Neutral Citation Number: [2021] EWCA Crim 411

Case No: 201902305 C3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROYDON CROWN COURT
HER HONOUR JUDGE CHARLES
T20187266

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2021

Before:

LADY JUSTICE CARR DBE
MR JUSTICE WILLIAM DAVIS
and
MR JUSTICE CALVER

- -

Between:

REGINA	**Respondent**
- and -	
ILHAN SAKIN	**First Appellant**
AND	
MUCTARR GARDRIE	**Second Appellant**

(Transcript of the Handed Down Judgment.
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Mr S Khan (instructed by **the Crown Prosecution Service**) for the **Respondent**
Ms S Meek (instructed by **Amosu Robinshaw Solicitors**) for the **First Appellant**

Hearing date: 22 March 2021

Judgment
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LADY JUSTICE CARR DBE:

The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. 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.

1. This matter comes back before the Court in highly unusual and regrettable circumstances.

2. On 2 March 2021 this constitution heard two appeals brought with limited leave by two appellants, Mr Ilhan Sakin ("IS"), now 22 years old, and Mr Muctarr Gardrie ("MG"), now 24 years old, against their convictions on 23 May 2019 following trial by a jury in the Crown Court in Croydon ("the Crown Court") before Her Honour Judge Charles ("the Judge") as follows:

   i) IS: on four counts of causing a person to engage in sexual activity without consent contrary to s. 4 of the Sexual Offences Act 2003 ("the 2003 Act") (counts 7, 8, 11 and 12), one count of controlling prostitution for gain contrary to s. 53 of the Act (count 16) and one count of rape contrary to s. 1 of the 2003 Act) (count 19);

   ii) MG: on four counts of causing a person to engage in sexual activity without consent contrary to s. 4 of the 2003 Act) (counts 7, 8, 11 and 12), one count of controlling prostitution for gain contrary to s. 53 of the 2003 Act (count 16) and one count of assault occasioning actual bodily harm contrary to s. 47 of the Offences against the Person Act 1861 (count 22).

3. The appellants also sought to renew their applications for leave to appeal against conviction on additional grounds to those for which leave has been granted.

4. Both appellants were later sentenced by the Judge as follows: IS to an overall term of 14 years' imprisonment; MG to an overall term of 9 years' imprisonment. IS renewed his application for leave to appeal against sentence.

5. The offences were said to have involved the forced and controlled prostitution of two vulnerable women, whom we shall call CH and AS, during the summer of 2018. Proceedings in relation to those counts involving AS (counts 1 to 6, 15 and 17), however, were halted either upon the prosecution offering no evidence or upon the Judge's direction to the jury at the close of the prosecution case to acquit. A co-accused, Mustapha Ghazlie (also known as and to whom we refer as "Gino"), was also acquitted at the close of the prosecution case on all counts on the Judge's direction. At the conclusion of the trial, the jury acquitted IS and MG on counts 9, 10, 13 and 14 (relating to multiple incident counts of causing CH to engage in sexual activity without consent).

6. At the conclusion of the hearing before us, we announced that we would dismiss the renewed applications for leave and the appeal of MG, but would allow the appeal of IS and quash his convictions, with written reasons to follow. A retrial was ordered.

We provided our written reasons the following day, 3 March 2021. In the light of the order for retrial we imposed reporting restrictions on those written reasons not only under s. 3 of the Sexual Offences (Amendment) Act 1992 but also under s. 4(2) of the Contempt of Court Act 1981.

7. The basis on which we allowed IS' appeal was that the Judge had failed to sum up IS' evidence to the jury. Ms Meek for IS, Ms Merrick for MG and Mr Khan for the Respondent, all of whom were trial counsel below, confirmed to us that she had failed to do so and that the transcript of the summing-up to that effect was accurate. In these circumstances, we concluded that IS' convictions had to be regarded as unsafe.

8. As we set out below, the premise of the appeal was in fact wholly misconceived. The Judge *had* summed up the evidence of IS (at the end of her summing-up and after having first summed up the evidence of MG). The transcript was incomplete and counsel's recollections, to the extent that they can have existed at all, were inaccurate. Our decision to allow IS' appeal and quash his convictions was founded on a fundamental mistake as to what had happened in the Crown Court. Having been misled as to the true position, we address below what remedy may be open to us.

<u>The facts in overview</u>

9. In the summer of 2018 CH was about 20 years old and AS was about 19 years old. IS, MG and Gino were said to have advertised the women on prostitution websites and to have retained the proceeds of the services that CH and AS provided.

