Neutral Citation Number: [2019] EWCA Crim 623

Case No: 201802169 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT MAIDSTONE
Mr Recorder Peter Guest
T 2017 7399

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9.4.2019

Before:

LORD JUSTICE SIMON
MR JUSTICE TURNER
and
HER HONOUR JUDGE TAYTON QC
(sitting as a Judge of the Court of Appeal Criminal Division)

- -

Between:

	R	**Respondent**
	and	
	C	**Appellant**

- -
- -

Mr Tim Bass for the Appellant
Mr Dominic Connolly for the Respondent

- -

Approved Judgment

The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

Lord Justice Simon:

1. This appeal against conviction, brought with the limited leave of the single judge, raises two points: first, the application of the hearsay provisions in chapter 2 of Part 11 of the Criminal Justice Act 2003 ('CJA 2003'); and secondly, the circumstances in which a Jury note may give rise to a decision to discharge them from returning verdicts.

2. On 24 April 2018, in the Crown Court at Maidstone, before Mr Recorder Peter Guest and a Jury, the appellant was convicted on each of 13 counts of sexual activity with a child contrary to s.9(1) of the Sexual Offences Act 2003. He was acquitted on a further count charging this offence (count 14) and two further counts of causing a child under 16 to engage in sexual activity (count 15 and 16). He was sentenced to a total term of 9 years imprisonment.

The trial

3. The charges arose out of allegations of sexual abuse by the appellant against his two step-daughters, G and C when they were young teenagers. G was born in June 2000 and her younger sister, C, was born in March 2003. Their mother's relationship with their father broke down in acrimonious circumstances in 2004. In 2008, she met the appellant and they started living together in 2009, at an address in Edenbridge. They married in 2010; and in 2011 she gave birth to twins, a son and a daughter.

4. In February 2013, the family moved to another address in Edenbridge, where G and C shared a room, divided by a curtain.

5. In 2014, the family moved to Sevenoaks and then, in August 2015, to an address in Swanley. In 2016, the appellant's father died. The death affected him and had a detrimental effect on the marriage. At this time, he was working at Costa Coffee in Westerham, where his early shifts required him to get up at 4.00 am.

6. The prosecution case was that for a period of months, when G was aged between 13 and 15, the appellant would go into her bedroom, ostensibly to say goodnight. He would kiss her on the lips, insert his tongue in her mouth (counts 1 and 2), and touch her breasts (counts 3 and 4). On one occasion, he was alleged to have touched her vagina (count 5). This conduct came to an end when G reported to her mother that she believed he had taken a photograph of her through the bathroom window when she was in the shower. Fearful that G might say something about what was happening in the bedroom, he stopped sexually abusing G. However, he then turned his attention to C. It was alleged that when C was aged 13, he would go into her bedroom in the early hours of the morning. He would kiss her, insert his tongue in her mouth (counts 6 and 7), touch her breasts (counts 8 and 9), suck her breasts (counts 10 and 11) and touch her vagina, over and under her clothing (counts 12-14). It was also alleged that he would also get her to touch his penis (counts 15 and 16). As we have noted he was acquitted on counts 14, 15 and 16.

7. These allegations came to light on 8 February 2017, when both girls disclosed what had happened to their mother. They then provided a more detailed account to a specially trained police officer in ABE interviews.

8. The appellant was arrested on the same day and was later interviewed. He denied the allegations. He said that he felt that he had a good relationship with both girls and did not know why they would make up the allegations. He was released on police bail pending further inquiries. He returned on police bail on the 18 May 2017, when the more detailed accounts obtained in the ABE interviews were put to him. He continued to deny the allegations.

9. On 17 March 2017, after providing her ABE account, G committed suicide at Dunton Green Railway Station. She left a suicide note that was to figure in the trial. The material parts of the note:

> I can't do this any more, the stress from the current situation is too much to handle and 24/7 I feel so guilty because of what happened … Make sure that bastard rotts (*sic*) in hell for what he has done to me and [C] …
>
> Mum, please call Dad, tell him everything but let him know how much I loved him. I miss our walks to the park and I miss him. I love you Dad.

