[2020 Gib LR 467]

LAGUEA v. R.

COURT OF APPEAL (Kay, P., Smith and Elias, JJ.A.): December 7th, 2020

Criminal Law—sexual offences—historic child sexual abuse—offender charged under Crimes Act 2011 in respect of offences before commencement of Act if "equivalent offence" under repealed Criminal Offences Act 1960—rape of child (2011 Act, s.217) equivalent to unlawful sexual intercourse with girl under 13 (1960 Act, s.107(1))—oral penetration of child (2011 Act, s.217 or s.220(1)) equivalent to indecent assault or indecent conduct towards child (1960 Act, s.117 or s.119)

The appellant was charged with five offences relating to the sexual abuse of a child.

It was alleged that the appellant had sexually abused the victim over a period beginning before November 2012 up to her thirteenth birthday in May 2013. The appellant was charged with two counts of vaginal penetration (Counts 1 and 2) and three counts of oral penetration (Counts 3 to 5). Count 1 related to the first occasion on which it was alleged that vaginal penetration occurred (which was some time between January and October 2011). Count 2 reflected an allegation that vaginal penetration occurred on numerous occasions thereafter, until May 2013. Count 3 was concerned with the first occurrence of oral penetration, which was said to have occurred in a car park between May 22nd, 2008 and November 23rd, 2012. Court 4 was a specimen count reflecting an allegation that oral penetration occurred on numerous subsequent occasions between those

dates. Count 5 represented an allegation of further acts of oral penetration between November 23rd, 2012 and May 2013.

On November 23rd, 2012, the Criminal Offences Act 1960 was replaced by the Crimes Act 2011. Under the 1960 Act, an offence of vaginal penetration of a child came under s.107(1), being "unlawful sexual intercourse with a girl under the age of thirteen." An offence of oral penetration came within s.117 (indecent assault) or s.119 (indecent conduct towards a child). From November 23rd, 2012, under the Crimes Act 2011, the offence under s.107(1) of the 1960 Act was replaced by the new offence of rape of a child under the age of 13, contrary to s.217, which included vaginal, oral or anal penetration. Oral penetration of a child also fell within the new offence of causing, encouraging or assisting a child under the age of 13 to engage in sexual activity pursuant to s.220(1) of the 2011 Act.

Section 601(2) of the 2011 Act provided:

"(2) If proceedings for an offence committed under any of the repealed Acts have not been commenced at the commencement of this Act—

(a) if there is an equivalent offence under this Act—proceedings must be brought under this Act;

(b) if there is no equivalent offence—proceedings cannot be brought."

The counts in the indictment were charged pursuant to the 2011 Act regardless of whether the alleged offences had been committed before or after November 23rd, 2012.

The appellant had previously been tried before the Chief Justice and a jury on an indictment containing six counts. The jury had found him not guilty on one count (of oral penetration committed between November 23rd, 2012 and the victim's 13th birthday) and returned no verdict on the other counts. A retrial was ordered. On being retried (before Ramagge Prescott, J. and a jury), the appellant was convicted on Counts 1–5. He was sentenced to 20 years' imprisonment on Counts 1 and 3, to run concurrently.

As part of the evidence in the first trial and the retrial, bad character evidence was adduced from two young women (Y and Z) describing sexual abuse by the appellant when they were children and the appellant was in a relationship with their mothers. The alleged conduct did not involve instances of penetration. Sections 369 and 371 of the Criminal Procedure and Evidence Act 2011 provided:

"369(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—

. . .

(d) it is relevant to an important matter in issue between the defendant and the prosecution . . .

. . .

(3) The court must not admit evidence under subsection (1)(d) . . . if, on an application by the defendant to exclude it, it appears to the

court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

. . .

371.(1) For the purposes of section 369(1) the matters in dispute between the defendant and the prosecution include—

(a) the question whether the defendant has a 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;

. . .

(2) If subsection (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without affecting any other way of doing so) be established by evidence that he has been convicted of—

(a) an offence of the same description as the one with which he is charged; or

(b) an offence of the same category as the one with which he is charged.

(3) Subsection (2) does not apply in the case of a particular defendant 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 for it to apply in his case."

The appellant appealed against conviction and sentence. He raised four grounds of appeal against conviction: Ground 1 concerned the form of the indictment and the legal implications of it; Ground 2 concerned, in relation to Counts 3–5, a plea of *autrefois acquit*; Ground 3 concerned bad character evidence; and Ground 4 complained about aspects of the summing up. The appellant submitted that (a) it was not lawful to indict him for offences under the 2011 Act in relation to events alleged to have taken place before the Act came into force on November 23rd, 2012; (b) the offences charged under the 2011 Act were not "equivalent offences" to those under the 1960 Act and therefore s.601(2) of the 2011 Act was not engaged; (c) while the use of specimen counts (Counts 2, 4 and 5) would be permissible in England and Wales, it was unlawful in Gibraltar; (d) in relation to the specimen counts, the trial judge failed to direct the jury that they must all be sure about the same incident of vaginal or oral penetration before they could convict on each count; (e) by finding the appellant not guilty on one count in the first trial, the jury must have rejected the allegation of oral penetration in the car park and, as that had been put forward as the first such act and the only one described in detail, it must follow that the jury's verdict meant that the jury rejected the entire history of oral penetration, hence the submission of *autrefois acquit*; (f) the bad character evidence was inadmissible as (i) the Chief Justice and the judge, when concluding that the prosecution's application fell within s.369(1)(d) of the Criminal Evidence and Procedure Act 2011, did not identify the "important matter in issue between the prosecution and the defence,"

propensity was not, without more, an important matter in issue, and proceeded to a premature consideration of relevance; (ii) the evidence did not demonstrate a propensity to commit "offences of the kind with which he is charged" (s.371(1)); (g) in the alternative, the bad character evidence should have been excluded by the judge in the exercise of her discretion, as it was fundamentally prejudicial to the fairness of the trial; (h) the judge's directions to the jury were inadequate; and (i) the sentence of 20 years' imprisonment was excessive.

Held, dismissing the appeal against conviction; allowing the appeal against sentence:

(1) It was not unlawful for the appellant to be indicted for offences under the 2011 Act in relation to events alleged to have taken place before it came into force in November 2012. Section 601(2) of the 2011 Act required the Crown to proceed under the 2011 Act when proceedings were commenced after November 22nd, 2012, provided the offence prescribed by the 2011 Act was an equivalent offence. The offences with which the appellant was charged under the 2011 Act in relation to events alleged to have occurred before it came into force, namely in Counts 1 and 2, rape of a child under 13 and, in Counts 3–4, causing a child to engage in sexual activity, were equivalent to the offences in the repealed 1960 Act of unlawful sexual intercourse with a girl under 13 (s.107) and indecent assault (s.117) or indecent conduct towards a child (s.119). While it was true that, in some respects, "rape" had been given a wider meaning by the 2011 Act, its new definition (whereby it could be committed against males as well as females; by way of vaginal, anal or oral penetration; and, in relation to a victim under the age of 13, notwithstanding consent) had changed nothing as far as the allegations in Counts 1 and 2 were concerned. The same conduct would have been equally criminal under both Acts. The same facts had to be proved and no defence which would have availed the appellant under the 1960 Act had been removed or narrowed by the 2011 Act. Similarly, acts of oral penetration with which Counts 3 and 4 were concerned would have amounted to offences under s.119 of the 1960 Act just as under s.220(1) of the 2011 Act. In neither case would the appellant have had a defence if the facts were proved (paras. 16–17).

