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Case No: 2022 00018 B1
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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT SITTING AT CROYDON
HIS HONOUR JUDGE GOWER KC
Ind. No. T20217159

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2022

Before:

LADY JUSTICE ANDREWS
MRS JUSTICE MCGOWAN
and
HIS HONOUR JUDGE FLEWITT KC

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Between :

RK	**Appellant**
- and -	
THE KING	**Respondent**

- -
- -

Ms T Panagiotopoulou (instructed by **Duncan Lewis**) for the **Appellant**
Mr T Woods (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 10 November 2022

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Approved Judgment

The provisions of the Sexual Offences (Amendment) Act 1992 apply. Accordingly no matter relating to the complainant shall during her lifetime be included in any publication if it is likely to lead members of the public to identify her as the victim of this offence. This prohibition applies unless it is waived or lifted in accordance with s.3 of the Act. In the light of the relationship between the appellant and the complainant, the Court has directed that he be anonymised in any report of the judgment.

Lady Justice Andrews:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Accordingly, no matter shall be included in any publication if it is likely to lead members of the public to identify the complainant as the victim of this offence. This prohibition will last throughout her lifetime unless waived or lifted in accordance with section 3 of the Act.

2. On 26 November 2021, following a trial in the Crown Court at Croydon before HH Judge Gower KC and a jury, the appellant (to whom we will refer as RK) was convicted of one count of rape of a child under 13, contrary to s.5(1) of the Sexual Offences Act 2003. The complainant is RK's daughter, to whom we will refer as "Susan". She was 10 years old at the time of the offence.

3. On 25 January 2022, RK was sentenced to an extended sentence of 20 years, comprising a custodial term of 15 years imprisonment and an extended licence period of five years. He appeals against both his conviction and his sentence by leave of the single judge.

Background

4. RK is the holder of a UK passport. He frequently travels between the UK and Nigeria. Susan was born in Nigeria in 2001, but when she was two years old her mother abandoned her. She was brought up by her paternal grandparents in Nigeria until 2006, when her father arranged for her to travel to the UK to live with him. Shortly after her arrival, he married a woman with whom she did not get on. The couple went on to have a child together.

5. In January 2009, RK was sentenced to 12 months' imprisonment after pleading guilty to assaulting Susan occasioning her actual bodily harm. That offence was committed in July 2008, on the day before Susan's seventh birthday. In consequence of this incident, Susan was taken into care. She was returned to the custody of RK in early May 2011. Social services continued to be involved with the family, who by then were living in a flat in Croydon. By the end of September 2011 RK's marriage had broken down and his wife left with their child, leaving RK alone in the flat with Susan.

6. At some stage thereafter RK changed the family name. In January 2012 he took Susan back to Nigeria with him to live. There, he entered into a new relationship with a lady whom we shall call "Mary". Susan liked Mary very much and regarded her as a mother figure. Susan was sent away to boarding school and only came back for school holidays. In October 2017, RK decided to leave Mary to return to the UK and rekindle his relationship with his estranged wife. Susan did not go with him. She claimed that after RK had left Mary, and Susan had returned to live with her grandparents, her father tried to get her to leave her grandparents and return to him. When she refused he arranged for her to be kidnapped, apparently with a view to sending her to a military school. It was only thanks to the efforts made by an uncle that she was able to escape.

7. In January 2018, having obtained emergency travel documentation through the British Council in Nigeria, Susan travelled to the UK on her own, intending to stay with

another family member. She was 16 years old. When she was asked by UK border force officials why she was an unaccompanied minor, she alleged that her father (who retained her passport) had raped her in the period between September and December 2011 when they were living on their own in the flat in Croydon. Susan was spoken to by the police in March 2018. There was then a delay whilst Susan made her mind up whether she wished to support a prosecution for that offence. She decided in July 2018 that she did, and provided her account of the incident by way of an ABE interview in August 2018.

