Application for leave to appeal against conviction of rape and indecent assault.

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION – APPEAL NO. 476

18th May 2017

Before: **Nigel Pleming QC, President**
George Bompas QC
Sir Michael Birt

Between: **Keith Hedley Le Page** **Appellant**

-and-

The Law Officers of the Crown **Respondent**

Advocate S Steel for the Appellant
Crown Advocate G Perry for the Respondent

BIRT, JA

1. This is the judgment of the Court.

2. On 13th July 2016 the appellant was convicted by the Royal Court (Judge Finch and nine Jurats) of seven counts of rape and one of indecent assault. He was subsequently sentenced to a total of 14 years imprisonment. He has not appealed against that sentence but now applies for leave to appeal against conviction.

The factual background

3. The appellant was at all material times the proprietor of a hairdressing salon known as The Cottage Salon, Grandes Rocques, Castel. The salon was run from an annex to the appellant's home at Papillon, Grandes Rocques, Castel. The business opened in about 1970 and initially the appellant ran it with only the assistance of his wife. In the late 1970s he began to employ a Saturday girl and subsequently he offered apprenticeships. The Saturday girls would work in the salon one day a week. They would sweep up hair, make tea for the customers and generally help out around the salon.

4. The indictment charged offences against three complainants, all of whom were working for the appellant at the time the offences were committed.

5. Counts 1 to 6 charged offences of rape in respect of the Complainant 1 during 1979 and 1980, when she was 14 or 15 years of age and the appellant was 27 or 28. Count 7 charged one offence of rape against Complainant 2 in 1985, when she was aged 17 and the appellant was about 33. Count 8 charged one offence of indecent assault against Complainant 3 between 1992 and 1994 when she was 15 or 16 and the appellant was 41 or 42.

6. We take first the evidence in respect of Complainant 1. She explained that her parents had bought her a horse when she was about 13½ and it was suggested to her that she should get a part-time job to help with the cost of upkeep of the horse. She began work as a Saturday girl at the appellant's salon. She was 14 in April 1978 and she began work in the summer holidays following that April. She said that the appellant seemed like a very friendly, nice man.

7. However, after a while the appellant began to get more affectionate. It started with pecks on the cheek and then developed into the odd kiss and cuddle. She described it as 'chipping away at her'. He wasn't being friendly as a boss or brother would be. It was not entirely clear from her evidence whether she was saying that these incidents took place in the salon when no-one could see or took place in the stock room.

8. There came a time after she had been working there six or seven months when she was asked to babysit for the appellant and his wife as they were going out. This is the subject of Count 3. She explained that about half an hour after the appellant and his wife had left, the appellant returned. She did not remember what was said but just remembered following the appellant upstairs to his bedroom where he had sexual intercourse with her on the bed. He had taken down his trousers and hers. He used a condom. She remembered it being very painful as she was a virgin. He ejaculated, they both pulled up their trousers and went downstairs. She carried on babysitting and he went off. She had not wanted to have sex with him but she did not say no or yes. She just froze. The appellant and his wife came back a couple of hours later but nothing was said.

9. She continued to work every Saturday at the salon and a few weeks later the appellant said that a client had not come in. He took her to what she referred to as the stock room and had sex with her there. He had sex with her against the wall. He just pulled her trousers down to the ankle and put a condom on. Again she did not say no and she did not say yes but she did not want him to do it. She felt she had been ruined already and no-one would want her now. In terms of timing this was when she was about 14¾. Sexual intercourse then became a regular event. It always took place in the stock room. He tended to just remove her clothing on her lower half and he would always use a condom. When asked why she didn't say anything to anyone, she said that it was a dirty secret and that lots of people would have been hurt. She just went along with it because she did not want to hurt anyone.

10. Count 1 related to the first occasion in the stock room but Count 2 was a specimen count representing the rest of the offences of rape in the stock room. She said that these acts of rape occurred on a regular basis for approximately a year.

11. Count 4 charged an offence of rape in the appellant's car. Complainant 1 said she was 15 at the time. The appellant had a Ford Capri and said she could have a little drive of the car in a car park. They stopped in a car park somewhere, she had a little drive around the car park or tried to do so. She then got in the passenger seat and the seat reclined. He got on top and pulled his and her trousers down before having sex with her.

12. Count 5 related to an incident which took place in Complainant 1's own bedroom. She thinks she was 15 at the time. Her mother and father and two brothers had gone out and she thought the appellant was aware of this as a result of a conversation at the salon. The appellant appeared in his car. She let him in although she did not know now why she had done so. She thinks she might have shown him her bedroom; in any event he raped her in her bedroom in the same way as previously.