(2) Rule 10(1) of the Indictment Rules did not prohibit specimen charges. Specimen charges were a longstanding pleading practice in Gibraltar as in England and Wales. The practice had been placed on a statutory footing in England and Wales under the Criminal Procedure Rules 2015, r.10.2(2). Although there was not a specific replication of the Criminal Procedure Rules in Gibraltar, s.4(2)(a) of the Gibraltar Criminal Procedure and Evidence Act 2011 provided "the Criminal Procedure Rules apply in Gibraltar with such modifications . . . as the circumstances of Gibraltar may require and so far only as the circumstances of Gibraltar

may permit . . .” If the Criminal Procedure Rules were needed to legitimize the pleading of specimen counts in Gibraltar, that need had been fulfilled (paras. 20–21).

(3) In relation to the specimen counts (Counts 2, 4 and 5), in the circumstances there was no risk that the jury might have convicted the appellant on different bases in respect of a particular specimen count. It was not possible on the evidence that different members of the jury would have taken different views of the several incidents forming the alleged course of conduct. Either they accepted the victim’s assertions of frequent repetition, or they did not. There was no realistic possibility of the jury being divided on the basis of their finding and there was no error in the directions given by the judge or the route to verdict which she produced to assist the jury (paras. 23–24).

(4) It was a fundamental principle of the common law that a person who had been acquitted in relation to a particular alleged offence could not be tried again for it. There were statutory exceptions but they did not arise in the present case. At the trial before the Chief Justice on an indictment containing six counts, the only verdict the jury was able to return was not guilty to a count alleging oral penetration occurring in a car park between November 23rd, 2012 and May 2013. The jury at the first trial had not, however, returned verdicts of not guilty on the remaining counts. The acquittal at the first trial only protected the appellant against further proceedings on the allegations of oral penetration to the extent of the allegation relating to the car park incident between November 23rd, 2012 and May 2013. *Autrefois acquit* was not a plea available to him at the retrial when the allegation in relation to the car park incident was that it occurred *before* November 23rd, 2012 (para. 25; para. 28; para. 32).

(5) The Criminal Evidence and Procedure Act 2011 provided a comprehensive statutory code on the admissibility of bad character evidence. Although the primary issue between the prosecution and defence was whether the victim’s account was truthful and accurate, it was permissible under the legislation for a jury to consider, in relation to that primary issue, a propensity on the part of the alleged wrongdoer to commit offences of the kind charged. The fact that the bad character evidence in the present case disclosed less serious behaviour than the offences charged was not a barrier to admissibility. What was required was a careful analysis by the trial judge of what the evidence, if accepted, might establish in relation to propensity. That analysis had occurred. The court was satisfied that the evidence of Y and Z was *prima facie* admissible (para. 33; paras. 41–43).

(6) When considering whether a trial judge had been correct to admit or exclude bad character evidence, an appellate court should not interfere unless the judgment was plainly wrong or the discretion had been exercised unreasonably in the *Wednesbury* sense. In the present case, it was clear that the Chief Justice (whose reasoning the trial judge adopted)

had in mind that the evidence consisted of allegations and not convictions, and he also had regard to the passage of time. He considered that admitting the evidence was prejudicial to the appellant but correctly considered that he had to consider fairness to both sides. He was mindful of the potential of the trial process to limit the prejudice. The exacting test for appellate interference had not been satisfied (paras. 44–45).

(7) Although the bad character directions given by the judge were relatively brief, the court was satisfied that they covered the essentials. They told the jury that they had to be sure about the evidence and whether it established a tendency to commit offences of the type charged. There could be no criticism of the judge for preferring the term "tendency" to "propensity." By telling the jury that they must not convict "wholly or mainly" on the bad character evidence, the judge had covered the risk of "undue reliance." The judge's treatment of bad character was sufficient to ensure that the jury did not misuse the evidence. The appellant was not treated unfairly by the judge dealing with the evidence of the bad character witnesses before turning to the victim's evidence or by directing the jury on bad character before dealing with the appellant's pre-existing good character. It might be that a different trial judge would have sequenced the summing up differently. There was no perfect formula in the circumstances. The appellant was not unfairly disadvantaged by the judge's approach. Ground 3 was therefore rejected (paras. 50–53).

(8) As Ground 3 was rejected, Ground 4 was unstainable (para. 59).

(9) While there was no doubt that the offences were heinous and deplorable, the judge had not been correct to sentence above the range of 11–17 years provided by the Sentencing Guidelines. The repetitive and persistent nature of the offending was not of such a nature as to fall within the exceptional category which could properly be described as a campaign of rape for which sentences of 20 years and above might be appropriate. Having considered all the evidence, the court considered the appropriate sentences to be 15 years on Counts 1 and 3, to run concurrently. Following further argument, the sentence on Count 3 was reduced to 2 years to take account of the maximum sentence allowed by law when the offence under Count 3 was committed (paras. 62–63).

Cases cited:

(1) *R.* v. *Brown* (1983), 79 Cr. App. R. 115, distinguished.
(2) *R.* v. *Hanson*, [2005] EWCA Crim 824; [2005] 1 W.L.R. 3169; [2005] Crim. L.R. 787, considered.
(3) *R.* v. *Hobson*, [2013] EWCA Crim 819; [2013] 1 W.L.R. 3733; [2014] Crim. L.R. 83, considered.
(4) *R.* v. *Leaver*, [2006] EWCA Crim 2988, distinguished.
(5) *R.* v. *Rackham*, [1997] 2 Cr. App. R. 222, referred to.
(6) *R.* v. *Weir*, [2005] EWCA Crim 2866; [2006] 1 W.L.R. 1885; [2006] 2 All E.R. 570; [2006] Crim. L.R. 433, referred to.

Legislation construed:

Crimes Act 2011, s.601(2): The relevant terms of this subsection are set out at para. 6.

Criminal Offences Act 1960, s.107(1): The relevant terms of this subsection are set out in para. 4.

Criminal Procedure and Evidence Act 2011, s.4(2)(a): The relevant terms of this provision are set out at para. 21.
s.367(1): The relevant terms of this subsection are set out at para. 33.
s.369: The relevant terms of this section are set out at para. 33.
s.371: The relevant terms of this section are set out at para. 33.

Indictment Rules 1961, r.10(1): The relevant terms of this provision are set out at para. 19.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953), Cmd. 8969), art. 7: The relevant terms of this article are set out at para. 14.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), s.8(4): The relevant terms of this subsection are set out at para. 14.