8. In the course of that interview Susan stated that after his wife and the other child left the property in Croydon her father began to act differently towards her. She said that "he would touch me" and that "he sexually abused me". She described the rape as occurring on one occasion only, on a bed in the sitting room of the flat, but she also made reference to being raped by her father on "one or two" occasions after he had taken her back to live in Nigeria. She said that he also sexually assaulted her there. She said that she eventually told Mary, who took her to her grandmother, and the police in Nigeria were informed, but did nothing in response to the report.

9. RK was arrested on entering the UK from Nigeria on 12 September 2018. In interview, RK denied the rape in Croydon, claiming that the allegation was malicious and prompted by Susan's desire for revenge on him for his decision to break up the family home and leave his partner Mary in Nigeria to renew his relationship with his wife, whom Susan disliked. He also suggested that his mother, with whom he had recently fallen out, was instrumental in encouraging Susan to make the false claim. He accepted that he was aware of the allegation of rape because it had been made in Nigeria, and he had found out about it some months earlier when he visited the police station for unrelated reasons.

10. Susan's allegations about her father's sexual conduct towards her in Nigeria were not taken further at the time when they were made. However, a second ABE interview was carried out on 17 October 2020 which dealt specifically with the Nigerian allegations. Susan described in some detail an occasion when she was around 12 or 13 years old on which her father raped her in the family home. She said that it happened "a few times" and at another point "twice" but gave no specific details in relation to the other occasions. She did however describe a specific occasion when her father was in the same bed as her in a hotel when he touched her breasts. She also said there were occasions when he put his fingers inside her vagina and rubbed the top part of it.

The application to adduce bad character evidence

11. On the first day of the trial, 17 November 2021, the Judge heard legal argument on an application made by the Prosecution to admit as bad character evidence under s.101(1)(d) of the Criminal Justice Act 2003 the allegations by Susan of what happened to her in Nigeria. Notice of that application had been given to RK's legal representatives on 19 October 2021. They had had the tapes of Susan's ABE interviews since July 2021, but an earlier "bad character" application served by the Prosecution in August 2021 had been confined to seeking the admission of RK's conviction for assault occasioning actual bodily harm and allegations of other physical violence by him towards Susan.

12. The defence served a notice in opposition to the October 2021 bad character application on 14 November 2021. In it they said as follows:

> *The complainant states that all allegations of rape were reported to the police in Nigeria but no action was taken. The defendant in his recently served interview stated that he had become aware of an allegation of rape made by the complainant as police in Nigeria informed him that such an allegation had been made (through [Mary] his ex-partner). He vehemently denied the allegation and expressed suspicion as to the timing of the report – which followed the defendant informing the complainant and Mary that his relationship with Mary had come to an end.*

13. The reasons for objection were set out as follows:

> *a. The defendant has faced no charges in relation to this alleged offence/these alleged offences; the prosecution made a deliberate decision not to prosecute this defendant and it was not until 13 October 2021 that a decision was taken to attempt to rely on this evidence as bad character evidence.*
>
> *b. It follows that in order for such allegations to be considered by the jury as probative of whether the defendant had a propensity to commit rape, the jury would have to be satisfied to the criminal standard of proof that the defendant had committed that other/those other rapes as a precondition of their relying on them as establishing propensity;*
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> *c. The admission of this evidence would necessitate the litigation of satellite issues which will complicate the issues the jury will have to decide.*
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> *d. The source of such alleged reprehensible conduct is the complainant herself, with no other independent supporting evidence; the situation is wholly different to cases where defendants face untried allegations by other complainants which could, if admitted as bad character, and provided s.109 was not engaged, be treated as cross-admissible evidence.*
>
> *e. In the circumstances, the admission of such evidence would be unfair to the defendant – the court is invited to exclude such evidence under s.101(3) and/or s.78 (of PACE).*

14. It should be noted that nowhere in the grounds of opposition was there any suggestion that the admission of the evidence would necessitate an adjournment of the trial, nor that RK would be unable to defend himself fairly against the further allegations because of the need, for example, to carry out further inquiries in Nigeria. Indeed the argument that the admission of the evidence would lead to "satellite litigation" is premised on the assumption that the allegations could be tried.