13. Count 6 reflected the last incident in the stock room although Complainant 1 could not recall whether this was before or after the incident at her home. Be that as it may, events came to a head shortly before her 16th birthday in April 1980. The appellant had given her a little ring or necklace and had also written her an affectionate note which was in the pocket of her riding jacket. As she was getting ready for a gymkhana with her mother, the note slipped out of the jacket and her mother read it. Her mother showed Complainant 1 the note and said 'Has Keith been having sex with you?' and she just broke down and said yes. She said she felt relieved and started crying. Her mother told her father who contacted the appellant and demanded that he come round to the house. There was then a confrontation and she remembered one of her brothers asking what was going on and her father replying 'Keith has had sex with your little sister'. She just remembered sitting with her head bowed. She was not completely certain but she thought that the appellant had admitted having sex with her and said that it was because he loved her. She remembered being particularly worried because a condom had split on the last occasion and she was worried that she was pregnant as her period was late. However, it came the next day. She told her father and he was very relieved and said 'right, that's it, that was the past, we carry on with the future now, don't look back'. It was never talked about again at home after that. She never went back to work for the appellant.

14. She was asked why it had taken her so long to complain. She said that initially it was because she thought it was her fault. Her father then died when she was about 22 at which time she was living in Israel. Later she had a family with three daughters. As they got older she thought she must do something about it but then one of her brothers was killed in France on his motorbike and her mother was too devastated. She did not wish to bring any more hurt or worry so she decided to wait until her mother died. It was three years after her mother's death before she came forward.

15. She said that whilst she was working at the salon, she used on occasion to have lunch or coffee with the appellant's wife and she recalled on one such occasion, his wife had asked her whether the appellant had ever touched her. Complainant 1 said that she wanted to tell his wife but felt unable to do so and accordingly denied that he had ever touched her.

16. She said that she had met Complainant 2 about 10 years before the trial when she worked for Complainant 2 in her salon for about 6 months. On discovering that Complainant 2 had also worked at the appellant's salon, she had asked Complainant 2 whether anything had ever happened to her and Complainant 2 had said that the appellant had also had sexual intercourse with her.

17. As to Complainant 3, Complainant 1 said that she was a friend of a friend but Complainant 1 did not really see her and had not known prior to the proceedings that Complainant 3 had also worked for the appellant.

18. In relation to the confrontation with the appellant, a statement from the complainant's surviving brother was read and he recalled a confrontation between his father and the appellant but could not remember where it took place. He recalled his father being very angry and asking the appellant all sorts of questions. He heard the appellant say words to the effect of 'I love her' or 'I want to be with her'.

19. The appellant was arrested on 31st March 2015 and interviewed the same day about Complainant 1's allegation. He accepted that Complainant 1 had worked in the salon as a Saturday girl but denied any form of sexual misconduct. The various incidents were put to him and he said that they had simply not occurred. He agreed that he had been asked by Complainant 1's father to attend their house where an accusation had been put that he had had sex with Complainant 1 and he recalled also being telephoned shortly afterwards to be informed that she was not pregnant.

20. Count 7 alleged an offence of rape in respect of Complainant 2. She began work as a Saturday girl in the salon in 1982 when she was 15. Unlike Complainant 1, she had a boyfriend at the time and they began to have sexual intercourse with each other when she was 16. While she was a Saturday girl, the appellant treated her well and she was very happy at the salon. When she turned 16 she began an apprenticeship and after a few months things began to change. The appellant would begin to put his hand on her hip when he was chatting to her, or touching her arm. He used to come up behind her and put both hands on her hips. There then came a time when he kissed her. After that he would quite often kiss her although she would try to keep out of his way at times when she thought he might do this. There then came a day when he asked her to come through to the house. She was 17 at this time. He coaxed her to the floor and pulled up her skirt. He pulled down her pants and his trousers and had sex with her on the floor. He did not use any contraception but she was on contraception at the time. She did not know what to do at the time, whether to shout or cry. She was just numb. After he had finished he got up and walked off leaving her on the floor. She accepted that she then went back into the salon and continued to work for the rest of the day and came to work the next day.

21. She said that not long afterwards he tried to kiss her again but on this occasion she said no, following which he did not try it again. However his behaviour changed and he became snappy and huffy with her and used to belittle her in front of clients. She remained working at the salon until the completion of her apprenticeship. When pressed on why she had not left, she said that it would have been difficult to leave halfway through an apprenticeship without giving the real reason and she did not feel able to do that. She never told anyone about it and she 'put it in a box and sealed it'. Her complaint to the police came about following a letter from the police after Complainant 1 had complained. Subsequently she was visited by the police who asked if she knew Keith Le Page at which time she said it fell into place. She was asked if she had discussed it with Complainant 1 when Complainant 1 worked for her at her salon about 10 years earlier. She said that the names of Complainants 1 and 3 did not mean anything to her and she had not spoken to Complainant 1 about what had happened.