Criminal Procedure Rules 2015, r.10.2(2): The relevant terms of this provision are set out at para. 19.

I. Winter, *Q.C.* and *C. Finch* for the appellant;
C. Rocca, *Q.C.* with *C. Gomez* for the respondent.

1 **KAY, P.,** delivering the judgment of the court: On August 20th, 2019, following a retrial before Ramagge Prescott, J. (the judge) and a jury, Jason Laguea (the appellant) was convicted of five offences relating to the historical sexual abuse of a young girl (X). She was the great-niece of a woman with whom the appellant was in a relationship at the time. All the offences were alleged to have occurred before her thirteenth birthday. They involved vaginal penetration (Counts 1 and 2) and oral penetration (Counts 3, 4 and 5). The appellant was later sentenced to 20 years' imprisonment on Counts 1 and 3 (concurrent), with no separate penalty imposed in respect of Counts 2, 4 or 5. He now appeals against conviction and sentence.

2 The appellant had previously stood trial before the Chief Justice and a jury in January 2019 in respect of the same allegations. On that occasion, the indictment had contained six counts. He was acquitted on one count (old Count 3) but no verdicts were returned on the other counts and there was an order for a retrial with which we are now concerned. We shall have to refer to aspects of the first trial. Before we address the grounds of appeal against conviction, it is necessary to describe the legislative history of the offences with which the appellant was charged.

Legislative history

3 The first two grounds of appeal are based on an interpretation of the legislative history relating to offences of vaginal and oral penetration of children. Until November 22nd, 2012, the relevant offences were set out in the Criminal Offences Act 1960 (the 1960 Act). From November 23rd, 2012, that legislation was replaced by the Crimes Act 2011 (the 2011 Act). The case for the Crown is that the offending in this case started before November 2012 and continued after that date. The end date of the allegations is May 21st, 2013, X's thirteenth birthday. Unsurprisingly, when giving evidence several years later, she was vague as to the dates.

4 Under the 1960 Act, an offence involving vaginal penetration of a child came within s.107(1). It was described as "unlawful sexual intercourse with a girl under the age of thirteen . . ." Consent was not a defence and the maximum sentence was life imprisonment. An offence of oral penetration came within s.117 (indecent assault) or s.119 (indecent conduct towards a child).

5 The law relating to sexual offences was reformed by the 2011 Act. One of its features was that the offence of rape was no longer limited to vaginal penetration but was extended to oral and anal penetration. The previous offence under s.107(1) was replaced by the new offence of rape of a child under the age of 13 pursuant to s.217 of the 2011 Act, which could take the form of vaginal, oral or anal penetration. In addition, oral penetration of a child (among other forms of abuse) would fall within a new offence of causing, encouraging or assisting a child under the age of 13 to engage in sexual activity, pursuant to s.220(1), which, for our purposes, took the place of ss. 117 and 119 of the 1960 Act. All this created a potential difficulty in a historical sexual abuse case where a course of conduct straddled the commencement date of the 2011 Act and the alleged victim is vague as to the chronology of the allegations.

6 The legislature appreciated this difficulty. It was addressed in s.601(2) of the 2011 Act, which provides:

> "(2) If proceedings for an offence committed under any of the repealed Acts have not been commenced at the commencement of this Act—
>
> (a) if there is an equivalent offence under this Act—proceedings must be brought under this Act;
>
> (b) if there is no equivalent offence—proceedings cannot be brought."

In the light of this, all the counts in the indictment were charged pursuant to the 2011 Act, regardless of whether the alleged offences were committed before or after November 23rd, 2012.

The structure of the indictment

7 The evidence was that vaginal penetration first occurred in one of two locations at a time when the victim was living at an address in Laguna Estate. Undisputed evidence was to the effect that she lived there between January and October 2011. Count 1 related to that occasion, which she had described in some detail. Count 2 reflected an allegation that vaginal penetration occurred on numerous occasions thereafter, before and after November 23rd, 2012 until her thirteenth birthday. These occasions were not described in any detail in the evidence.

8 Count 3 was concerned with the first occurrence of oral penetration which was said to have taken place in the appellant's vehicle in a car park in Devil's Tower Road between May 22nd, 2008 and November 23rd, 2012. Count 4 was a corresponding specimen count reflecting an allegation that oral penetration also occurred on numerous subsequent occasions between the same dates. Count 5 then represented an allegation of further repeated acts of oral penetration between November 23rd, 2012 and May 21st, 2013. It was therefore the only count confined to the period of time between the coming into force of the 2011 Act and X's thirteenth birthday. Whereas Count 3 was described in some detail in her evidence, Counts 4 and 5 were not.

9 In the event, the appellant was convicted on all five counts.

The grounds of appeal

10 By amended grounds of appeal for which we granted leave, the appellant seeks to overturn the convictions under four headings. The first two are technical in nature and turn on (1) the form of the indictment and the legal implications of it, and (2) in relation to Counts 3, 4 and 5, a plea of *autrefois acquit*, which had been rejected by the judge. The remaining grounds relate to the conduct of the retrial. Ground (3) is concerned with bad character evidence. Ground (4) complains about aspects of the summing up, including the way in which the judge dealt with issues of character.

Ground 1: the form of the indictment

11 Under this ground of appeal, Mr. Ian Winter, Q.C. (who did not appear at the first trial or the retrial) makes essentially three submissions. First, he submits that it was not lawful for the appellant to be indicted for offences under the 2011 Act in relation to events alleged to have taken place before it came into force on November 23rd, 2012. Secondly, he

objects to the way in which the indictment included some counts containing specimen allegations, that is, single counts representing numerous offences of the same nature said to have been committed on different occasions. Thirdly, he complains that while counts were not duplicitous on their face, the way in which the case was put and left to the jury offended the principles illustrated in cases such as *R.* v. *Hobson* (3) and *R.* v. *Rackham* (5).

(1) ***Charging under the 2011 Act***

12 This submission is relevant to the convictions on Counts 1–4 but not to the conviction on Count 5, where the particulars of offence expressly stated that it occurred between November 23rd, 2012 and May 21st, 2013.

13 We shall have to consider Counts 1–4 individually. At its simplest, Mr. Winter's submission is that they are all unlawful because a person cannot be convicted of an offence that did not exist at the time of the conduct alleged to constitute it. Surprisingly, his skeleton argument, a sizeable document, made no mention of s.601(2) of the 2011 Act, which, on its face, not only permits but requires the Crown to proceed under the 2011 Act when proceedings are commenced after November 22nd, 2012, provided that the offence prescribed by the 2011 Act is "an equivalent offence."

14 When s.601(2) was raised by the Director's skeleton argument, Mr. Winter sought to reply in a written submission by referring to art. 7 of the ECHR and s.8(4) of the Gibraltar Constitution. The former does not assist him because it is concerned with an "act or omission which did not constitute a criminal offence . . . at the time it was committed." That cannot be said of the alleged acts in this case. Section 8(4) of the Constitution uses different language:

> "No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence . . ."