15. The Judge decided to admit the evidence. He gave his reasons in a careful written ruling. He described the decision not to charge RK with offences reflecting the allegations of what he did in Nigeria as "seriously flawed" but he said that it had been made clear to him that there was no prospect of that decision being reversed. After rehearsing the rival arguments put forward by counsel, he said that the evidence was admissible through the s.101(1)(d) gateway on the basis that it was capable of establishing that the defendant had the propensity for which the prosecution contended, namely to force himself sexually upon his daughter, which in turn was relevant to the central question in the case, which was whether he raped his daughter in this country. The fact that the allegations about what happened in Nigeria post-dated the alleged rape in this country was not a bar to its admissibility. The gap in time was not that great even in the context of the life of a child. What mattered was that the evidence was capable of establishing that the defendant had the alleged propensity at the time of the alleged offence.

16. The Judge did not consider that the fact that the prosecution took the decision not to charge RK in relation to the Nigerian allegations would be a bar to its admissibility. He referred to the decision in *R v Nguyen* [2008] EWCA Crim 585, and particularly the observations at [34]. In that case the Court of Appeal (Criminal Division) rejected the contention that a defendant was necessarily worse off if the evidence is admitted under s.101(1)(d) instead of being made the subject of prosecution and trial. It said that if there is no suggestion of bad faith, then the reason why the Crown decides to adopt the s.101(1)(d) route rather than prosecute has little if any relevance. If the evidence was relevant then it was in principle admissible, unless its admission had such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.

17. The Judge also referred to the case of *R v Mitchell*, [2016] UKSC 55, in which the Supreme Court considered a number of authorities, including *Nguyen*, and held that the proper issue for the jury on the question of propensity is whether they are sure that the propensity is proved. He said he proposed to direct the jury accordingly. He pointed out (correctly) that if the Nigerian allegations had been included as charges on the indictment, the jury would have been directed that their verdicts on each of the other counts need not be the same as that in respect of the alleged Croydon rape. The fact that the sole source of the bad character evidence was the complainant herself was immaterial. The Judge dismissed any concerns about satellite litigation, on the basis that the source of the bad character evidence was the same as that in respect of the rape allegation which was on the indictment, and gave rise to the same central issue.

18. An issue raised by the defence concerning the ambit of the complaint made by Susan to the Nigerian authorities was described by the Judge as discrete and peripheral. He pointed out that in any event, the defence case was that she had reported the rape which was the subject of the indictment. The Judge described as "speculative in the extreme" the suggestion that the defendant's lawyers in Nigeria might be able to track down documentation relating to the complaint which Susan made to the Nigerian authorities, in circumstances in which enquiries by the police in this country had yielded nothing. The lateness of the application to admit the evidence, and the fact that RK was not interviewed about the Nigerian allegations, had not put him at any tangible disadvantage. The defence case was straightforward – namely that the

allegations were fabricated – and did not depend on small details that RK might have forgotten at the time of his police interview, which in any event took place a number of years after the alleged events.

19. The Judge concluded that the admission of the evidence imposed no real unfairness on the defendant and that it would be inappropriate to exclude it; he also took the view that there was a risk of real unfairness to the complainant if the jury were not to hear this evidence and as a result be presented with an incomplete or partial picture of what she said happened. Ultimately it would be for them to decide whether she was truthful and reliable, but it was better for them to make that decision on the basis of a complete account.

The Appeal against Conviction

20. On behalf of RK, Ms Panagiotopoulou submitted that the evidence, though potentially admissible as evidence of the propensity alleged by the prosecution, had such an adverse effect on the fairness of the proceedings that it ought to have been excluded. She accepted that the defence had been aware since July or August 2021 of the allegations made by Susan about what happened in Nigeria, but pointed out that the prosecution had chosen to confine the original bad character application to the previous conviction for assault on Susan and other allegations of physical assault. She contended that because of this, there was no reason for the defence to investigate the Nigerian allegations in August 2021, because the inference could properly be drawn that the prosecution was not going to seek to rely on them. That does not explain why, in a case turning on the complainant's credibility, the defence would not have wished to find out for themselves whether these further allegations gave rise to a basis for impugning it.

