant got older, she became disruptive and he put a play tent for her in his bedroom. While she played, he sat and read the newspaper. He also played with her, but he did not get into the tent. He said the complainant liked music and watching television, and he had some science fiction and children's films.

34. He remembered being told of the allegations by ZR. He described occasions when the complainant took her clothes off and danced. There had been a particular visit when the complainant was skipping and bouncing about; he noticed that she had taken her top off. He told her that this was wrong and she should put it back on again. He testified that she was never naked in front of him. Once when he was sitting on the sofa, the complainant hugged and kissed him and put her hand on his crotch. Her mother was present and he said nothing about what had happened although it unnerved him. At the time, he thought it was an accident. The complainant was fond of being kissed on the lips, and he regularly kissed her in this way. Although at the time he did not think it was inappropriate, in retrospect he wondered whether there had been too many hugs and kisses.

35. He denied having a conversation with JR about blanking videos. He accepted going on holiday with JR to Tenby but denied saying he could do a prison sentence but could not sign the Sex Register.

36. He said he had no contact with the complainant between 2003 and 2016, when she turned up at his house unannounced. He was unaware she recorded their conversation.

37. He testified that he looked back at his relationship with the complainant with fondness. The allegations had come out of the blue. He suggested he used to tell her off if she was misbehaving and had done so a few days before the allegations were made for misbehaving in a shop. Once the allegations were made, her visits to him stopped. He concluded she had problems and was a mixed up six-year old.

38. He had been shocked to see her at his door in 2016.

The Appellant's Submissions on the Missing Evidence

39. Mr Mark Cotter Q.C., on behalf of the appellant, has highlighted a number of issues that he submits arise out of the lost material.

40. He suggests that the Index of Interview raises a number of questions. As recorded in the Index, when SR was first asked about what she told her father, she is recorded as having said "sex what happened with my brother". This truncated version of the ABE interview does not contain any follow-on questions on this issue. It is argued this is an "extremely troubling" answer, given the appellant is not implicated at that stage. Mr Cotter submits that this subject would inevitably have been explored during the first ABE interview, potentially enabling him to contend that SR had attributed inappropriate sexual activity on the brother's part to the appellant. He would have sought, additionally, to enquire as to whether she had earlier sexual knowledge from others, thereby giving her the knowledge to invent allegations against the appellant.

41. SR is recorded in the Index as having said "I kissed him on the lips before. Dad told me not to only on the head." In a similar vein, there is not record of whether this was pursued in questioning in 2002. It is not clear in the shortened record of the ABE interview whether SR was talking about her brother rather than the appellant at this stage.

42. During the appellant's interview during 2002, various observations are made to him by the interviewing officer that appear to be based on SR's original ABE, as follows:

> "[SR] is saying that in the tent that she's been asked to suck your penis, which she has done. She's then explained that something's come out of the top of your willy, or your peep peep hole."
>
> "[SR] also mentioned a sexual encounter where again she's been asked to suck your willy… on the settee."

43. It is suggested that these comments give the impression that SR is describing two specific instances of fellatio in different locations. Without the full the original ABE, it is impossible to know if this assumption is correct.

44. Additionally, during his 2002 interview under caution, the appellant was asked:

> "Have you ever asked [SR] to remove her, what she calls her knickers, her underclothes?"
>
> "Whilst you've been in the tent with [SR] have you ever kissed her… cos she's saying that you've actually asked for a kiss in the tent."

45. It is suggested that these questions appear to have been based on the 2002 ABE, but they are not reflected in the Index and they do not form part of SR's account in the more recent ABE. This gives rise, it is submitted, to a clear inference that the ABE in 2002 is inconsistent with the ABE from 2017 but this could not be properly explored during the trial.

46. The brief summary of SR's allegations in the Family Support Unit materials includes her saying: "She also states that he was lying in bed naked with no blankets on himself talking to her". Again, this is not included in the Index and it was not referred to in the 2017 ABE.

47. During appellant's 2002 interview, an officer asked: "Right so we've seized a number of videos. How many videos have you got in your collection?". The appellant replied there were a large number and that up to sixteen were "recordable" (rather than pre-recorded). In the Index, SR is reported as saying that she watched a Pinocchio video at the appellant's address, which she borrowed. In interview, the appellant accepted that she had borrowed a Pinocchio video. By contrast, during the 2017 ABE SR stated that she watched a video from the Alien series in the appellant's room, which contained a sex scene. The results of any further enquiries in relation to the videos is unknown. It is submitted it is likely that this issue would have been explored during the 2002 ABE interview.