However, it seems to us that the position is the same. Its purpose and effect is to proscribe *ex post facto* criminalization. It has no bearing where the offensive conduct was criminal under the old law and the new law. In the event, the ECHR and the Constitution barely featured in Mr. Winter's oral submissions.

15 However, he did attempt to circumvent s.601(2) by reference to its own terms by submitting that the offences charged under the 2011 Act—rape of a child under 13 and, in later counts, causing a child to engage in sexual activity—are not "equivalent offences" when set against the offences set out in the repealed 1960 Act.

16 The predecessor of rape of a child under 13 was unlawful sexual intercourse with a girl under 13, pursuant to s.107 of the 1960 Act. Whilst it is true that, in some respects, "rape" has been given a wider meaning by the 2011 Act, its new definition (whereby it can be committed against males as well as females; by way of vaginal, anal or oral penetration; and, in relation to a victim under the age of 13, notwithstanding consent in fact) has changed nothing as far as the allegations in Counts 1 and 2 are concerned. The same conduct would have been equally criminal under both Acts. The same facts had to be proved and no defence which would have availed the appellant under the 1960 Act was removed or narrowed by the 2011 Act. It is plain that the rape of a child under the age of 13 is, in the circumstances of this case, an "equivalent offence" to unlawful sexual intercourse with a girl under 13 under the 1960 Act. Accordingly, this submission fails in relation to grounds 1 and 2.

17 We turn to Counts 3 and 4, the allegations of oral penetration. Under the 1960 Act, they would have been charged either as indecent assault under s.117 or indecent conduct towards a child under s.119. As regards the latter, the position is essentially no different from the one we have described in respect of Counts 1 and 2. The act of oral penetration would have amounted to the offence under s.119 of the 1960 Act just as it does under s.220(1) of the 2011 Act. In neither case would the appellant have had a defence if the facts were proved. It is true that the maximum sentence has been substantially increased but the 2011 Act ensures that an offence committed when the 1960 Act was in force is not sentenced under the new regime: s.601(3). We conclude that the offences pursuant to s.220(1) of the 2011 Act charged in Counts 3 and 4 were "equivalent offences" in the context of s.601(2). If this were not so, and if the correct interpretation of "equivalent" were to be synonymous with "identical," there could be no prosecution after November 2012 for an offence committed before the commencement date. This is made clear by s.601(2)(b) which states in terms that "if there is no equivalent offence, proceedings cannot be brought." Such an interpretation would be contrary to common sense and the clear legislative intent.

(2) ***Specimen counts***

18 Whilst Counts 1 and 3 were specific allegations (the initial vaginal and oral penetrations respectively), Counts 2, 4 and 5 were always put on the basis that they were course of conduct or specimen counts—Count 2, the subsequent acts of vaginal penetration; Count 4, the subsequent acts of oral penetration down to November 22nd, 2012; and Count 5, the acts of oral penetration after that date. Mr. Winter submits that, although this would be permissible in England and Wales, it is unlawful in Gibraltar.

19 The starting point of this submission is r.10(1) of the Indictment Rules 1961:

> "A description of the offence charged in an indictment, or where more than one offence is charged in an indictment, of each offence so charged, shall be set out in the indictment in a separate paragraph called a count."

In England and Wales, the Criminal Procedure Rules 2015, r.10.2(2) provide:

> "More than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission."

No such provision has been enacted in Gibraltar. So, submits Mr. Winter, course of conduct or specimen counts are not permissible here.

20 We consider this submission to be simply wrong. Rule 10(1) of the Indictment Rules has never prohibited specimen charges. It is concerned with the form of the indictment and, as Mr. Winter accepts, Counts 2, 4 and 5 are not duplicitous in form. Issues may arise as to how such counts are left to the jury, but that is a different matter and one to which we shall shortly return. Nor is it the case that specimen charges in England and Wales were an innovation which was only legitimized by r.10.2(2) of the Criminal Procedure Rules. That simply put a longstanding pleading practice on to a statutory footing. The practice was and is as established in Gibraltar as it was in England and Wales.

21 Moreover, s.4(2)(a) of the Gibraltar Criminal Procedure and Evidence Act 2011 provides:

> "(a) the Criminal Procedure Rules apply in Gibraltar with such modifications (for example, in nomenclature) as the circumstances of Gibraltar may require and so far only as the circumstances of Gibraltar may permit . . ."

In other words, although there is not a specific replication of the Criminal Procedure Rules in Gibraltar, they have been adopted by s.4(2)(a). If they were needed to legitimize the pleading of specimen counts in Gibraltar, that need has been fulfilled. So we have both belt and braces on this issue.

(3) ***The way in which the specimen counts were left to the jury***

22 Again, this submission relates only to Counts 2, 4 and 5. In some circumstances, specimen or course of conduct allegations give rise to a risk that a jury might convict, even though a sufficient number of them were not satisfied as to the same basis of guilt. Some might be sure as to one aspect of the course of conduct whilst others base their conclusion on a different aspect. The leading case in England and Wales is *R.* v. *Brown* (1), where a specimen count of deception was evidenced by a number of

separate transactions and the trial judge had wrongly directed the jury that they did not have to be agreed with respect to any particular transaction. Applying that to the present case, Mr. Winter complains that, in relation to the specimen counts, the judge failed to direct the jury that they must all be sure about the same incident of vaginal or oral penetration before they could convict on each count.

23 When the principle exemplified by *Brown* falls to be considered, the context of the case in question has to be carefully assessed. In *Brown*, the trial judge plainly considered it possible on the evidence that different members of the jury might take different views of the several transactions forming the alleged course of conduct. However, in the present case that simply did not arise in relation to the specimen counts. X had described in detail the first act of vaginal penetration (Count 1) and the first act of oral penetration (Count 2). She had given no detail at all about the subsequent acts beyond asserting that they were repeated on many subsequent occasions. In these circumstances, we consider that there was no risk whatsoever that the jury might convict the appellant on different bases in respect of a particular specimen count. Either they accepted X's assertions of frequent repetition or they did not. In the event, they did. This is simply not a *Brown* case.

24 In *Hobson* (3), Elias, L.J. considered the application of *Brown* in the context of sexual abuse allegations. He said ([2013] 1 W.L.R. 3733, at para. 24):

> "Where the complainant cannot particularise any specific incident and merely alleges a pattern of similar conduct, the question for the jury will be whether they are sure that the account of the complainant is reliable. There will be no room for the jury to focus on one incident rather than another because no single occasion is sufficiently distinct, and it would be meaningless and unhelpful to tell the jury that they had to be sure in relation to the same incident."

That resonates here. In our judgment, there was no realistic possibility of the jury being divided on the basis of their finding and there was no error in the directions given by the judge or the route to verdict which she produced to assist the jury.

Ground 2: *autrefois acquit*

25 It is a fundamental principle of common law that a person who has been acquitted in relation to a particular alleged offence cannot be tried again for it. There are statutory exceptions but they do not arise in this case. At the trial before the Chief Justice on an indictment containing six counts, the only verdict the jury was able to return was on what was then Count 3. It was the first of the counts alleging oral penetration. The particulars of offence stated:

"Jason Laguea, between 23 November 2012 and 21 May 2013, in Gibraltar, intentionally penetrated the mouth of Miss X, a person Under the age of 13 years, with his penis."