22. Count 8 charged indecent assault in respect of Complainant 3. She was born in 1977. She thought she began as a Saturday girl and then moved on to an apprenticeship, although there seemed to be some doubt as to whether she had ever worked as a Saturday girl. She too said that all was well to start with and it was a fun place to work. However she said that things changed after a few months. The appellant would start brushing against her, perhaps holding her arm, or brush against her chest. He would put his hands on her hips. He also started to massage her on her shoulders when he would be standing behind her but rather close. She did not consider it to be accidental contact and it got more frequent. At the beginning she did not think anything of it but gradually she thought it was not right. There then came a day when they were standing at the counter in the salon and the appellant was massaging her shoulders. He then pushed himself against her and put his hand down her front, inside her top and her bra. He touched her breast. She said words to the effect 'please don't do that, I don't want you to do that' whereupon he stopped. She carried on working for the rest of the day, and then told her mother what had happened when she got home that evening. Her father telephoned the appellant and said that she would not be coming back. Her parents also telephoned the college through which she was doing her apprenticeship and a lady from there came round.

23. She said that she had been telephoned by the police last year and asked if she had ever worked for the appellant. She said yes and she knew why they had called. She said that she knew Complainant 1 as they had met about 3 years ago through a mutual friend but they had never discussed what had happened to either of them. She denied that she had made the complaint because she had a grudge against the appellant as he had been critical of her performance during her apprenticeship.

24. Complainant 3's father gave evidence and confirmed that Complainant 3 had come home from work when she was 16 and said that she had been sexually harassed by the appellant. He recalled

telephoning the appellant and saying that Complainant 3 would not be coming back to work and adding 'I am sure you know why'. He said the appellant replied that he did not know why, to which he, the father, responded by referring to sexual harassment, at which he heard the appellant say to his wife that Complainant 3 was alleging sexual harassment. A statement from Complainant 3's mother was admitted in evidence in which she confirmed that Complainant 3 had come home early from work one day very upset and had said that the appellant had sexually harassed her. The mother could not now remember the details. She confirmed they had also spoken to the college.

25. After Complainant 1 had made her complaint to the police and the appellant had been interviewed, further investigations were carried out which led the police to approach Complainants 2 and 3 as a result of which they too gave statements of complaint about what had happened to them. Following those complaints by Complainants 2 and 3, the appellant was interviewed again on 19th April 2015 but on this occasion answered no comment to most of the questions asked of him.

26. The appellant gave evidence in which he denied that anything untoward had happened in connection with any of the complainants. In relation to Complainant 1, he denied any form of touching, kissing or cuddling prior to the alleged rapes and he denied ever having had sexual intercourse with her. He said that Complainant 1 had never babysat for him and his wife, as she alleged, because they always used his sister to babysit for the children. He also denied that he had ever taken Complainant 1 out in his car or had ever visited her home prior to being asked to go there by her parents. He admitted that there had been a confrontation where they had accused him of having had sex with their daughter. He said that he had denied this and had not made the remarks attributed to him by Complainant 1's brother. He had instead said 'I love my wife. I don't love [Complainant 1].' He also agreed that he had been telephoned a few days after the confrontation to be told that Complainant 1 was not pregnant, but he said he had replied it was nothing to do with him anyway.

27. Similarly, in relation to Complainant 2, he denied that there had been any touching or kissing as she had described nor had he had sex with her in the lounge as alleged. He had never had sex with her.

28. As to Complainant 3, he again denied any form of touching prior to the offence charged and also denied that he had put his hand down her top and touched her breast as alleged. He said that he had had occasion to warn Complainant 3 that if she didn't buck her ideas up, she would be getting the sack. This was only just before he received the call from Complainant 3's father in which the father said he had indecently touched Complainant 3. He agreed that he had immediately relayed this allegation to his wife and said that it was absolutely ridiculous. He accepted in cross-examination that he could not think of any motive as to why the three women would make up these allegations but he thought that they had got their heads together to do so and he pointed out that whereas Complainant 1 had said that she had discussed the matter with Complainant 2 some ten years ago, Complainant 2 had denied this.

29. The Court also heard evidence from the appellant's wife and two of his sons. All three of them gave general evidence about the way in which the salon was operated and how unlikely it was that there would be opportunity for the appellant to be alone with any of the complainants so as to be in a position to assault them. We would note the following particular evidence from the appellant's wife:-

    (i) She denied (as alleged by Complainant 1) asking Complainant 1 whether the appellant had ever touched her.

    (ii) She supported the evidence of the appellant that they had never asked Complainant 1 to babysit and that they invariably asked the appellant's sister to do so.

(iii) She said that she had never seen any inappropriate or sexual touching of any of the complainants by the appellant.

(iv) She confirmed that the appellant had told her of the allegation made by Complainant 1 immediately after his return from the confrontation at the home of Complainant 1's parents.

30. The older son, who was 6 or 7 at the time, said that Complainant 1 had not babysat for him and his brother and only the appellant's sister had done so. The appellant's sister also gave evidence to confirm that she had always babysat for the appellant and his wife.

31. In her thorough closing submissions, the advocate then appearing for the appellant emphasised to the Jurats that Complainants 1 and 2 had continued to work at the salon despite what they were saying had happened to them and never told their parents or anyone else about what had happened (until in the case of Complainant 1 the note from the appellant was found). She submitted that this was wholly inconsistent with what they were now alleging had happened to them. This was not a case where they were saying that there had been any threats made of dire consequences if they told anyone. She also emphasised the conflicting evidence which Complainant 1 had given as to the location of where the alleged rapes had taken place at the salon and how it was inconceivable that, if she had really been raped on earlier occasions by the appellant, she would then have gone with him in his car or let him into her own house when no-one else was there. She drew many other criticisms of the prosecution case to the attention of the Jurats.