10. In circumstances that we will come to, this extract from the note was placed before the Jury as an Admissions.

11. The defence case was that the allegations against the appellant were untrue. He gave evidence in his defence and relied upon the account which he given at length in his police interviews. He said that he would give G a kiss on the cheek as he tucked her into bed, when she was younger, but no more than that. So far as C was concerned, he explained that although he got up early to go to work, there was only one occasion when he entered her room and that was because she was talking in her sleep. He agreed that his relationship with his wife and the girls had deteriorated after the death of his father; but he told the Jury that at no stage had he sexually assaulted his step-daughters.

The first issue: the admission of the hearsay evidence

The Recorder's ruling

12. The defence submitted that both G's ABE interview and her suicide note amounted to hearsay, which should not be admitted in evidence before the Jury. The argument of Mr Bass was that, although G was dead and her evidence was therefore potentially admissible as hearsay under s.116(2)(a) of the CJA 2003, her death was caused by the very person in support of whose case it was sought to give the statement in evidence, and therefore was rendered inadmissible by the operation of s.116(5)(a). Further, and in any event, the ABE evidence did not meet the test for admissibility in s.114 of the CJA 2003 and should in any event be excluded on the proper application of s.78 of the Police and Criminal Evidence Act 1984 ('PACE 1984'). Similar arguments were advanced in relation to the suicide note, with the added force that the note was of little probative value when weighed against the emotive accusation against the appellant made by G shortly before she died.

13. The Recorder set out the arguments for and against the admission of ABE interview. Although he expressed some doubts about it, he assumed for the purposes of the

argument that s.116(5) applied in the circumstances. However, he concluded that the words of the note, 'the current situation is too much to handle' showed that G's decision to take her own life was not brought about by the prospect of giving evidence, but by reason of all the events surrounding and flowing from her disclosure of the appellant's offending.

14. He then considered the application of s.114 of the CJA 2003 and s.78 of PACE 1984; and applied the staged approach set out by this Court in *Riat (Jaspal) and others* [2013] 1 Cr App R 2. Having directed himself as to the dangers of admitting 'sole and decisive' hearsay evidence, he concluded that the evidence should be admitted.

The statutory framework

15. Chapter 2 of Part 11 of the Criminal Justice Act 2003 provides:

> 114. Admissibility of hearsay evidence -
>
> (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if -
>
> (a) any provision of this Chapter or any other statutory provision makes it admissible,
>
> (b) any rule of law preserved by section 118 makes it admissible,
>
> (c) all parties to the proceedings agree to it being admissible, or
>
> (d) the court is satisfied that it is in the interests of justice for it to be admissible.
>
> (2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant) -
>
> (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
>
> (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
>
> (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
>
> (d) the circumstances in which the statement was made;
>
> (e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it.

(3) Nothing in this Chapter affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings.

16. Section 116 of the 2003 Act is the first of the principal categories of admissibility.

116. Cases where a witness is unavailable -

(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,

(b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and

(c) any of the five conditions mentioned in subsection (2) is satisfied.

(2) The conditions are -

(a) that the relevant person is dead;

(b) that the relevant person is unfit to be a witness because of his bodily or mental condition;

(c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;

(d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken;

(e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the

statement, and the court gives leave for the statement to be given in evidence.

(3) For the purposes of subsection (2)(e) 'fear' is to be widely construed and (for example) includes fear of the death or injury of another person or of financial loss.

(4) Leave may be given under subsection (2)(e) only if the court considers that the statement ought to be admitted in the interests of justice, having regard—

(a) to the statement's contents,

(b) to any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement if the relevant person does not give oral evidence),

(c) in appropriate cases, to the fact that a direction under section 19 of the Youth Justice and Criminal Evidence Act 1999 (c. 23) (special measures for the giving of evidence by fearful witnesses etc) could be made in relation to the relevant person, and

(d) to any other relevant circumstances.

(5) A condition set out in any paragraph of subsection (2) which is in fact satisfied is to be treated as not satisfied if it is shown that the circumstances described in that paragraph are caused -

(a) by the person in support of whose case it is sought to give the statement in evidence, or

(b) by a person acting on his behalf,

in order to prevent the relevant person giving oral evidence in the proceedings (whether at all or in connection with the subject matter of the statement).