The jury found the appellant not guilty on that count. Counts 4, 5 and 6, upon all of which the jury were unable to reach unanimous or majority verdicts, were also concerned with oral penetration by reference to either s.217 or s.220(1) of the 2011 Act. The jury were also unable to reach unanimous or majority verdicts on Counts 1 or 2, which contained the allegations of vaginal penetration.

26 In order to understand precisely what the acquittal on Count 3 related to, it is instructive to have regard to the route to verdict which the Chief Justice had provided to the jury. It posed six questions. The first two were concerned with Counts 1 and 2, the allegations of vaginal penetration. For present purposes, we can concentrate on questions 3–6, which were concerned with the allegations of oral penetration. They read as follows:

"*Question 3*

Are we sure that Jason Laguea penetrated X's mouth with his penis in the Car Park on the occasion described by X when someone approached them ('the Car Park Incident')?

If No, return a verdict of Not Guilty on Counts 3, 4 and 5

If Yes, go to Question 4

Question 4

Are we sure that Jason Laguea penetrated X's mouth in the Car Park incident between 22 May 2008 and 23 November 2012?

If No, return a verdict of Not Guilty on Count 3 and go to Question 5

If Yes, return a verdict of Guilty on Count 3 and go to Question 5

Question 5

Are we sure that Jason Laguea penetrated X's mouth on an occasion other than the Car Park Incident between 22 May 2008 and 23 November 2012?

If No, return a verdict of Not Guilty on Count 4 and go to Question 6.

If Yes, return a verdict of Guilty on Count 4 and go to Question 6.

Question 6

Are we sure that Jason Laguea penetrated X's mouth on an occasion other than the Car Park Incident in Gibraltar between 23 November 2012 and 21 May 2013?

If No, return a verdict of Not Guilty on Count 5.

If Yes, return a verdict of Guilty on Count 5."

27 Mr. Winter's basic submission is that, by finding the appellant not guilty on Count 3, the jury must have rejected the allegation of oral penetration in the car park. As that had been put as the first such act and the only one described in detail, it must follow that, properly interpreted, the verdict meant that the jury were rejecting the entire history of oral penetration. Hence the plea of *autrefois acquit.* Initially, Mr. Winter submitted that the jury must have answered question 3 of the Chief Justice's route to verdict in the negative, thereby entitling the appellant to an acquittal on all the counts concerning oral penetration.

28 It seems to us that that approach conflates the answer to question 3 of the route to verdict and the verdict of not guilty on Count 3. However, they are not the same thing. We accept that, if sufficient of the jury had answered question 3 in the negative, that would have involved a total rejection of the car park incident and, therefore, of the oral penetration allegations. But the acquittal on Count 3 cannot be equiparated with a negative answer to question 3. We know that the jury did not return verdicts of not guilty on the remaining counts alleging oral penetration. Mr. Winter initially submitted that that was because they were not asked to but that submission was the result of the erroneous conflation of question 3 and Count 3. An examination of the court file shows beyond doubt that the jury *were* asked if they had reached unanimous or majority verdicts on the subsequent counts. They had not and they were then discharged.

29 It comes as no surprise that the jury did not convict on any of the oral penetration counts. After all, they had been unable to reach any unanimous or majority verdicts on Counts 1 and 2, the allegations of vaginal penetration. So what is the explanation of the fact that they were only able to return a verdict on Count 3 and not on any other count in relation to either form of penetration?

30 In the indictment at the first trial, Count 3 was paired with Count 5. Unhelpfully, they were not in chronological order. The particulars of offence in Count 5 dated the allegation as being "between 22 May 2008 and 23 November 2012." Count 3 particularized the later period of "between 23 November 2012 and 21 May 2013." We remind ourselves that the rationale of these dates is that November 23rd, 2012 was the commencement date of the 2011 Act and May 21st, 2013 was the day before X's thirteenth birthday. The logical analysis of the responses of the jury to the two counts is that, whereas at least a permissible majority could reject the car park incident as having occurred in the later period, no permissible majority could agree on whether it had occurred in the earlier period or at all.

31 We know of nothing in the evidence that militates against the jury having reached a conclusion that, if the car park incident happened, it happened in the earlier rather than in the later period. And, as we have said, a failure to reach a conclusion on whether it had happened at all was entirely consistent with the failure to reach verdicts on Counts 1 and 2.

32 This leads us to the sure conclusion that the acquittal on Count 3 at the first trial only protected the appellant against further proceedings on the allegations of oral penetration to the extent that the allegation relating to the car park incident occurred between November 23rd, 2012 and May 21st, 2013. *Autrefois acquit* was not a plea available to him at the retrial when the allegation in relation to the car park incident was that it occurred *before* November 23rd, 2012.

Ground 3: character

33 Save for certain exceptions, including similar fact evidence, the common law did not allow the prosecution to adduce as part of its case the previous convictions or evidence of other reprehensible behaviour on the part of a defendant. In England and Wales, this was changed by the Criminal Justice Act 2003. In Gibraltar, the same step was taken by the Criminal Evidence and Procedure Act 2011, s.367(1) of which abolished the common law rules "governing the admissibility of evidence of bad character in criminal proceedings . . ." Section 368 *et seq*. now provides a comprehensive statutory code to regulate the subject. The following provisions are particularly relevant to the present case:

> "369(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—
>
> . . .
>
> (d) it is relevant to an important matter in issue between the defendant and the prosecution . . .
>
> . . .
>
> (3) The court must not admit evidence under subsection (1)(d) . . . if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> . . .
>
> 371.(1) For the purposes of section 369(1) the matters in dispute between the defendant and the prosecution include—

> (a) the question whether the defendant has a 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;
>
> . . .
>
> (2) If subsection (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without affecting any other way of doing so) be established by evidence that he has been convicted of—
>
> (a) an offence of the same description as the one with which he is charged; or
>
> (b) an offence of the same category as the one with which he is charged.
>
> (3) Subsection (2) does not apply in the case of a particular defendant 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 for it to apply in his case."

The categorization of offences for the purposes of s.317(2)(b) is effected by Schedule 8, to which we shall return.

34 The evidence of bad character that was controversial in the present case was the evidence of two young women, Y and Z. Y's mother had been in a relationship with the appellant between the late 1990s and 2007. They had married in 2006 but separated soon after. That relationship preceded the one between X's great-aunt and the appellant. Z's mother had been in a relationship with the appellant after the events with which we are concerned. It had started around 2013, had led to marriage in 2015 but had come to an end in 2016.