10. CH and AS had lived together for a short time at AS's shared sheltered accommodation in Mitcham. There was evidence of AS working as an escort. AS alleged that CH bullied her, controlled her escort business and took money from her. CH accepted involvement, but denied forcing AS into prostitution.

11. CH and AS were due to be evicted on 10 August 2018 because of unpaid rent and complaints from their fellow tenants. They decided to throw a leaving party on their last night at the property. Gino, who knew CH, went along and introduced IS and MG to CH and AS at the party. IS invited the women to stay at his family home in Bermondsey, his parents being away on holiday. CH and AS moved in to the Bermondsey property that night and the party continued. A day or two later MG arrived on the scene and thereafter stayed most nights. They all left the property just over a week after the arrival of CH and AS and then rented various flats in Croydon and East London. AS left the group on 9 September 2018, CH on 19 September 2018.

12. AS attended Wimbledon Police Station in the evening of 9 September 2018, and was ABE interviewed on 19 September 2018. CH attended hospital on 19 September 2018; the police were called, and she was ABE interviewed on 20 September 2018.

13. AS's account was to the effect that, whilst at Bermondsey, she was drinking heavily and having sex against her wishes for money in IS' brother's bedroom. When the group moved on from Bermondsey, she was told by IS and MG that her job now was to have sex with the men who turned up and who had paid for it. She did not want to do it, and on occasions the men were violent. She was told that she had no choice. She received no money for her services. She was told that she would be hurt if she tried to

leave and was punched and abused. The door was locked and when she stood outside the property she was guarded. Her movements were monitored. AS said that CH had taken her telephone and clothes away, and threatened her. She was not aware of CH having sex with the visiting men. She managed to escape on the pretext of taking the dustbins out and getting a cigarette.

14. CH' s account to the police on 19 September 2018 was that she had been staying at AS' house. It became apparent that AS was in the escort business and was in the process of being evicted. AS had invited two men to the property. She and AS went to one of the men's property where she, CH, was encouraged to assist AS in her escort business by taking telephone calls. She was encouraged to become a masseuse, which she agreed to do, in order to avoid being an escort. She created a website account to advertise her services. Shortly after arriving at the property in Bermondsey, another man arrived and she was plied with alcohol and drugs. Men would then turn up and have sex with her. They would move frequently. The men controlled her telephone and social media. CH said that she had consensual sex with MG on several occasions. However, when she sobered up and refused, he assaulted her. She also said that MG assaulted her on 17 September 2018 when she returned a (false) positive pregnancy test.

15. In her ABE interview CH said that AS was already escorting before they left for IS' family home. Whilst there, AS escorted and CH partied and got close to MG. At one point he asked CH to answer the telephones for AS. One day, still at Bermondsey, a man arrived and said that he was there for her. IS told her to go into the other room; she refused; MG grabbed her, put his arm around her neck, pushed her against the door and called her a whore. She was forced to have oral and vaginal intercourse with the man.

16. On another occasion, when AS was out, CH was made to service one of AS's clients with oral and vaginal intercourse. On another occasion, IS asked for oral sex and slapped her bottom. There was an argument; eventually she relented and gave him oral sex. As for the incident involving the pregnancy test, when she told MG (with whom she had been having consensual intercourse) of the positive result, he reacted by punching her in the face before pulling her down the stairs. He punched her again, kicked her in the leg and stomach and started banging her head on the floor. When she said she needed to leave, she was told that she worked for them. They went to a drive through restaurant. She got out of the car, kept walking, got on a bus and went to the hospital.

17. Overall, CH said that she never wanted to work as a prostitute. IS and MG forced her into it and she felt that she had no choice. She accepted that she posted photographs of herself on the internet in underwear but this was not for selling herself or for sexual purposes.

18. IS and MG were arrested, as was Gino. Police searched their addresses and seized a variety of items, including telephones and a laptop computer. In interview, MG answered "no comment" to all questions. IS did likewise, but put forward a prepared statement stating that the allegations were false. He had not committed the offences.

The trial

19. The trial commenced on Monday 29 April 2019 and concluded on 23 May 2019. The prosecution's case relied principally upon the evidence of CH and AS. It was accepted that both women engaged in "extremely reckless" behaviour both immediately before and after meeting IS and MG, but it was that behaviour that made them so vulnerable to the exploitation perpetrated by IS and MG.