21. Ms Panagiotopoulou sought to distinguish the case of *Nguyen* on the basis that in that case there were two complainants whereas in this case there was one. Therefore it could not be submitted that (in the absence of collusion) there was unlikely to be a coincidence that two different people were complaining about the same or similar behaviour. Whilst that is true as far as it goes, it does not follow that evidence of a pattern of similar behaviour is not potentially probative of propensity just because it emanated from a single source. The Judge rightly gave that submission short shrift. As he pointed out, the whole case turned on the complainant's credibility.

22. In any event, this submission did not establish that there would be any prejudice to a fair trial by admitting the evidence. The jury would have to assess the credibility of the witness taken in the round, and the cross-examination would proceed on the basis that she was fabricating all the allegations. The Judge gave them directions on how they should approach the evidence of propensity, including that they could not regard the evidence as providing any support for the prosecution's case unless they were sure that Susan's account of sexual abuse in Nigeria was an essentially truthful one and that RK's behaviour revealed a propensity to force himself sexually on her. However, even if they were sure that RK had raped Susan in Nigeria on at least one occasion, that evidence did not, by itself, prove that he was guilty and they should not place undue reliance upon it, and could not convict him just, or even mainly, because of it. Those directions were exemplary, and arguably went further than required by *Mitchell*.

23. When pressed as to what the unfairness to her client was, Ms Panagiotopoulou said that the date on which Susan made the complaint to the Nigerian police was contentious. RK said that he found out about it in 2017 (after his split from Mary) when he and a lawyer had visited the police station in Nigeria to make a complaint concerning his mother. Susan had suggested that the report was made a year or so earlier. The lawyer would be able to give evidence as to what the Nigerian police told them about the ambit of Susan's complaint and when it was made to them. Susan also claimed that the incident in the hotel (which, under cross-examination, she alleged was a full rape and not a sexual assault as she had said in her second ABE interview) occurred in a different state in Nigeria when she and RK were visiting a cousin, and RK said there was no such visit at that time, as the cousin could confirm.

24. Ms Panagiotopoulou said that it only emerged in the course of evidence from the officer in the case at trial that the enquiries made by the police of the police in Nigeria relating to Susan's report had consisted of just two emails, sent around a year apart, the earlier of which was sent to the wrong email address. The email that was sent to the correct address was not responded to. She described those efforts as "half-hearted". Those instructing her would have tried harder; they could have instructed inquiry agents in Nigeria to look into the police report or possibly flown out to Nigeria themselves. They might also have wanted to ask questions of the British Council about what Susan said at the time when she obtained her emergency travel document.

25. Mr Woods, who prosecuted the case at trial, told the Court that when he came into the case, which was at a fairly late stage, he took the view that an application to include the Nigerian allegations as counts on the indictment would have precipitated a defence application for an adjournment in order to make further inquiries in answer to the allegations. He accepted the logical force of the point that if the defence could not have answered new counts on the indictment without an adjournment, they would not have been able to answer the same allegations without an adjournment even if they were not put on the indictment. In hindsight, he said that the decision he took may not have been correct. He submitted that in the event there was no evidence that RK could not fairly deal with the Nigerian allegations at trial.

26. Mr Woods pointed out that the defence had known of the bad character application for a month prior to the trial, and of the allegations themselves for longer than that, but their notice in opposition had not suggested that there would be a need for an adjournment for further investigations to be carried out in Nigeria. The defence made no request for further disclosure by the prosecution. Moreover, there was nothing to stop inquiries being made of the lawyer or the cousin at any stage, even during the trial. Tellingly, no application had been made to introduce evidence from either of them (or from any other source in Nigeria) as fresh evidence on this appeal.

27. In our judgment, the Judge was not only entitled to allow the application for the reasons that he gave, but right to do so. There is no evidence of prejudice to the defence that would have a materially adverse effect upon the fairness of the trial. It is highly speculative to suggest that further inquiries in Nigeria might have revealed more documentation or evidence which would have assisted the defence in attacking Susan's credibility further than they were able to at trial. If the cousin had been able to confirm that there was no visit at the time when Susan said there was, that confirmation could easily have been obtained by contacting him or her by telephone

or email. Likewise, it should have been relatively straightforward for RK's solicitors to contact the Nigerian lawyer who accompanied RK to the police station to obtain his account of what the police told them, or a copy of any attendance note he made.