17. Section 126 of the 2003 Act contains the Court's residual discretion to exclude hearsay evidence:

126. Court's general discretion to exclude evidence -

(1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if -

(a) the statement was made otherwise than in oral evidence in the proceedings, and

(b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.

(2) Nothing in this Chapter prejudices -

(a) any power of a court to exclude evidence under section 78 of the Police and Criminal Evidence Act 1984 (c. 60) (exclusion of unfair evidence), or

(b) any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise).

18. The provisions of s.78 of the Police and Criminal Evidence Act 1984 are familiar:

78 Exclusion of unfair evidence.

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, 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.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

Ground (ii): the application of s.116(5)

19. Although the single judge refused permission to appeal on this point, we permitted the appellant to argue the point as it raised a point of statutory interpretation which could be usefully resolved on this appeal.

20. Despite his doubts the Recorder was prepared to assume that s.116(5) applied. While, the hearsay provisions of chapter 2 have been described by this Court as 'labyrinthine', see *Kordakinski* [2007] 1 Cr App R 17 at [71], and 'needlessly complicated', see JR Spencer 'Hearsay Evidence in Criminal Proceedings' (2nd Ed) at §6.46-47, we are clear in our view that s.116(5) did not apply.

21. Subject to the provisions of s.114(1)(a)-(d) the ABE interview and the suicide note were inadmissible hearsay since the contents were not given in oral evidence. Section 116 is a provision within chapter 2, see s.114(1)(a).

22. Section 116(1)(a) and (b) provides thresholds of admissibility under s.116, which were both satisfied in the present case: the oral evidence of G would have been admissible in evidence at trial and she was readily identifiable as the maker of the statement.

23. The next question was whether condition (a) was satisfied. It plainly was: G had died on 17 March 2017. It followed that the evidence was admissible subject to the proviso in s.116(5).

24. The evidence would not have been admissible if G's death was (i) caused 'by the person in support of whose case it is sought to give the statement in evidence', and (ii) 'in order to prevent the relevant person giving oral evidence.'

25. Mr Bass's argument, which he realistically acknowledged as 'unattractive', was that G 'opted to take her own life', and consequently, her death and absence as a witness was caused by herself. Since she was the person in support of whose case it was sought to give the statement in evidence, her evidence was inadmissible, by reason of s.116(5).

26. In our view this argument fails as a matter of statutory interpretation. Section 116(2)(a) identifies the person whose evidence is relied on as 'the relevant person'. Section 116(5)(a) refers to 'person in support of whose case' it is sought to give the statement in evidence. Such a person is not described as 'the relevant person' and the reason is plain: in its context, the subsection applies to a party in the trial. Although the position might be different under s.116(2)(c), so far as s.116(2)(a) is concerned, the person referred to in s.116(5) will be the defendant or someone acting on his or her behalf.

27. We would add that the defence interpretation would create significant practical difficulties, as is clear from the argument before the Recorder. It invites a determination of why a prosecution witness killed him or herself. This is a matter with which the coronial process is designed to deal, but which the Crown Court is not. It may, for example, involve a detailed investigation and analysis of a deceased's mental health and state of mind over a significant period of time, and the calling of evidence. It may be that in some cases it will be clear that a witness kills him or herself in order to avoid giving evidence. If that is so it will be a relevant factor when the court comes to consider the test for admissibility under s.114(2). In any event, in the present case, the Recorder was entitled to find on the facts available to him that G did not kill herself in order to avoid giving evidence, and that her decision was 'brought about by all the events surrounding and flowing from disclosure'.

28. It follows that, although we granted permission to appeal on this ground, we reject the argument.

Ground (ii) the admission of the suicide note

29. As is clear from the decision of this Court in *Riat (Jaspal) and others* [2013] 1 Cr App R 2 at [6], when working through the statutory framework in cases where it is sought to admit hearsay evidence, a judge is concerned at several stages with both: (i) the extent of the risk of unreliability, and (ii) the extent to which the reliability of the evidence can safely be tested and assessed. The judgment in that case set out a stepped or staged approach which should be adopted by trial judges at [7] and [8]:

> 7. The statutory framework provided for hearsay evidence by the CJA 2003 can usefully be considered in these successive steps:

(i) is there a specific statutory justification (or 'gateway') permitting the admission of hearsay evidence (ss 116-118)?