35 Before the first trial, Y and Z had made witness statements evidencing bad character on the part of the appellant. Y stated that her mother and the appellant commenced their relationship when Y was about 8 or 9. She described being sexually abused by the appellant in the form of touching her private parts over her clothes, grabbing her breasts after she commenced puberty and taking her hands towards his private parts when they were in bed, only stopping when she took evasive action. Z's statement referred to events when she was between fourteen and seventeen. She described the appellant "trying to kiss me all the time and be extremely close and he would talk to me about things you shouldn't when I was fourteen like sex and how I should be sexy." He would be "really like cuddling up to me all the time and he would actually kiss my mouth and I would tell him to step away because I don't like it." Neither Y nor Z had

reported these matters at the time and the appellant has never been charged with any offences in relation to them.

36 At the outset of the first trial, the prosecution applied to adduce the evidence of Y and Z pursuant to s.369(1)(d) as evidence "relevant to an important matter in issue between the defendant and the prosecution." Reference was made to s.371(1):

> "the question whether the defendant has a 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."

The Chief Justice ruled in favour of the prosecution. It is necessary for us to refer both to his ruling and to the later ruling of the judge at the outset of the retrial which was to the same effect.

37 The relevant parts of the ruling of the Chief Justice read as follows:

> "In my judgment the bad character evidence (if accepted by the jury) is relevant in that it shows a sexual interest in girls in middle childhood/early adolescence and an inclination to act upon that interest. If proved it is conduct which establishes a natural tendency to commit offences of the type with which the Defendant is charged. The circumstances surrounding the allegations by Y and Z are particularly relevant because (if accepted) they also evidence a propensity to engage in grooming behaviour of children in respect of whom the Defendant placed himself in the situation of a parent or quasi-parent. A quasi-incestuous sexual preoccupation is rare and specific in nature and a reasonable jury may consider that the proposition that X should make a complaint against an innocent man who has such a peculiar sexual preoccupation, which is consistent with X's complaint, as highly unlikely. The passage in Archbold 2018 at 13–57 . . . is apposite:
>
> > '. . . to show that [D] has a sexual interest in children does make it more likely that the allegation of the child complainant is true; its force derives from the unlikelihood of coincidence.'
>
> In my view the nature of the alleged propensity is one which makes it more likely that the Defendant committed the offences with which he is charged."

The Chief Justice went on to consider the length of time between the matters to which the evidence related and the matters charged, together with any impact on the fairness of the proceedings. He concluded that the evidence should be admitted, "subject to the jury being properly directed."

38 There has been a dispute as to whether the judge was bound by the ruling of the Chief Justice or whether she was obliged to consider the

matter *de novo* and, if the latter, whether she did so. In our view this was a sterile debate because it is abundantly clear that, whether or not as a matter of obligation, the judge did consider the matter *de novo.* She twice referred to "looking at the matter afresh," before concluding:

> "I don't ignore the fact that the offences with which the Defendant is charged are for oral rape and vaginal rape and that the allegations of bad character . . . do not relate to oral rape or vaginal rape, but, to my mind, the importance of that evidence is that it evidences a degree of grooming which is part and parcel of this trial and it also relates to some sexual activity . . . in my view, it is relevant and in my view it is capable of showing a propensity to engage in grooming and to engage in a degree of sexual activity with children of that age bracket. And it is important that the context of the alleged sexual activity be viewed in its entirety . . . having considered the ruling of the Chief Justice . . . I would rule in exactly the same way."

Thus, she explained the ruling in her own words and also adopted the reasoning of the Chief Justice.

Analysis

39 This ground of appeal raises three distinct issues: (1) whether the bad character evidence was *prima facie* admissible pursuant to the statutory provisions; (2) if so, whether the judge was wrong not to exercise her discretion to exclude it pursuant to s.369(3); and (3) if the evidence was properly admitted, whether the judge's directions to the jury about it were adequate.

(1) *Prima facie admissibility*

40 Mr. Winter's primary submission on this issue is, we think, a novel one. It is that the Chief Justice and the judge, when concluding that the prosecution's application fell within s.369(1)(d), "jumped over" the question of identifying the "important matter in issue between the prosecution and the defence" and proceeded to a premature consideration of relevance. He submits that propensity is not, without more, an important matter in issue. It might become one if, for example, a defendant positively asserts that he is not the kind of man who would commit an offence of the kind charged but here, at the time of the ruling(s), the appellant's defence was simply a total denial.

41 We do not accept this submission. If it were correct, it would mean that the basis upon which similar fact evidence is admissible had been narrowed by the Criminal Procedure and Evidence Act rather than widened, which was plainly the intention. The one authority relied upon by Mr. Winter—*R.* v. *Leaver* (4)—does not assist him. The previous conviction there had been placed before the jury by agreement and the

principal issue on appeal related to how the judge directed the jury in relation to it. Whilst it is true that the drafting of ss. 369(1)(d) and 371 (or, more accurately, their equivalents in the Criminal Justice Act 2003) led to some debate as to whether the provisions had succeeded in achieving their intended purpose (see Archbold, *Criminal Pleading, Evidence and Practice*, para. 13–41), it is plain that the authorities in England and Wales support the radical construction. Although the primary issue between the prosecution and the defence in the present case is whether X's account was truthful and accurate, it is permissible under the modern legislation for a jury to consider, in relation to that primary issue, a propensity on the part of the alleged wrongdoer to commit offences of the kind charged. Where there is evidence of a propensity, the effect of s.371(1)(a) is to include it in the matters in issue. It becomes admissible, subject to the other constraints set out in the statute. All this is apparent from, for example, *R.* v. *Weir* (6) ([2005] EWCA Crim 2866, paras. 34 and 37 (Kennedy, L.J.)) and the leading case of *R.* v. *Hanson* (2), where, dealing with the appellant Gilmore, Rose, L.J. said ([2005] EWCA Crim 824, at para. 39):

> "the previous convictions were plainly relevant to the issue of whether his possession of the goods, in those circumstances, was innocent or criminal. They established propensity to steal, and that propensity increased the likelihood of guilt."

Accordingly, we do not consider Mr. Winter's "jumping over" submission to be well-founded.

42 His alternative submission on *prima facie* admissibility is that the evidence sought to be adduced by the prosecution did not fall within the statutory provision because it did not demonstrate a propensity to commit "offences of the kind with which he is charged": s.371(1). The submission is that the offences charged were grave ones of vaginal and oral penetration, whereas the evidence sought to be adduced by the prosecution was limited to offences which, at their highest, amounted to relatively minor indecent assaults or acts of indecent conduct towards a child. The first answer to this submission is that, where reliance is placed on previous *convictions*, the statute provides that it is not only convictions for offences of the same description which may be admitted but also offences of the same "category": s.371(2). Offences of the same category are defined in Schedule 8. In relation to sexual offences concerning persons under the age of 16, rape, intercourse with a girl under 13, indecent assault of a girl under 16, sexual activity with a child and causing *etc.* a child to engage in sexual activity are all offences "of the same category." Although the present case is not concerned with previous convictions, it would be anomalous if the same behaviour, albeit unprosecuted, automatically fell outside the "kind." The fact is that the statute provides an exclusionary mechanism. In the case of previous convictions, the court will not allow

them to be admitted if satisfied that it would be "unjust" to do so: s.371(3). By parity of reasoning, in relation to unprosecuted conduct, the court would no doubt avoid a similar injustice by excluding them pursuant to s.369(3), to which we shall return.