32. Following summing up by the judge, the Jurats unanimously convicted the appellant of the 8 counts on the Indictment.

Grounds of Appeal

33. No criticism is made of the summing up, nor is the verdict of the Jurats challenged as not being supported by the evidence. The appellant relies upon the following 3 separate grounds of appeal:-

(i) The long delay before commencement of the criminal proceedings had the consequence that a fair trial was not possible.

(ii) The judge was wrong to hold that the evidence of Complainant 3 in relation to Count 8 was cross-admissible in respect of Counts 1 – 7 (and vice versa) as it failed to satisfy the test for the admission of similar fact evidence.

(iii) Fresh evidence should be admitted to show that Complainants 1 and 3 were Facebook friends from December 2014 to December 2016, which evidence undermined their credibility and supported the defence case theory of collusion.

We shall consider each of these grounds in turn.

Ground 1 – abuse of process - delay

34. In Taylor –v- Law Officers of the Crown (13th May 2011) this court confirmed (at paras 107 and 108) that the Royal Court has an inherent jurisdiction to stay a criminal prosecution on the ground of delay if it considers that a fair trial is not possible. The court emphasized that the passage of time between the occurrence of the offence and arrest and prosecution, per se, is insufficient to justify a stay. It quoted with approval the statement of principle on the topic contained at para 21 of the judgment of Rose LJ giving the decision of the English Court of Appeal in R –v- S (SP) [2006] 2 Cr. App R 23 (p341) which we set out below.

35. Neither counsel in this case referred initially to Taylor. Instead, in his skeleton argument, Advocate Steel quoted paragraph 37 of the judgment of the English Court of Appeal in R –v- F (TB) [2011] 2 Cr. App R 13 (p145); [2011] EWCA Crim. 726 where the court sought to lay down certain principles in relation to delay which it extracted from earlier cases. In his written contentions, Crown Advocate Perry also referred to that formulation of the principles.

36. However, shortly after that case, in R –v- F (S) [2011] 2 Cr. App R 28 (P393); [2011] EWCA Crim. 1844 a five judge Court of Appeal was convened to consider various conflicting decisions of the Court of Appeal in this area. The judgment of the Court of Appeal in that case disapproved of certain aspects of the statement of principle in F (TB). It held that the position remained as laid down in Attorney General's Reference (No. 1 of 1990) and in S (SP) and that in future, those two cases, together with F (S) itself, should be the only cases cited when dealing with a suggested abuse of process on the ground of delay, as all the other cases were fact specific.

37. The statement of principle laid down in S (SP) (approved in F (S)) is at para 21 of the judgment of that case and is in the following terms:-

> ***"21. In the light of the authorities, the correct approach for a judge to whom an application for a stay for abuse of process on the ground of delay is made, is to bear in mind the following principles:-***
>
> ***(i) Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule;***
>
> ***(ii) where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted;***
>
> ***(iii) no stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held;***
>
> ***(iv) when assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate direction from the judge;***
>
> ***(v) if, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted."***

38. In F (S) itself, the court added that, contrary to what was said in F (TB), an application for a stay of proceedings on the ground of delay should normally be made before the beginning of the trial rather than, as suggested in F (TB), after all the evidence has been called. It also stated (at para 16) that the occasions when a stay should be granted where the delay has not been occasioned by any fault on the part of the prosecution '*are likely to be almost vanishingly rare*'. It also approved (at para 35) the observation that, where a delay results from the reticence of an alleged victim in reporting an allegation of sexual abuse, the court is entitled to adopt an understanding attitude towards the difficulties that can be encountered by such witnesses in making complaints. In other words, reticence in such circumstances should not be interpreted without more as *'fault on the part of the complainant'*.

39. In our judgment, the statement of principle in S (SP) (endorsing Attorney General's Reference (No. 1 of 1990) supplemented by the observations in F (S)) should be taken as an accurate statement of the approach to be followed in cases of delay in this jurisdiction.

40. We should add that Advocate Steel also referred to the English Court of Appeal case of R –v- B (BS) [2003] 2 Cr. App R 13 (p197); [2003] EWCA Crim. 319 and in particular the observation of Lord Woolf CJ at para 28:-

> ***"In this case it has to be recognised that because of the delay that occurred, in our judgment the appellant was put in an impossible position to defend himself. He was not… able to conduct any proper cross-examination of the complainant. There was no material he could put to the complainant to suggest that she had said that something had happened on one occasion which could be established to be incorrect. There was no material in the form of notes that were given to the doctors which showed that she had changed her account. All that the appellant could do was to say that he had not committed the acts alleged against him. [Counsel] says that to say to a jury, when faced with allegations of the sort that were made here, "I have not done it" is virtually no defence at all."***

41. However the Court of Appeal in F (S) emphasised the difference between an application that there is no case to answer and a stay for abuse of process on the ground of delay. They are distinct features of the trial process and these two separate responsibilities of the judge should not be elided with each other. A similar distinction arises at the Court of Appeal level when it considers on the one hand whether there should have been a stay on the ground of abuse of process by reason of delay and on the other, whether any conviction is safe. The court noted (at para 20) that the observation of Lord Woolf CJ referred to above had perhaps led to some of the conflicting jurisprudence which had arisen subsequently and held that this observation in fact related to the issue of whether the conviction in that particular case was safe (see para 38). Thus it was noted that the court in B (BS) specifically said that the judge at the trial had been entitled to reject the application for a stay on the ground of delay.