28. Given the lapse of time between Susan's report to the Nigerian police and the trial it seems unlikely that the defence would have had any better prospect of obtaining information from the Nigerian police directly than their English counterparts did when they made their inquiries in September 2018 and August 2019. Enquiries from the British Council would be unlikely to assist the defence to any material extent even if they revealed that Susan only told them of the Croydon rape. Ms Panagiotopoulou was unable to satisfy us that in the absence of an adjournment (which the defence did not seek) or further enquiries, RK could not properly respond to these allegations.

29. Ms Panagiotopoulou sensibly did not press the complaints she had made in her written Advice and Grounds about the Judge's summing up. She accepted that he fairly summarised the evidence of the witnesses. Although she criticised the Judge for allegedly failing to highlight all the inconsistencies in Susan's evidence, counsel accepted that he did specifically mention the change in her account of the second incident in Nigeria from one of sexual touching in her second ABE interview to one of rape when she gave her evidence in court, and her explanation for it. Ms Panagiotopoulou also accepted that she had already highlighted all the aspects of Susan's evidence on which the defence sought to rely, in the course of her closing speech to the jury, which immediately preceded the part of the Judge's summing-up which dealt with the evidence.

30. For all these reasons, the conviction is safe and the appeal against conviction is dismissed.

The Appeal against Sentence

31. Ms Panagiotopoulou quite rightly did not seek to renew a ground refused by the single judge complaining of the finding of dangerousness.

32. It was common ground that this offence fell into category A culpability in the Definitive Sentencing Guideline for rape of a child under 13 because of the abuse of trust. The issue was whether the Judge erred in placing it within category 2 on the basis that Susan was "particularly vulnerable" due to personal circumstances.

33. In our judgment he was entitled to do so for the reasons that he gave. Susan had been subjected to physical violence at the hands of her father which had led to her being taken into foster care for a period; her mother had left the family home when she was two years old, and at the time of the offence she had no mother figure or equivalent that she could turn to for help. The fact that she was still under the care of social services at the time did not negate her particular vulnerability.

34. Therefore the Judge did not err in the categorisation of the offending; the real issue was whether he was justified in elevating the starting point of 13 years to a custodial term of 15 years after balancing the various aggravating and mitigating factors that he identified. He regarded it as an aggravating feature that RK permanently removed Susan from the UK in January 2012 which he found was because RK wanted to minimise the risk of her telling anyone in this country what he had done to her. He

spoke of the "speed and suddenness" with which RK uprooted her from school and took her out of the jurisdiction. He described the effects on Susan of what he had done to her as "profound and enduring", referring to her victim personal statement. He also referred to RK's previous convictions, although none were for sexual offences. He stated that he treated the conviction for assault on Susan for which RK went to prison as an aggravating feature. He took into account such mitigation as existed, chiefly the delay.

35. Ms Panagiotopoulou argued that as the previous violence towards Susan had brought the case into category 2 in the first place, there was an element of double-counting. However, what brought the case into category 2 was the effect that the previous violence had on Susan's vulnerability at the time of the offending; it was something which, together with the other factors the Judge identified, made her more vulnerable than other 10 year olds living alone with the offending parent. The conviction for violence towards her was an independent aggravating factor in terms of the offender's culpability for the offence.

36. The Judge was plainly entitled to move upwards from the starting point within the category because of the deliberate decision to remove the child from the jurisdiction to Nigeria within a short time after the offence occurred, in order to minimise the chances of her telling anyone. He identified and took into account all other relevant aggravating factors and such mitigating factors as existed. Standing back and looking at the sentence as a whole, whilst 15 years was perhaps towards the upper end of the available sentencing range for this single offence, and other judges might have imposed a custodial period that was nearer to the starting point, we are not persuaded that the term that this experienced judge chose was wrong in principle nor that it was manifestly excessive. For these reasons the appeal against sentence is also dismissed.