43 It follows, in our judgment, that the mere fact that the evidence of Y and Z disclosed less heinous behaviour than the offences charged in the current indictment is not, in itself, a barrier to admissibility. What was required was a careful analysis by the trial judge of what the evidence of X and Y, if accepted, might establish in relation to propensity. It received such an analysis by the Chief Justice in the passages from his ruling which we set out earlier. That was adopted and supplemented by the judge at the retrial. We are satisfied that the evidence of Y and Z was *prima facie* admissible.

(2) *Should the evidence have been excluded pursuant to s.369(3)*

44 In his skeleton argument, Mr. Winter submitted:

> "The evidence of Y and Z was fundamentally prejudicial to the fairness of the trial. It was generalized and not specific such that it was impossible to test it or to defend against it and it painted the Appellant as a paedophile. It destroyed the possibility of the jury determining the case on the reliability of X's evidence—in fact the only issue in the case."

Plainly a trial judge has an important role at this stage of the proceeding and it is important for us to keep in mind what was said by Rose, L.J. in *Hanson* (2) ([2005] EWCA Crim 824, at para. 15):

> "If a judge has directed himself or herself correctly, this Court will be very slow to interfere with a ruling either as to admissibility or as to the consequences of noncompliance with the regulations for the giving of notice of intention to rely on bad character evidence. It will not interfere unless the judge's judgment as to the capacity of prior events to establish propensity is plainly wrong, or discretion has been exercised unreasonably in the *Wednesbury* sense . . ."

45 It is clear that the Chief Justice (whose reasoning was adopted by the judge) had in mind the fact that the evidence consisted of allegations and not convictions. He also had regard to the passage of time, particularly in relation to the evidence of Y. He also considered that admitting the evidence would not "divert" the trial. He appreciated that the evidence was prejudicial to the appellant but correctly considered that he had to consider fairness to both sides. He was mindful of the potential of the trial process to limit the prejudice. We do not consider that his ruling or its adoption and supplementation by the judge satisfies the exacting test for appellate interference. We would add that Mr. Finch, who was not led at the first

trial or the retrial, cross-examined Y and Z extensively. The appellant could have contradicted their evidence by testimony of his own but he chose not to do so, as was his right.

(3) *The summing up*

46 Mr. Winter advances a number of criticisms of the summing up. At this stage we are only concerned with the way in which the judge dealt with the character evidence. We shall return to the other criticisms later.

47 The judge's task in dealing with good and bad character was not an easy one in this case. The appellant had no previous convictions and his good character was relevant, chronologically first to the jury's assessment of the evidence of Y. If, having taken it into account, the jury were satisfied as to its veracity, then he was no longer a man of good character at the inception of his contact with X and only a bad character direction would be relevant at that stage. If, on the other hand, the jury were unconvinced by Y, then the appellant's good character still subsisted in relation to the indicted allegations of X.

48 The judge dealt with this complex situation in the following passages:

> "It is not in dispute that the Defendant has no previous convictions . . .
>
> On the other hand, you have heard evidence from [Y and Z]. The Defendant denies the allegations of [Y and Z] of improper sexual conduct. Now, when you come to consider this evidence, it is important that you bear this evidence in mind in the proper context, always remembering that the Defendant is not on trial in respect of any behaviour relating to [Y or Z].
>
> So how should you approach the evidence of [Y and Z]? If you are sure that one or more of the alleged assaults on [Y] occurred, or you are sure that the Defendant behaved towards [Z] in an inappropriate sexualized way, you should consider whether such conduct of which you are sure shows that the Defendant had a tendency to commit offences of the type with which he is charged. If you are sure that he did have a tendency, then you treat this as support for the Prosecution's case, but this could only be part of the evidence against the Defendant and you must not convict him either wholly or mainly on the strength of it. If you are not sure the Defendant had such a tendency, then his previous conduct could not support the Prosecution's case against him.

> If you are not sure that any of the allegations made by [Y or Z] you must ignore them completely and you must treat the Defendant as a man of previous good character.
>
> Treating him as a man of good character does not mean that he could not have committed the offences with which he is charged but his good character is something which you should take into account in his favour in two ways.
>
> First, you should take his lack of convictions and cautions and his personal qualities into account when you are deciding whether you believe what he said to the police when he was interviewed.
>
> Secondly, the fact that the Defendant is now some 51 years old and has the qualities about which you have been told . . . and has not committed any previous offence may mean that it is less likely that he would have committed the offences with which he is charged.
>
> You should take the Defendant's good character into account in his favour in the ways I have said but it is for you to decide what importance you attach to it."

We note that, when reviewing the evidence, the judge dealt with the bad character witnesses before turning to the evidence of X. Her summing up of the former occupies about as much of the transcript as does her summary of X's evidence. This is not just because there were three of them (including Y's mother). It is plain that they had been cross-examined in some detail by Mr. Finch when he had been endeavouring to explore the possibility of collusion between the witnesses.

49 A judge faced with the task of summing up even a very straightforward case where bad character is in issue will be guided by what Rose, L.J. said in *Hanson* (2) ([2005] EWCA Crim 824, at para. 18):

> ". . . the judge . . . should warn the jury clearly against placing undue reliance [bad character]. Evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant. In particular, the jury should be directed; that they should not conclude that the defendant is guilty or untruthful merely because he has these convictions. That, although the convictions may show a propensity, this does not mean that he has committed this offence or been untruthful in this case; that whether they in fact show a propensity is for them to decide; that they must take into account what the defendant has said about his previous convictions; and that, although they are entitled, if they find propensity as shown, to take this into account when determining guilt, propensity is only one relevant factor and they must assess its significance in the light of all the other evidence in the case."

In addition, it is necessary to tailor the directions to the case in hand.

50 Although the directions articulated by the judge were relatively brief, we are satisfied that they covered the essentials. They told the jury that they had to be sure about the evidence and as to whether it established a tendency to commit offences of the type charged. There can be no criticism of the judge for preferring "tendency" to "propensity." By telling the jury that they must not convict "wholly or mainly" on the bad character evidence, the judge covered the risk referred to in *Hanson* as "undue reliance." Her language embraced the fact that propensity, when established, is only "one relevant factor." By implication, there was sufficient to convey the message that the jury should consider its significance "in the light of all the other evidence in the case." In our judgment, the judge's treatment of bad character, standing alone, was sufficient to ensure that the jury did not misuse the evidence.

51 The remaining complaint is that, by dealing with the evidence of the bad character witnesses before turning to the evidence of X and by directing the jury on bad character before dealing with the appellant's pre-existing good character, the judge skewed the character issues to the appellant's detriment. It may well be that another trial judge would have sequenced the summing up differently but the question for us is whether the appellant was treated unfairly by the judge's approach. There is no criticism of the terms of the good character direction. It was entirely conventional.