20. Reliance was also placed on the accommodation bookings made by IS and MG; their income and expenditure over the relevant period; emails between MG and an accommodation provider in which MG was said to have lied as to the nature and purpose of occupancy; various video clips showing CH and AS interacting with IS, MG and Gino in an ostensibly "happy and fun" environment; MG stating that other recordings were "all evidence" and should be deleted; a video by IS filming himself asking for God's forgiveness and exposing CH's breast while she was asleep; a recording of CH saying that IS had "blacked her eye".

21. At the close of the prosecution case, the prosecution abandoned counts 1 to 6 against all defendants. This was because in her evidence AS had exonerated all three defendants. She was adamant that the person who had coerced her into working as a prostitute in July and August 2018 was CH. Following submissions, the Judge also ruled that there was insufficient evidence for the other counts relating to AS to proceed. Further, as already indicated, Gino was discharged.

22. MG, who was of previous good character, gave evidence. It was his case that, before he ever met the women, CH was forcing AS to work as a prostitute to fund their lifestyle of drugs and alcohol. CH had operated her own website, posting pictures of herself in lingerie. When they moved in together, CH worked willingly as a prostitute. There was no force or coercion used against her. His position in summary was that CH was working in the sex industry before she ever met him and worked as a prostitute as a means of living. It was CH who was controlling prostitution for herself and AS. No assault ever took place.

23. IS also gave evidence. His case was that he had a 'summer of fun' with AS, CH, MG and Gino. They moved between different apartments throughout London, drinking and smoking cannabis. IS also pursued his hobby of creating music. During that time, both AS and CH were carrying out escorting services; however, he was not involved. He suspected that CH was acting as the 'pimp' and bullying AS. The girls had a fraught relationship and had constant arguments. He had no financial motive to operate the girls' escort business. His income during this time was derived from the Department of Work and Pensions and a carer's allowance. His family had also left him some money. In addition, he was completing work experience at his uncle's hairdressing salon. AS and CH chose to stay with IS, MG and Gino because they enjoyed their company.

24. In chronological terms, he was introduced to AS and CH by Gino. They arrived in Mitcham, where both AS and CH were staying and began 'partying'. It was at this time that he was told by CH that she was an escort. They moved to his family's home at Bermondsey. The reasons why he offered to allow AS and CH to stay at his family residence were twofold: first, he wanted to continue the party; secondly, he understood that AS was on the verge of becoming homeless and he wanted to help.

He said that he was from a 'decent family'. He cared about the girls and this was reflected in his concern for the family home whilst they were staying there. He repeated his concerns that he wanted to ensure that the property was not damaged and refused to allow AS to carry out escorting services in his parents' bedroom, in case a stranger stole an item of property. He said that none of MG's friends came to his home.

25. Following their stay in Bermondsey, they moved to 50 Sydenham Road. The move between the different properties was part and parcel of their 'summer of fun'. It was intended to replace the holiday to Turkey that they had planned. Their short stay at each property was a result of the booking process. They were only able to reserve the property for a few nights before it became fully booked. At Sydenham Road IS allowed AS to borrow his mobile telephone so that she could contact friends and relatives. He then became aware that she was most likely utilising the telephone to operate her escorting business. He did not consider that this was any of his business and saw no need to stop her. He assumed that both AS and CH were working as prostitutes at this address; however, he did not see any money exchanging hands.

26. He said that he was not continuously with AS and CH during their time between the properties. He had repeatedly to leave to care for his grandmother.

27. In relation to specific alleged incidents, IS:

    i) Denied having a physical fight with CH. He only argued with CH about her consistent consumption of his alcohol and her failure to replace it;

    ii) The video created by IS was a 'music video', made whilst drunk and intended to be posted on social media. The knife brandished by MG was for visual effect;

    iii) IS recorded both AS and CH after the police visit because he had become paranoid after smoking cannabis;

    iv) IS did not witness the alleged fight between MG and CH. He was in the back room. However, he suggested that it sounded more like a conversation.

28. The defence also relied, amongst other things, on AS' account that CH had worked willingly as a prostitute; visits by the police when CH had not made any complaint to them; hearsay evidence from a fellow occupant of the shared accommodation in Mitcham to the effect that CH was forcing AS to work as a prostitute; social services records; text messages showing CH making arrangements with clients for threesomes with herself and AS; sexual health clinic visits; the rental property arrangements; online comments calling AS a liar when AS said that CH had kidnapped her.