42. No application for a stay on the ground of abuse of process by reason of delay was made to the Royal Court in this case either before or during the trial. We have not been addressed on whether that precludes this Court from considering the matter but we proceed on the basis that, although the lack of any application for a stay is a matter to be noted, this Court has the ability to quash a conviction on the ground that the trial amounted to an abuse of process even if that point was not raised below.

43. We therefore approach the matter on the basis of the principles outlined above in paras 37 and 38. In particular, we note the observation in S (SB) that, where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted. This was also the view of the five judge court in F (S) referred to at para 38 above. Advocate Steel very properly accepted that the complainants in this case could not be said to be at fault by delaying in complaining to the police. In our judgment, he was right to do so. There is much greater understanding nowadays of how difficult it can be for victims of sexual abuse to bring themselves to reveal or talk about what has happened to them and therefore how there is often a considerable period before they feel able to complain to the police.

44. Advocate Steel submitted that, because of the lengthy delay since the events complained of, evidence was lost which was of such importance that no directions from the judge could cure the defect and ensure a fair trial. He referred to the following potential evidence:-

    (i) The work records of the salon. These might have rebutted the suggestion by Complainant 1 that false bookings were made to create opportunities for his offending with Complainant 1 and could have provided details of customers present at the salon at relevant times who might have been able to testify as to what they had witnessed.

    (ii) Because Complainant 1 had not been able to state exactly when the rapes outside the workplace occurred, the appellant had not been able to put forward accurate alibis to prove that he could not have been present at particular places at particular times.

(iii) If the complaint had been made promptly, there might have been forensic evidence to show that there had not been any sexual contact.

(iv) On her evidence, Complainant 1 was about 5 feet tall at the time and it might have been possible to demonstrate at that time that she could not reach the pedals of the particular Ford Capri and therefore could not have driven it as she said she had. Furthermore, it might have been possible to show that the passenger seat did not recline far enough to permit sexual intercourse on that seat to have been a practical proposition.

(v) The opportunity to have the Ford Capri forensically examined for any traces of Complainant 1's presence or sexual activity had been lost.

(vi) There were no accurate contemporaneous plans of the salon or the house and these might have helped in showing that Complainant 1's description of where she had been raped could not be correct.

(vii) Both of Complainant 1's parents were deceased. Any evidence they could give in relation to the alleged admissions made at the confrontation and the lost note found in the riding jacket was therefore not available.

(viii) The records of the college for further education were no longer available. These might have contained material relevant to the complaint made by Complainant 3 at the time.

45. In F (S), the Court of Appeal referred at paras 31 and 32 with apparent approval to two earlier cases, namely R –v- MacKreth [2009] EWCA Crim. 1949 and R –v- Hereworth [2011] EWCA Crim. 74 to the effect that mere speculation about whether the absence of documents or witnesses due to the passage of time was a disadvantage to the defendant was insufficient to lead to the conclusion that a fair trial was impossible.

46. In our judgment that is the situation here. It is impossible to know whether the eight matters listed in para 44 would have helped the appellant or been damaging to his case. Furthermore, if the absence of material of this nature were sufficient to lead to a stay on the ground of delay, it is hard to envisage any case of historical sexual abuse being tried. It will always be possible to suggest that delay has led to the loss of records or to an inability to put forward an alibi or to witnesses not being available or to forensic evidence being absent. We do not see that any of the matters raised by Advocate Steel are unusual in this respect and we do not see that, even cumulatively, they lead to a conclusion that a fair trial was not possible. Each of the eight grounds simply speculates that, if available, such evidence might have helped the appellant. Some of them (such as (iii) and (v)) would be equally true even if there had only been a delay of a few months and others, such as (i) and (ii), would be unlikely to help after a delay of only a few years.

47. We are not surprised that the advocate then representing the appellant did not apply for a stay on the ground of delay. In our judgment a fair trial was perfectly possible despite the delay and the trial which in fact took place was fair notwithstanding the eight matters referred to by Advocate Steel. There has accordingly been no abuse of process. Although it is not listed as a ground of appeal, we have nevertheless considered the safety of the conviction and we do not consider the conviction to be unsafe as a result of the matters referred to by Advocate Steel. We therefore reject this ground of appeal.