(ii) what material is there which can help to test or assess the hearsay (s.124)?

(iii) is there a specific 'interests of justice' test at the admissibility stage?

(iv) if there is no other justification or gateway, should the evidence nevertheless be considered for admission on the grounds that admission is, despite the difficulties, in the interests of justice (s.114(1)(d))?

(v) even if *prima facie* admissible, ought the evidence to be ruled inadmissible (s.78 of the Police and Criminal Evidence act 1984 (PACE) and/or s.126 of the CJA 2003?

(vi) if the evidence is admitted, then should the case subsequently be stopped under s.125?

8. Although there is no rule to the effect that where the hearsay evidence is the 'sole or decisive' evidence in the case it can never be admitted, the importance of the evidence to the case against the accused is central to these various decisions.

30. The Recorder identified the approach to the hearsay provisions in the CJA 2003 set out by Hughes LJ in *Riat*; and approached the question of admissibility accordingly. At step (i), he identified the statutory gateway: s.116(2)(a). At step (ii) he considered what material there was that might test the evidence, noting that he had to ensure that the evidence could be safely viewed as reliable. He noted that there had been full disclosure of unused material, including G's General Practitioner and counselling notes, together with disclosure of recent complaint made by G to her mother and the police. He also noted that C was present when these matters came to light; and was available to be cross-examined. Since step (iii) and (iv) did not arise, the recorder then addressed step (v).

31. Strictly speaking s.114(2) is only directly applicable when a court is considering whether or not to admit evidence under s.114(1)(d) of the CJA 2003. However, the nine factors, (a)-(i) in s.114(2) provide a useful checklist or *aide memoire* for a judge when considering the admission of evidence under s.126 of the CJA 2003 and s.78 of PACE, see *Riat* (above) at [22]. The court should give consideration to these factors, to the extent they are relevant on the facts of the case, both with regard to such weight they bear individually and to each other. However, they are not a questionnaire to be answered, see for example, *Taylor* [2006] 2 Cr App 14 at [39].

32. The Recorder addressed each of the matters set out in s.114(2)(a)-(i) in reaching his conclusion that the hearsay material should be admitted.

33. Step (vi) of the *Riat* staged approach did not arise.

34. On this appeal, Mr Bass submitted that the terms of the suicide note were both accusatory, highly emotional, non-specific and prejudicial; not least because they did not identify what the appellant was said to have done. To the extent that the contents went beyond what was said in the ABE interview, the contents should have been excluded as a matter of fairness.

35. Mr Connolly accepted that the contents of the suicide note was emotive, but submitted that it contained potentially strong evidence that the appellant had committed serious offences against G, as she had alleged in her ABE interview.

36. It is clear from the Recorder's reasoning that he properly considered both the risk of the unreliability of the evidence and the extent to which it could be tested and assessed. He concluded, in relation to both the ABE interview and the extract from the suicide note, that having regard to all the circumstances, their admission would not have such an adverse effect on the fairness of the proceedings that they should be excluded. In doing so, he adopted the staged approach to the issue of admissibility of both the ABE interview and the suicide note, considering the various issues that arose under s.114(2) of the CJA 2003 and s.78 of PACE 1984.

37. In such cases, this Court will only interfere with such an exercise of judgment if it concludes that a decision was reached which was outside the band of legitimate decisions available to the Judge, see for example, *Finch* [2007] 1 WLR 1645 at [23]. It is plain that the Recorder was aware of the charged nature of the note and the likely effect on the Jury of its contents. It was for this reason that he gave a warning to keep 'cool heads.' Some judges might have admitted the ABE evidence but excluded the suicide note; but that is not a reason for interfering with the Recorder's decision following a careful and measured ruling.

38. Accordingly, we reject ground (ii).

The second issue: the Jury note and the decision not to discharge the Jury: Ground (iii)

39. In the course of her evidence, the appellant's wife explained how on 8 February 2017, following the disclosures of G and C, she made a video call to the appellant to challenge him about her daughters' allegations. He had denied any wrongdoing. In cross-examination, but not in response to any question asked of her, she gave evidence of a text message, whose impact was not apparent to counsel or to the Recorder. However, after the appellant had given evidence, a Juror wrote a note to the Recorder, in the following terms:

> At the end of [Mrs C's] evidence yesterday, her last comment regarding the text message from Brett on 8 February '17 whilst in the hallway, Brett said something similar to 'I love you and the kids. We've been here before … [break in audio] … broke the family'. Question: Please can you confirm the wording of the text message and explain what was meant by 'We've been here before and it almost broke the family'.