48. A CPU 4 form from social services, relating to the investigation, refers to minutes from a strategy meeting on 21 August 2002. Decisions from the meeting include, first, establishing the date of SR's medical examination and who conducted it and, second, any information regarding SR's mother and what part she played (if any) during the police investigation and the medical examination. Mr Cotter argues that these matters cannot now properly be explored.

49. In the South Wales Police Notification Referral (FSU/1), an entry dated 17 September 2002 records "I informed Bob Cummins of information that had come to light in the case conference on 16th September 2002. [SR] has witnessed her parents having sex." Mr Cotter submits this report is troubling, particularly when linked to the reference in the Index to sex happening with her brother. It is suggested that none of this could properly be examined, investigated or verified during the trial.

50. There is no record of what was seized from the appellant's address, nor is there an account as to the outcome of any examination, apart from the play tent. However, in FSU/1 there is an entry dated 9 October 2002: "[c]ontact made with DC Paul Williams, the forensic examination of items (sic) taken possession of has proved negative", suggesting that more than just the play tent was sent off for some form of examination. There is no record of which items may have been involved.

51. The CPU 4 form from social services records minutes from a strategy meeting on 21August 2002 and sets out at paragraph 6: "[SR] had disclosed to her brother […] that her uncle had made her "suck his dick" and kissed her in the bedroom a few weeks ago. This is inconsistent with her 2017 ABE, where she recalls telling her mother first and then her sister.

52. In the same document, relating to a meeting on 3 September 2002 (paragraph 7), it is stated "[SR] has been interviewed… and gave very detailed information about the assault." There was an earlier, seemingly contradictory entry dated 7 August 2002 within a recording sheet attached to the end of the document which relates to a telephone call with DC Amanda Probert: "Amanda and colleague, Tony Evans, interviewed [SR] yesterday and although [she] failed to disclose and the medical evidence is unsupportive of sexual abuse, both Amanda and Tony were concerned by [her father's] attitude towards police and his daughter." These two entries are seemingly inconsistent.

53. The relevant occurrence report recites: "Have received return of CPS file signed by Senior Prosecution Officer Mr Peoples stating that due to lack of forensic and medical evidence he suggests that no further action should be taken against [the appellant]." There is no information as to what, if any, medical evidence was sought, although it is noted that in her 2017 ABE SR said she first reported the appellant's behaviour when he hurt her throat. Additionally, the social services recording note sets out "[the appellant] is to be arrested and interviewed today but Amanda found [SR's] evidence was so tainted that the case will not proceed."

54. It is suggested there is a lack of clarity as to the medical evidence to which there is reference and to understanding in which way SR's evidence was considered to be tainted. Ms Probert does not now recall referring to the evidence as tainted, or the possible basis for such a suggestion.

55. It is submitted that the absence of the 2002 ABE interview and the police file causes substantial prejudice to the appellant, such that a fair trial is impossible. Mr Cotter suggests the missing material contained information that had the potential to be highly relevant to the issues in the case, particularly as to SR's accuracy and credibility. It is argued that in an historic sex case, following the legislative removal of the requirement for corroboration,[1] the absence of such material places the appellant at a serious disadvantage. It is contended that SR's evidence cannot now be properly tested.

[1] Section 32 Criminal Justice and Public Order Act 1994

56. These offences are alleged to have occurred when SR was taken by her mother to the address where the appellant lived with his mother. The latter died in 2010 and, as set out above, SR's mother went missing on 31 January 2016. Any account from them as to what happened during these visits is now unavailable.

57. Against that background, Mr Cotter contends this was not a strong case.

The Ruling on the Abuse Application

58. Mr Cotter raised many of the submissions set out above before the judge, arguing that the prosecution should be stayed as abuse of the process of the court. The judge ruled that it was possible for the appellant to have a fair trial. He highlighted that there were a number of contemporaneous documents going back to 2002 which described what had been said by the complainant and others at that time. The gist of SR's original account was set out in the brief extract of the ABE interview, together with the allegations that had been put to the appellant in his interview. There was material from SR's father and uncle which could be explored during the trial, and there was a significant amount of detail – set out above – on which reliance could be placed as regards SR's credibility.