Ground 2 – cross-admissibility

48. In Dodd and Butler –v- Law Officers of the Crown [23rd July 2015, 34/2015], this Court approved the statement of principle by the Jersey Court of Appeal in U –v- Attorney General [2012] (1) JLR 349 where Nutting JA said this at paragraphs 12-14:-

"The test for admitting similar fact evidence.

12. It is common ground that the relevant legal test for the introduction of similar fact evidence involves a two-stage analysis. The first is a hard-edged question of relevance, at which stage the question is whether the material has any probative value. The second stage involves a discretionary exercise to determine whether the evidence should, in all the circumstances of the case, be admitted.

13. None of this is controversial or new. It is well established that similar fact evidence is admissible if it is relevant to an issue before the court,* e.g. *because it tends to prove one of the elements in the alleged offence, or to rebut a defence which would otherwise be open to the accused (*Styles *v.* Att. Gen. *(17), following* O'Brien *v.* Chief Const. (S. Wales) *(5) ([2005] 2 A.C. 534, at para. 67* et seq*) and ultimately* Makin *v.* Att.-Gen. for New South Wales *(3)). The question of coincidence lies at the heart of the analysis. Evidence is likely to be admissible if an attempt to explain it away by coincidence would be an affront to common sense, or would be against all probabilities, or would only be accepted as an explanation by "an ultra-cautious jury" (referred to in* D.P.P. *v.* P *(1)).

14. It is worth emphasizing that, in order to admit similar fact evidence, it is not necessary for the prosecution to wait until a specific defence has been set up. It is sufficient if the defence is reasonably available (*Harris *v.* D.P.P. *(2) (36 Cr. App. R. at 52–54)). Nevertheless, the prosecution must not be allowed to adduce prejudicial evidence by imputing to the accused an intention to set up some improbable or fanciful defence (*Thompson *v.* R. *(18) ([1918] A.C. at 232)). This qualification is illustrative of the more general principle mentioned above, which requires the court to balance the probative value of any admissible similar fact evidence against its prejudicial effect, and to exercise a discretion in deciding whether to allow it to be adduced-a discretion which is exercised by reference to the interests of justice (*Noor Mohamed *v.* R. *(4) ([1949] A.C. at 192))."

49. Archbold 2005 Edition (the last edition before the statutory changes were introduced in England and Wales by the Criminal Justice Act 2003) is to like effect. Thus para 13-23 states as follows:-

"… the rationale of similar fact evidence in such cases [i.e. where the defendant denies the allegation on the basis that the prosecution witnesses are mistaken or lying] is simply stated. Two or more people do not make up, or mistakenly make, similar allegations against the same person independently of each other…."

And at 13-25:-

"In such cases, the task of the judge will be to assume that the evidence of the witnesses is true (R –v- H [1995] 2 AC 596, HL), and then ask himself whether explanation of the common allegations on the basis of chance or coincidence would be an affront to common sense. No particular degree of similarity is required. The reality is that independent people do not make false allegations of a like nature against the same person."

50. A useful summary of the development of the rules in relation to similar fact evidence is to be found at paras 39-40 of the judgment of the Jersey Court of Appeal in F –v- AG [2016] JCA 168 delivered by Perry JA. He summarised the position at para 42 as follows:-

"Following the guidance given by the House of Lords in Director of Public Prosecutions – v- P, the question to be decided is whether there is material upon which a jury would be entitled to conclude that the evidence of one complainant about what occurred, is so related to the evidence given by another complainant about what happened to that other complainant, that the evidence of the first complainant provides strong enough support for

the evidence of the second complainant to make it just to admit it, notwithstanding its potential prejudicial effect."

51. F was a case concerned with sexual offences against two step-daughters of the defendant. One step-daughter was 3-7 years old at the time of the offending and the other was 13-14. Details of the various offences are set out at paras 3-16 of the judgment from which it appears that the nature of the alleged sexual conduct varied although there were also similarities. Despite this the Court of Appeal held at para 43 that the degree of similarity was sufficient (also in respect of a third girl in respect of whom charges had not been brought) for the evidence to be cross-admissible :-

"43. In the Appellant's case, there was ample material to support the learned Commissioner's direction to the jury on cross-admissibility; that is for the testimony of each of the three girls to be capable of providing support for the testimony of the other. The Appellant was the girls' step-father. The evidence demonstrated that the Appellant used his position within the family to take advantage of opportunities for sexual contact with his step-daughters, each of whom was a child. The evidence was capable of demonstrating that in the period during which he lived with the children he displayed a sexual interest in each of the girls and abused his position of trust by subjecting them to indecent touching. In the case of Complainant 1 and Complainant 2 there was in addition the fact that some of the indecency took place at a time when they were in bed and the Appellant lay on top of them. In the case of Witness 3 and Complainant 2 the indecent touching was of an opportunistic nature and involved, among other things, touching their bottoms. There were additional similarities concerning the Appellant's exposure of his penis to Complainant 1 and to Complainant 2".