<u>Ruling on cross-examination of CH</u>

29. IS sought leave pursuant to s. 41 of the Youth Justice and Criminal Evidence Act 1999 ("s. 41") to ask questions about the sexual behaviour of CH, including as to the suggestion that she had had consensual sex with IS on the first night at his property and by reference to a statement of DC Innes dated 1 May 2019 (served late during the course of trial). That statement indicated that between January and March 2019 CH

had set up a premium snap chat site and was selling intimate pornographic pictures and videos of herself online. She told DC Innes that she had twice agreed to meet men for sex, but had not in fact done so.

30. Whilst the Judge granted permission to the defence to explore CH's activities as an escort prior to the indictment period, she refused permission to explore these particular two topics.

31. As to the suggestion of consensual sex with IS, the submission was that that activity went to the issue of consent. However, as the Judge noted, the issue on count 16 (oral rape) was not consent but whether or not the incident had occurred at all. As for the further submission that the jury was entitled to know the background to the allegations (namely that the summer was "free and easy"), that too was not relevant to any issue in the case. Nor would it assist the jury's evaluation of IS' intentions when filming CH and exposing her breast whilst she was asleep, something in relation to which IS could give his own full account. The Judge thus ruled that this line of questioning and evidence would not be permitted.

32. As to the matters arising out of the statement of DC Innes, it was submitted that, unless the defence could cross-examine CH on these matters, the jury would be left with the false impression that CH was not inclined to sell herself but for the intervention of the appellants. The Judge commented that the defence line of reasoning fell "into the forbidden category": the jury would be invited to infer that, had CH been controlled by IS in her work as an escort, she would have been affected such that she would be unlikely to engage in any similar behaviour again. What CH had chosen to do subsequently was irrelevant to the question of whether her escort work was controlled earlier by others. Evidence of related work, falling short of escorting, was irrelevant. The Judge confirmed that she had considered broader considerations of relevance in line with *R v A No 2* [2002] 1 AC 45.

33. In summary, the Judge concluded that the main purpose of exploring these two topics would be to impugn CH's credibility. A refusal of leave would not be likely to render unsafe any conclusion of the jury.

Grounds of challenge

34. For IS, Ms Meek advanced (or sought to advance) the following grounds of appeal against conviction:

    i) (leave sought): the Judge erred in refusing to permit under s. 41 cross-examination of CH (or evidence in rebuttal) by reference to the matters arising out of the statement of DC Innes and to admit into evidence CH's continued consensual work in the sex industry and meeting men for sex (which CH in fact denied having done). This was submitted to have been an important matter, given the thrust of CH's evidence which was to the effect that she would not have provided sexual services unless she had been forced to by the appellants;

    ii) (leave granted): the Judge erred in permitting the prosecution to close its case as it did and in failing to deal adequately in the summing up with the evidence that AS gave against CH in this regard. No assistance was given to the jury as

to how it should deal with the inconsistencies in the evidence of the two witnesses. On the particular facts of this case, where the tension between the evidence of CH and AS was so great, the jury were entitled to "more assistance" by way of further legal direction as to how to deal with their conclusions on the inconsistencies, and the extent to which such conclusions might (or might not) support the defence. Reliance was placed on the fact that, whilst the counts relating to AS had been removed from the jury, AS' evidence was still in play (and relied on in part by the prosecution in its closing speech);

iii) (leave granted): the Judge erred in failing to summarise his defence to the jury in summing-up. The unfairness was compounded by the fact that, whilst the jury had received evidence of IS' previous bad character, the appropriate associated legal direction (whilst provided to them at the end of the written legal directions) was never read out to them or drawn specifically to their attention.

35. On the question of sentence Ms Meek submitted that there was no adequate account taken of IS' youth, of the acquittals, or of the relevant sentencing ranges in the Sentencing Council Guideline on Sexual Offences ("the Guideline"). The sentence of 6 years' imprisonment on the count of oral rape did not reflect the true culpability or harm in what was an unusual case. The sentences also failed to take into due account the principle of totality.

36. For MG, Ms Merrick advanced (or sought leave to advance) essentially the same first two grounds of appeal against conviction put forward for IS. She adopted Ms Meek's submissions.

Grounds of opposition

37. Mr Khan for the Respondent contended that the Judge was right to restrict the cross-examination of CH for the reasons that she gave. IS and MG, through concession by the Respondent and/or leave of the Judge, had considerable latitude in cross-examining CH, which they did at considerable length. The directions to the jury in relation to the evidence of AS were entirely adequate.