40. Following an investigation in the absence of the Jury, it became apparent that this was a reference to an allegation of a sexual assault which had been made against by the

appellant in 2014 by a female member of staff at a bar where he had then worked. The allegation had been investigated by the police who had decided to take no further action.

41. In the light of the issues raised by the note, the defence applied to discharge the Jury.

42. In refusing the application, the Recorder set out the terms of the note and said that the implication of what was said had not struck either counsel or him.

43. Having listened to the audio recording of the evidence Mr Bass took instructions from the appellant, and the Recorder offered him the opportunity of reopening the defence case so that the appellant could, if he wished, deal with the issue raised. It was agreed that the witness was referring to a passage on the third page of her witness statement. In 2014, the appellant had been arrested for a sexual assault on a woman aged 18 whom he knew from work. The allegation was that he had tried to kiss her and touch her breasts. The police decided not to charge him on the basis of insufficient evidence; and the appellant therefore remained a man of good character. The question from the Jury came after the appellant had given evidence and the defence had closed its case, and just before speeches. The Recorder set out the defence submission that, since the Jury now knew that there was a previous allegation, this had the effect of introducing bad character evidence and the Jury should therefore be discharged. The prosecution's considered response was that the appropriate course was to give a robust Jury direction.

44. The Recorder ruled that there was an overwhelming interest in continuing the trial and he refused to discharge the Jury. Potential prejudice would be dealt with by way of a firm jury direction; and in the particular circumstances of the case it was appropriate to rely on the good sense of the Jury, and to approach the case on the basis that they would follow any direction that they had been given and would be given.

45. The Recorder then gave the direction. He set out the terms of the note, and added this:

> There is no evidence as to what that remark – if it has been accurately recorded and reported – refers to. [The appellant's wife] was not asked any further questions about that remark by either barrister, nor too was the defendant asked any questions about that remark by either of the barristers. The remark was not regarded by either barrister as of any significance and I agree with that view. The defendant, you were told, is a man of good character without convictions or cautions, and that position remains. I direct you that that remark is of no relevance to the issues you are considering. You should not speculate as to what [the appellant's wife] was referring to and you should put that remark out of your mind as irrelevant when you come to consider the evidence in this case.

46. Before us, Mr Bass submitted that this direction was not sufficient to dispel the prejudice that had been introduced by the evidence that the Jury had heard, and which they had asked about. The prejudice to the appellant was the possibility, or even likelihood, that the Jury would regard the observation, 'we've been there before and it almost broke the family' as a reference to an earlier incident of the same nature.

47. In *Lawson (Michael) and others* [2007] 1 Cr App R 20, this Court addressed the issues that may arise when inadmissible evidence which is prejudicial to the defendant is disclosed to a Jury. Auld LJ giving the judgment of the court said this:

> 64. The ultimate question for the court in determining whether the judge correctly ruled against the appellants' application to discharge the jury is whether, given the error he made and the steps he took to mitigate it, it is satisfied that the convictions are safe; *Docherty*. And, in determining that question in a case such as this of wrongly admitted prejudicial material, the appropriate test for the trial judge is that identified in *Docherty*, namely as to the 'the most prejudicial interpretation' and its possible effect on the jury. Perhaps, more useful is the simpler and more broadly expressed formulation in *Medicaments and Related Classes of Goods* (No.2) [2001] 1 W.L.R. 700, CA, whether a fair-minded and informed observer would conclude that there was a real possibility, or real danger, that the jury would be prejudiced against a defendant by wrongly admitted prejudicial information.
>
> 65. Whether or not to discharge the jury is a matter for evaluation by the trial judge on the particular facts and circumstance of the case, and this court will not lightly interfere with his decision. It follows that every case depends on its own facts and circumstances, including: 1) the important issue or issues in the case; 2) the nature and impact of improperly admitted material on that issue or issues, having regard, inter alia to the respective strengths of the prosecution and defence cases; 3) the manner and circumstances of its admission and whether and to what extent it is potentially unfairly prejudicial to a defendant; 4) the extent to and manner in which it is remediable by judicial direction or otherwise, so as to permit the trial to proceed. We repeat, all these matters and their combined effect are very much an evaluative exercise for the trial judge in all the circumstances of the case. The starting point is not that the jury should be discharged whenever something of this nature is put in evidence through inadvertence. Equally, there is no sliding scale so as to increase the persuasive onus on a defendant seeking a discharge of a jury on this account according to the weight or length of the case or the stage it has reached when the point arises for determination. The test is always the same, whether to continue with the trial would or could, by reason of the admission of the unfairly prejudicial material, result in an unsafe conviction.