52. In the present case, the trial judge directed the Jurats that the evidence of each complainant was capable of supporting the evidence of the others. Although the advocate then appearing for the appellant initially submitted to the judge that cross-admissibility should only apply to the evidence of Complainants 1 and 2, she did not demur when the judge indicated, after having heard from Crown Advocate Perry, that he considered that cross-admissibility also applied in respect of Complainant 3.

53. Advocate Steel accepts that there were sufficient similarities in the evidence of Complainant 1 and Complainant 2 to satisfy the test for similar fact evidence and for such evidence therefore to be cross-admissible. He was clearly right to do so. However, he submits that this was not so in respect of Complainant 3 and that the judge was wrong in law to direct that it was. He submits that the nature of the sexual assault was different in that it involved touching her breast under her bra, which was not alleged in respect of either of the first two complainants. Secondly, he points to the significant time difference in that the offences took place approximately 12-15 years after the offences alleged by Complainant 1 and approximately 7-10 years after the offence alleged by Complainant 2. Thirdly, although he accepts that there was evidence of grooming in respect of all three complainants, he asserts that there was a difference in relation to Complainant 3 as she did not allege there had been any kissing, unlike the first two complainants and the period of grooming was much shorter.

54. In our judgment, there were ample grounds upon which the trial judge could correctly find that the evidence of Complainant 3 was admissible in relation to the counts against the other two complainants and vice versa. The relationship between the appellant and the three complainants was similar in each case. They were either Saturday girls or apprentices employed by him at his salon. He was in a position of trust towards them. There was ample evidence of a similar approach on his part towards grooming them. This involved being nice to them to begin with before moving on to touching, holding and cuddling them at work. Although the exact nature of the touching varied, its general nature and the circumstances in which it occurred were very similar in each case and the fact that there was a gap of several years does not alter this. Whilst it

is true that in the case of Complainants 1 and 2, the case was that the appellant had proceeded to rape each complainant and that had not occurred in relation to Complainant 3, that seems to us to be beside the point. Matters did not progress any further with Complainant 3 because she brought matters to a close by firmly saying no.

55. In our judgment, there were sufficient similarities about the relationship of the appellant to the three complainants and his modus operandi in seeking to groom them for the purposes of sexually assaulting them to justify cross-admissibility. It would be a remarkable coincidence if, in the absence of collaboration, three girls independently came up with a very similar account of how the appellant groomed young girls who worked for him at the salon and then moved on to sexually assaulting them. The possibility of collaboration or concoction by the three complainants putting their heads together was raised fairly and squarely by the defence before the Jurats. A difficulty in the way of the defence on this point was that there was clear evidence that Complainants 1 and 3 had complained about the appellant's behaviour to their respective parents at the time (1980 in the case of Complainant 1 and 1994 in the case of Complainant 3) i.e. well before any suggestion of their having met each other so as to be able to put their heads together to concoct a story. We therefore reject this ground of appeal.

Ground 3 – Fresh Evidence

56. The appellant seeks leave to adduce fresh evidence in the form of two witness statements from Mr Christian Le Page, one of the sons of the appellant.

57. The test for admitting fresh evidence on appeal is referred to in Presland –v- Law Officers (4th July 2007), [2007-08] GLR N11. The test is as follows:-

    (i) The evidence that it is sought to be called must be evidence that was not available at the trial.

    (ii) It must be evidence relevant to the issues.

    (iii) It must be evidence which is credible evidence in that it is well capable of belief.

    (iv) It must be such that, after considering the evidence, there might have been a reasonable doubt in the minds of the Jurats as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

    The court in Presland went on to elaborate the first of these limbs (at paragraph 16) by emphasising that there had also to be a reasonable explanation for the failure to adduce the evidence at trial.

58. The first statement of Mr Le Page says that he is a Microsoft certified professional and is the managing director of an IT consultancy firm in Guernsey. He says that on 1st February 2017 he created a new Facebook account. This enabled him to review all public pictures published by Complainants 1, 2 and 3. He found that on the Facebook profile of Complainant 3, there were six pictures which had been posted by Complainant 3 between December 2014 and December 2016 which were 'liked' by Complainant 1. The like function enables a person to comment that they 'like' what has been posted.

59. He goes on to say that to test who can 'like' whose photos, he searched for a real-life friend of his, who he was not Facebook friends with, on his new Facebook account. He found that he could see the public pictures posted by his real-life friend but, as a 'non-friend' for Facebook purposes, he could not 'like' those pictures as the option to 'like' was not displayed under the picture. He concluded therefore that, although Facebook enables an account holder to put pictures out publicly so that they can be seen by anyone, only a Facebook friend of the account

holder has the ability to 'like' the picture. This evidence suggested therefore that Complainant 1 and Complainant 3 were Facebook friends between December 2014 and December 2016.

60. His second witness statement is dated 30th March 2017 and states that, having carried out further investigations, he has ascertained that they were not at that date friends on Facebook.

61. Advocate Steel submits that this evidence was not available at trial and there is a reasonable explanation for it not having been called then. The defence did not investigate any links between the complainants on social media because the family of the appellant were advised not to carry out such searches in case they breached the appellant's bail condition not to contact the complainants directly or indirectly.