38. The Respondent's Notice was, to our surprise, silent on the ground of appeal arising out of the Judge's failure to sum up IS' evidence. However, orally, Mr Khan sought to uphold IS' convictions on the basis that there were sufficient references in the summing-up to the nature of his defence, which raised issues very similar to those arising in the case of MG, in respect of whom the summing-up was entirely fair.

Renewed application for leave in relation to the application to cross-examine CH

39. For ease of reference, we repeat our written reasons for refusing the application for leave in relation to the application to cross-examine CH.

40. S.41 provides materially as follows:

> "1) If at a trial a person is charged with a sexual offence the, except with the leave of the court,
>
> a) No evidence may be adduced, and

> b) No question may be asked in cross-examination,
>
> by or on behalf of any accused at the trial about any sexual behaviour of the complainant."…

41. By s. 41(2) the court can give leave in relation to any evidence or question only if satisfied that (3) or (5) applies and that a refusal of leave might have the result of rendering unsafe a conclusion of the court or jury on any relevant issue in the case. S. 41(3) applies, amongst other things, if the evidence or question relates to a relevant issue in the case that is not an issue of consent, or if it is an issue of consent and the sexual behaviour of the complainant in question is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused. S. 41(4) provides:

> "For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness".

42. Once the criteria in s. 41 for admissibility are met, it is not open to a judge to exclude the evidence (see *Re T* [2012] EWCA Crim 2358; [2013] Crim LR 596). S. 112(3)(b) of the Criminal Justice Act 2003 provides that the restriction in s. 41 is not affected by the bad character provisions of the Criminal Justice Act 2003. Any evidence about a complainant's sexual history that amounts to bad character has to satisfy the requirements of both s. 100 and s.41.

43. Like the Single Judge, we did not consider that there was any arguable flaw in the Judge's rulings under s. 41.

44. The Judge permitted cross-examination of CH, and for evidence to be led by the defence, as to whether CH had worked as an escort, prostituting herself, and as to whether she was controlling AS, prior to the involvement of either MG or IS. She permitted cross-examination of CH as to whether she was controlling AS during the weeks when they were all together. She judged that to be relevant to the question of whether CH was a willing or unwilling prostitute on any of the occasions when money was paid by visiting men to use her whilst she was with IS and MG.

45. By contrast, whether or not CH had had consensual sex with IS on the first night at his family home (which CH disputed) was irrelevant. The question on count 16 was whether or not the incident happened at all, not whether or not CH had consented. As for general context, context has to be relevant to be admissible. The Judge was fully entitled to consider it to be irrelevant; and in so far as it could be said to have any relevance, it would be based on pure speculation. On appeal IS did not seek to pursue any challenge to this part of the Judge's ruling.

46. The Judge was also fully entitled to conclude that it was also irrelevant that, after CH parted company with MG and IS, she may have made money by selling explicit photographs and/or videos of herself engaging in consensual sexual activity. To allow such questioning would have been to invite the jury to consider that CH was

less capable of belief in her claims of forced activity directed by MG and IS because of some otherwise unrelated consensual activity. This is the sort of illogical reasoning and/or speculation which s. 41 is designed to prevent.

47. We therefore refused the renewed applications for leave on these grounds.

Direction on inconsistencies

48. Again, for ease of reference, we repeat our written reasons for refusing the appeal advanced on the basis that the Judge's directions to the jury in relation to the alleged inconsistencies between the evidence of AS and CH were inadequate.

49. The suggestion for the Appellants was that the jury should have been directed along the following lines:

   i) Each alleged inconsistency should have been "particularised and identified";

   ii) In respect of each alleged inconsistency, the jury was to consider if they found it significant;

   iii) If considered significant, the jury would have to decide whether there was an acceptable explanation for it;

   iv) If there was an acceptable explanation, it might not affect the witnesses' reliability;

   v) However, if the inconsistency was fundamental to an issue that they were considering, they "would be less willing to overlook it".

50. These are directions that may (in some form) be considered appropriate in a situation where there are internal consistencies in a single witness' evidence. But they are not apt (and certainly not necessary) in a situation where, as here, what is alleged are inconsistencies between the evidence of two separate witnesses.

51. Those allegedly "key and fundamental" inconsistencies were fairly highlighted in the summing up, as was rightly accepted for both Appellants. They can be identified as follows: Mitcham prior to meeting "the boys"; meeting "the boys"; moving to Bermondsey and events there; moving to Sydenham Road; visit by the police; events at later properties and allegations against CH by AS; outcalls and the clinic visits to GUM; moving to the final property with AS and CH at Aldgate East.