52 As we observed earlier, the situation faced by the judge was complex. Whilst we think it would have been preferable if the judge had invited the jury to consider the evidence of Y in the context of good character—her account being the first chronologically—and only to consider the crucial evidence of X with bad character in mind if they had already accepted the evidence of Y, in truth there is no perfect formula in the circumstances of this case. Standing back and looking at the character issues holistically, the ultimate question is whether the appellant was unfairly disadvantaged by the judge's approach. We are satisfied that he was not. We consider it to be highly improbable that the jury, having been given the good character direction in the context of the assessment of X's evidence, would not have had it in mind when considering Y's evidence.

53 For all these reasons, we reject ground 3.

Ground 4: the summing up (other criticisms)

54 We have already considered and rejected as a ground of appeal the criticism of the way in which the judge dealt with character in her summing up. This final ground is in the form of an attack on other aspects of the summing up. With appropriate candour, Mr. Winter accepted that, standing alone, ground 4 could not sustain a successful appeal. Its purpose

was to provide support for ground 3. As we have rejected ground 3, we shall not go into ground 4 in great detail. It states:

> "The Learned Trial judge failed to sum up the case fairly to the jury; failed to direct the jury that they could only convict if they were sure that the indicted conduct had taken place in Gibraltar such that the conduct alleged to have taken place in Spain could not found the basis of conviction; wrongly reduced the force of the defence case to the jury; failed to sum up the appellant's interview fairly; failed to direct the jury as to the possibility of collusion between [X, Y and Z]; and otherwise failed to direct the jury properly of what they needed to be sure of before they could convict."

55 The judge clearly directed the jury that, in order to convict, they had to be sure that the offence was committed in Gibraltar. The evidence covered the entire duration of the relationship between the appellant and X. This included evidence of sexual abuse in Spain in the early stages and later on as well. It was all part of the history and no complaint has been or could be made about its admissibility. However, each count in the indictment was particularized as having taken place "in Gibraltar." The judge emphasized this in three places in the summing up. She referred to the wording of the indictment. Soon after that she referred to the "key question" the jury had to answer in relation to each count and, in so doing, she repeated the words "in Gibraltar." Later, when recounting the evidence about sexual activity in Sotogrande, she added:

> ". . . whilst it may assist you in deciding whether you are sure that the Defendant is guilty, he is not charged with any sexual activity in Spain, [you] must absolutely be sure that the offences took place in Gibraltar."

And, of course, the core Counts 1 and 3 were described as having taken place at specific locations in Gibraltar.

56 As regards delay, we do not accept that the judge "reduced the force of the defence submissions," as Mr. Winter submits. She said that:

> "there may be a danger of real prejudice to the Defendant and this possibility must be in your minds when you decide whether the Prosecution have made you sure of the Defendant's guilt."

Later, she added:

> "Even if you believe that the delay in this case is understandable, if you decide that because of it, the Defendant has been placed at a real disadvantage in putting forward his case, take that into account in his favour when deciding if the Prosecution have made you sure of his guilt."

It is suggested that all this was effectively diluted when, elsewhere, the judge included a passage in which she contemplated reasons why the lateness of a complaint may not detract from its truth. She said:

> "A late complaint does not necessarily signify a false complaint any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether in the case of this particular complainant, the lateness of the complaint such as it is assists you at all and if so what weight to attach to it. You need to consider what the complainant herself said about her experience and her reaction to it."

And later:

> "It is important . . . that you remember that the complainant is providing her present explanation from the perspective of a young adult, she was bound to because she was looking back after some years and trying to explain how she felt as a child. A child however does not have the same ability as an adult to bring perspective and judgment to bear on her relationship with others. Life viewed through the eyes and mind of a child may appear very different and you need to consider how this child aged 8–13 in the family environment in which she lived might have reacted to behavior from the Defendant such as she has now described. It would depend you may think on several factors, among them the emotional chemistry between members of the family, the personality of the individuals concerned and the nature of the relationships in the house."

This strikes us as even-handed and helpful. The same can be said of the judge's references to X's lack of emotion when giving evidence.

57 The judge dealt with the issue of collusion between X and the other witnesses extensively in order to place before the jury the material "relied upon by the Defence when suggesting collusion between the Prosecution witnesses." It seems that they were all cross-examined at length in the hope of firming up the suggestion of collusion. It seems to us that the cross-examination yielded little or nothing of substance. It was not incumbent on the judge to give any further direction on the issue.

58 The final complaint is that the judge sold the appellant short when summing up his case to the jury. He had not given evidence but that, of course, did not relieve the judge of the duty to remind the jury of the way in which his case had been put. That comprised what he had said to the police in interview, what had been elicited from the witnesses and what had been raised in the course of the trial. The appellant had declined to answer some of the questions he had been asked in interview. In the second interview, he produced via his legal representative a prepared

statement. It amounted to a complete denial, together with an assertion that X may have rewritten history by pinning on him an account of real events in relation to which the true perpetrator was X's natural father. At trial, X was cross-examined on the basis that she had made up the allegations because she felt abandoned by the appellant, with whom she was fixated. It was also suggested that she was finally caused to make her allegations as a result of watching a film about sexual abuse with her boyfriend shortly before she went to the police. All this was referred to in the course of the summing up. We reject the complaint that the judge did not do justice to the appellant's case.

59 We consider ground 4 to be unsustainable. The judge's summing up was balanced and fair.

Conclusion

60 It follows from what we have said that we are unpersuaded by the grounds of appeal against conviction and the appeal is therefore dismissed.

Appeal against sentence

61 The judge passed concurrent sentences of 20 years' imprisonment in relation to Counts 1 and 3, with no separate sentences in respect of Counts 2, 4 or 5. She plainly had regard to the totality of the offending. We say at once that her sentencing remarks were a careful analysis of the relevant factors. She had regard to the UK Sentencing Guidelines in relation to offences of rape involving victims under the age of 13. They typically categorize cases by reference to harm and culpability. Mr. Winter submits that the case ought to have been categorized as 3A rather than 2A. We disagree and endorse the judge's categorization.

62 The starting point for 2A is 13 years, within a range of 11–17 years. It seems that the judge then increased the sentence to 20 years by reference to this passage in the Guidelines:

> "Offences may be of such severity, for example involving a campaign of rape, that sentences of 20 years and above may be appropriate."

There is no doubt that the offences in this case were heinous and deplorable but we do not consider that the judge was correct to pitch the sentence above the 11–17 years range. The repetitive and persistent nature of the offending was not, in our view, of such a nature as to fall within the exceptional category which can properly be described as a campaign of rape. In our view, the judge was not entitled to sentence outside the Guidelines.

63 We have no doubt that the judge was correct to sentence at a level above the starting point of 13 years. However, having considered all the matters so compellingly described by the judge, we consider that the appropriate sentences were ones of 15 years on Counts 1 and 3, to run concurrently. To that extent, the appeal against sentence is allowed.

Appeal dismissed.

March 9th, 2021: Following further argument from the parties, the sentence on Count 3 has been reduced to 2 years to take account of the maximum sentence allowed by law when the offence under Count 3 was committed.