59. There were particular matters about which there was uncertainty because documents or potential witnesses were unavailable, but the judge concluded there was sufficient information to enable proper exploration of the issues in the case, ensuring the appellant would have a fair trial.

60. The judge reviewed the position following SR's evidence and his decision was unchanged, notwithstanding the regrettable loss of potential evidence.

The Respondent's Submissions

61. On behalf of the Crown, Caroline Rees Q.C. submits that the judge's rulings on abuse of process were impeccable and his conclusion was correct. It is suggested that the trial process provided the appellant a proper opportunity to explore the gravamen of the issues raised in the case.

62. Any prejudice potentially caused to the appellant was properly addressed, including by way of a carefully tailored direction in the summing up.

63. In all the circumstances, there were no substantive grounds to justify granting a stay of the indictment on grounds of abuse of process.

The Directions to the Jury

64. The judge directed the jury on this issue as follows:

> "Now in this case there is no doubt that the original police paper file was destroyed. It became mouldy from water damage and as a result was, along with other files, destroyed.

> The video recording of the 2002 interview of (SR) has been lost so that all that remains of that is the typed up notes of the officer who was observing the interview and we know from the length of the interview, which I think was 50 minutes, and the fact that the notes are contained within two sides of paper that many, many more observations, many more things were said than appears in those notes and that has been lost.
>
> We do have the transcripts of the defendant's interview at that time, the police in, in his interview under caution to the police and we do have certain documents. Those documents arise from the fact that because of the childcare concerns there was a sharing of documentation with Social Services who of course have responsibility for childcare matters and so there is documentation relating to the liaison between the police and the Social Services but what is there is described by counsel for the defence as fragments, or fragmentary and there is no doubt that other documents have been lost.
>
> The contents of those documents is unknown. There are, going back to the 2002 investigation, there's a considerable doubt about the medical evidence. We don't know for certain that she was examined, I think the inferences is that she was but we don't, we have no medical notes, we don't know for what the doctor was looking but we, we do know that it was negative in the sense that there was nothing that was probative of the defendant's guilt.
>
> We know that these video tapes were taken. We don't know what was on them, what was on them was clearly not probative of guilt. We know that there were forensic tests carried out in respect of the tent and those were negative but undoubtedly there would have been other matters explored, family members who, to whom the complainant had initially been made, on would have expected to have been the subject of a statement. If they were, that has gone.
>
> Matters have been raised which counsel says one might have expected to have been explored with members of the family If they were, there is no record of it. So take that into account when considering whether the defendant has been placed at a real disadvantage when deciding whether the prosecution has satisfied you of his guilt."

Discussion

65. It is important to have in mind the wide variations in the evidence relied on in support of prosecutions: no two trials are the same, and the type, quantity and quality of the evidence differs greatly between cases. Fairness does not require a minimum number of witnesses to be called. Nor is it necessary for documentary, expert or forensic evidence to be available, against which the credibility and reliability of the prosecution witnesses can be evaluated. Some cases involve consideration of a vast amount of documentation or expert/forensic evidence whilst in others the jury is essentially asked to decide between the oral testimony of two or more witnesses, often simply the complainant and the accused. Furthermore, there is no rule that if material has become unavailable, that of itself means the trial is unfair because, for instance, a relevant avenue of enquiry can no longer be explored with the

benefit of the missing documents or records. It follows that there is no presumption that extraneous material must be available to enable the defendant to test the reliability of the oral testimony of one or more of the prosecution's witnesses. In some instances, this opportunity exists; in others it does not. It is to be regretted if relevant records become unavailable, but when this happens the effect may be to put the defendant closer to the position of many accused whose trial turns on a decision by the jury as to whether they are sure of the oral evidence of the prosecution witness or witnesses, absent other substantive information by which their testimony can be tested.

66. In a case such as the present, the question of whether the defendant can receive a fair trial when relevant material has been accidentally destroyed will depend on the particular circumstances of the case, the focus being on the nature and extent of the prejudice to the defendant. A careful judicial direction, in many instances, will operate to ensure the integrity of the proceedings. This general statement is not meant to preclude the possibility that a fair trial may sometimes be unachievable when relevant material cannot be deployed (see, for instance, *R v Anver Daud Sheikh* [2006] EWCA Crim 2625). But we stress that the strength and the utility of the judge's direction is that it focuses the jury's attention on the critical issues that they need to have in mind.