48. It is clear from this passage, as well as other cases in this area of the law, that decisions on whether to discharge a Jury are matters for the evaluation of the trial judge, who will be particularly well placed to make an assessment of the considerations which bear on the issue; and that there can be no guiding principles the application of which will provide the answer to the question whether a Jury should be

discharged in every case. The starting point is that the Jury should not be discharged when inadmissible material is introduced in evidence, and the four enumerated considerations in *Lawton* at [65] are likely bear more or less weight depending on the circumstances.

49. We turn then to these four considerations, although plainly it was not intended to be an exhaustive list. First, we accept that the appellant's good character was an important issue in the case. Secondly, we also accept that the remark had the potential to invite speculation as to that good character since that was 'the most prejudicial interpretation' and the possible effect on the Jury, see *Docherty* [1999] 1 Cr App R 274. However, it did not in fact introduce his bad character or directly impugn it. Thirdly, in contrast to some cases, the matter of concern arose adventitiously. One or more members of the Jury had picked up a point that had not been noticed either by counsel or the Recorder. Finally, in so far as it could be, the matter was dealt with promptly and effectively. The Jury were told that this was not a matter that was regarded as significant by the prosecution, the defence or the Recorder. They were reminded of the evidence that the appellant was a man of good character; and they were told that the remark was of no relevance to any issue in the case, that they should not speculate about the witness was talking about, and that they should put the remark out of their mind as irrelevant. As this Court has said on many occasions, Juries can be expected to follow clear directions of this kind.

50. The Recorder having decided not to discharge the Jury and having given the direction that he did, the question arises as to how an appellate court should approach that decision. Although we were referred to the Privy Council decision of *Arthurton v. The Queen* [2005] 1 WLR 949 as an example of a case where an appellate court reversed a trial judge's decision not to discharge a Jury, we did not find it helpful to compare the very different facts of that case with the present case, since it will seldom be helpful to compare the facts of cases rather than apply established principles, However, in the judgment of the Board given by Dame Sian Elias there is this:

> 28. A decision to discharge a jury is a matter of discretion for the trial judge. It falls to be exercised in the context of the trial, the flavour of which may not be readily recaptured on appeal. It will often be a difficult decision. Questions of fairness arise in relation to others, as well as to the accused. The judge in the present case was conscious that the case was a retrial, involving a young complainant. In many cases jury directions will sufficiently meet fears of prejudice through disclosure of irrelevant or insufficiently probative evidence. Whether there is unfairness turns on the context, including in particular the issues at trial. The decision whether or not to discharge a jury is one an appellate court will not interfere with lightly, as cases such as *Weaver* and *Palin* emphasise. Where the trial judge has not fallen into any error of principle, it is necessary of the appellate court to form the view that there has been unfairness which, if not corrected, would amount to a miscarriage of justice.

51. Again, there is the emphasis on the advantages that the trial judge has over an appellate court in weighing the issue in context, and the clear statement that, unless

the trial judge has made an error of principle, an appellate court will be diffident about interfering in the decision.

52. In the present case, the Recorder carefully weighed the relevant considerations for and against the discharge of the Jury and concluded that he should not do so. In our view that was a decision that was plainly open to him; was not outside the broad ambit of a discretion; and, in the light of the prompt direction, did not result in unfairness.

Conclusion

53. Whether viewed individually or cumulatively we are not persuaded that the grounds of appeal raise a serious doubt about the safety of the conviction. Accordingly, the appeal is dismissed.