62. We do not accept that submission. Searches on social media are nowadays a common method of investigating whether there is any connection between people. It would have been open to the defence to instruct an independent expert to carry out such searches or, if they were concerned about the bail condition, to apply to the court for a variation of the condition so as to enable this to occur. It follows that the evidence was available at the time and there is no reasonable explanation for it not having been called. The condition for the admission of this evidence is therefore not satisfied. Nevertheless, we go on to consider what its effect would have been if it had been admitted.

63. In response to the statement of Christian Le Page, the prosecution produced a statement from James Le Coulliard, a Civil Internet Investigator with the States of Jersey Police. He said that Mr Le Page's first witness statement was incorrect when it concluded that you cannot 'like' someone's picture unless you are a Facebook friend of that person. Mr Le Coulliard asserts that whether or not a 'like' option appears below a picture on Facebook depends upon the privacy settings of the account on which the picture is published, not on whether you are a Facebook friend of the publisher.

64. We were informed by Advocate Steel that, in the light of Mr Le Coulliard's evidence, it was now accepted on behalf of the appellant that the fact that Complainant 1 'liked' photographs posted by Complainant 3 did not prove that they were Facebook friends. Nevertheless, he submitted that this was still a likely explanation for the existence of the 'like' entry by Complainant 1 and that the evidence is capable of raising a reasonable doubt when taken with the existing evidence because of what Complainant 1 and Complainant 3 said in evidence.

65. Complainant 1 was asked about this in evidence in chief and at page 45 of the transcript is the following:-

> ***"Q - What about [Complainant 3], does that name mean anything to you?***
>
> ***A - Yes, I'm … she's a friend of a friend of mine but I don't really see her. I just know that she's a friend of a friend but I don't …***
>
> ***Q – Did you know prior to these proceedings that she had worked for Keith as well?***
>
> ***A – No."***

She was not asked about this in cross-examination.

66. In evidence in chief, Complainant 3 said as follows at page 133 of the transcript:-

> ***"Q – Do you know either [Complainant 2] or [Complainant 1]?***

A – Like I know [Complainant 1], like we met about three years ago by like mutual friends but like not when like she worked with Keith.

Q – So what happened to you or what happened to her, did you discuss that at the time?

A – No. No, we didn't.

Q – And were you aware anything had happened to her?

A – Nothing, no.

Q – Did she seem to be aware whether anything had happened to you?

A – No.

Q – But that has been some time after you left the salon?

A – Oh, a long time, years afterwards. It must have been about three like four like years ago I met [Complainant 1], just by chance."

67. In cross-examination of Complainant 3, the following exchange took place at page 145 of the transcript:-

"Q – And you knew one of the people who has made the complaint, do you not?

A – Like quite like recently, yes.

Q – And I suggest -

A – But like not friends. I've like seen her a few times with like mutual friends for like birthdays or stuff.

Q – But you did know her prior to these matters coming to court, did you not?

A – Her?

Q – You did know [Complainant 1] prior to these matters coming before the court, did you not?

A – I've known her probably three years, for like four years but like I've not seen her for like a while though, [inaudible] not seen her when I got my phone call, no.

Q – I suggest… that you did discuss –

A – You can, that's fine, but no, I didn't see her.

Q – Just listen to the question, that you did discuss these matters with her and that you arrived at these accounts together?

A – That is not true."

68. Advocate Steel submitted that, if they were Facebook friends between December 2014 and December 2016, this was inconsistent with their evidence at trial and undermined their credibility. It supported the defence case theory of collusion.

69. He went on to submit that if they were Facebook friends, the fact that neither of them volunteered this when giving evidence was very suspicious and suggested that they wished to hide the fact. This gave credence to the fact that they had conspired to concoct the case against the appellant. We unhesitatingly reject that suggestion. Neither of them was ever asked whether they were Facebook friends or whether they had been in contact with each other via social media. It is unreasonable to expect a witness to volunteer information which she has not been asked about and then seek to draw some adverse inference from the fact that she has not done so.

70. In our judgment, even assuming that the defence could show that Complainant 1 and Complainant 3 were Facebook friends between December 2014 and December 2016, this would not render the convictions unsafe. A fair reading of the evidence of both Complainant 1 and Complainant 3 is that they accepted that they knew each other a few years prior to the trial and had met. They were not however particular friends and they had not spoken about what had happened in the salon. The fact that they may have been Facebook friends does not in our judgment add materially to the admitted degree of contact between them or suggest that they were lying in what they said in evidence. It would not be inconsistent with their evidence or undermine their credibility as submitted by Advocate Steel. The suggestion of possible collusion was fairly and squarely before the Jurats and in our judgment there is no possibility that the mere fact that they were Facebook friends (if they were) might have led the Jurats to a different verdict.

71. We therefore reject this ground of appeal.

Conclusion

72. For the reasons which we have given, we do not consider that any of the three grounds of appeal are reasonably arguable and we therefore dismiss this application for leave to appeal against conviction.