67. It is useful to have in mind the guidance given by this court on this issue in earlier appeals. In *R. (Ebrahim) v Feltham Magistrates' Court* [2001] 2 Cr App R 23, Brooke LJ observed that "(t)he circumstances in which any court will be able to conclude, with sufficient reasons, that a trial of a defendant will inevitably be unfair are likely to be few and far between" [26]. He continued:

> 27. It must be remembered that it is a commonplace in criminal trials for a defendant to rely on "holes" in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence.

68. Gross LJ in *DPP v Fell* [2013] EWHC 562 (Admin) at [15]), observed:

> […] the burden of proof is on the party seeking a stay; the standard of proof is a balance of probabilities, the civil standard. The party seeking a stay must make good to the civil standard that, owing to the missing evidence, he will suffer serious prejudice to the extent that no fair trial can be held and that, accordingly, the continuance of the prosecution would amount to a misuse of the process of the court. […] the grant of the stay in a case such as this is exceptional. It is, effectively, a measure of last resort. It caters for and only for those cases which cannot be accommodated with all their imperfections within the trial process. It is of course a

> very different situation where evidence has gone missing through some serious culpability or bad faith on the part of the prosecutor or investigator […].

69. Treacy LJ in *R v R.D.* [2013] EWCA Crim 1592 emphasised the precise nature of the relevant questions when evidence is missing:

> 15. In considering the question of prejudice to the defence, it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of the missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to a defendant.

70. In *R v Allan (Christopher Mero)* 2017 EWCA Crim 2396, a case of attempted rape and sexual assault in which a considerable quantity of documentation, including exhibits, went missing before trial, and against the background that there was clear DNA evidence implicating the accused, Simon LJ observed:

> 29. The central question was whether there could be fair trial for both parties bearing in mind that the trial process is usually able to address the sort of problems that arises from this type of issue. The burden was on the defence to show, on the balance of probabilities, the applicant would suffer serious prejudice to such an extent that a trial would not be fair. The trial judge was the person best placed to assess such issues and plainly adopted the proper legal approach to the question of unfairness.
>
> 30. In our view, she was plainly correct in her conclusion that the DNA analysis was a firm evidential basis for the prosecution case. The defence was able to put before the jury the agreed facts in relation to the missing evidence "the holes in the prosecution case" to use the phrase of Brooke LJ in *Ebrahim*. They were able to cross-examine as to why material was mislaid or was otherwise no longer available. They were able to address the jury on these matters, and there was nothing in the missing evidence which might "taint" the DNA evidence.

71. It is clear that imposing a stay in situations of missing records is not a step that will be taken lightly; it will only occur when the trial process, including the judge's directions, is unable adequately to deal with the prejudice caused to the defence by the absence of the materials that have been lost. The court should not engage in speculation as to what evidence might have become unavailable but instead it should focus on any "missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case" (per Treacy LJ [67] above).

72. In this case, notwithstanding the records that had been destroyed, the appellant was in possession of a substantial amount of material that could be used to test the reliability and credibility of the complainant. The contents of the Index (which was a summary of the ABE interview), the paucity of the forensic evidence, the initial allegation against SR's brother, the clear contradictions in the complainant's emerging account, the admission of lies to her boyfriend and the assessment in 2002 by a key officer that SR's evidence was so tainted that the case would not proceed are all no more than key examples of the substantial information that was available to help the jury evaluate SR's account. There was, therefore, extraneous evidence of real substance to assist the jury assess whether her account was to be accepted. Indeed, it might be said that Mr Cotter had available to him significantly more material to be deployed during cross-examination than is often the case during the trial of sexual allegations of this kind.

73. The judge's directions to the jury should include the need for them to be aware that the lost material, as identified, may have put the defendant at a serious disadvantage, in that documents and other materials he would have wished to deploy had been destroyed. Critically, the jury should be directed to take this prejudice to the defendant into account when considering whether the prosecution had been able to prove, so that they are sure, that he or she is guilty. The judge gave an impeccable direction to this effect, of which there is no criticism by Mr Cotter.

74. We reiterate that it is always to be regretted when material relevant to a prosecution is inadvertently destroyed – the prosecution have a critical responsibility to store case records safely – but we are wholly confident the defendant in this case received a fair trial, given most particularly the judge's exemplary approach to the issue of the lost documents.

75. For these reasons this appeal is dismissed.