52. The jury were duly directed that it was for them to assess the evidence that they had heard. Where the evidence conflicted, they would want to assess the truthfulness, accuracy and reliability of those witnesses whose evidence was in issue. There was no material error in the Judge's directions.

53. Consistent with this conclusion, no concern or query as to sufficiency of the Judge's directions was raised in this regard by any counsel at trial, including at the time when her written legal directions were under scrutiny.

54. We therefore did not consider that the convictions of either IS or MG were unsafe on this ground. That disposed of the appeal so far as MG was concerned.

Failure to sum up IS' evidence

55. As set out above, IS gave evidence at trial during all of Tuesday 14 May 2019 and in the morning of Thursday 16 May 2019. He gave a full account and denial.

56. Having handed out written legal directions and repeated a large number of them orally, the Judge explained to the jury how she would sum up the evidence:

> "Let me turn to my summary of the evidence now. We will deal with what was going on before Mitcham and what went on at Mitcham and then, perhaps, we will stop when we get to Bermondsey because I have endeavoured to do this chronologically. I will try to read together all the evidence the Crown called, address by address. It is sometimes difficult to do so because it is not entirely clear, perhaps, which address we are dealing with at any given point. When we come to the defence evidence, however, I will simply remind you of what each defendant said. Firstly, it is fresher in your minds anyway and secondly, that was the way they gave their evidence and it is important, perhaps, that I remind you of how that flowed."

57. The Judge kept to her word so far as the evidence for the prosecution was concerned. Having summarised that evidence, she then turned to the defence evidence:

> "We will turn to what each defendant said. You have heard this rather more recently, so I am not going to repeat every word of what each defendant said, but it is only fair to the defendants if I remind you in summarised form of their accounts."

58. The Judge then summed up the evidence of MG in some detail (covering some 10 pages of transcript). At one point she referred to what he said about an apparent inconsistency between his evidence and his defence statement. She interposed a reference to a similar issue in relation to IS' evidence but only in the context of the prosecution's case that there was a material inconsistency with the contents of his defence statement. When she did so, she said that she would remind the jury of his evidence later.

59. However, the transcript provided for the appeal hearing on 2 March 2021 showed that, having dealt with MG's evidence, the Judge then simply said:

> "That completes my review of the evidence."

60. The jury were sent home with a view to retirement first thing the next day - which is exactly what happened. When they retired, they took with them, amongst other things, the video material on which IS had commented in his evidence.

61. The position appeared to us to be odd. It was clear to us that the Judge at all times intended to sum up IS' evidence. She had said on several occasions that she would do so. Her summing-up had been well-prepared. There was no reason why she would have failed to do so. Further, not only must she have failed to notice the omission at

the time, but all (four) trial counsel must have failed to notice what would have been a clear and obvious failure to cover IS' evidence.

62. However, the transcript was unambiguous and three of the four trial counsel were appearing on the appeal before us and confirmed its accuracy.

63. Thus, as presented to us, this was not a situation where the Judge had failed to refer to one aspect or some detail of IS' evidence or defence. There appeared to be a wholesale failure to remind the jury of the substance of IS' evidence. The position was apparently compounded by the failure to give the jury the necessary "bad character" direction orally. In short, the summing-up did not appear to reach the standard of fairness to which the Judge herself expressly recognised IS was entitled and which she had obviously intended to achieve.

64. Applying the relevant principles to be found in a well-known line of authority including, most recently, *R v Uddin & Ors* [2021] EWCA Crim 14 and *R v Reynolds (Nicholas)* [2019] EWCA Crim 2145; [2020] 1 Cr App R 2020; [2020] 4 WLR 16 ("*Reynolds*"), we concluded that IS' convictions had to be regarded as unsafe.

65. It accordingly appeared that IS' convictions fell to be quashed. On this basis, his renewed application for leave to appeal against sentence fell away. We declared the result of IS' appeal against conviction orally in open court at the conclusion of the hearing on 2 March 2021.

Subsequent events

66. On 9 March 2021 counsel for IS appeared before the Judge on an unrelated matter. At some stage the Judge made an informal enquiry of her as to the status of IS' appeal. Counsel informed her that his appeal had been allowed on the basis of the Judge's failure to sum up his evidence.

67. The Judge went back to check her notes. She also listened to the audio file of her summing up. IS' counsel likewise listened to the audio file. It became apparent that the Judge had in fact summed up IS' evidence after her summary of MG's evidence.

68. The Judge and counsel for IS informed the Registrar and this constitution immediately of these developments. On 10 March 2021 we gave directions for this reconsideration hearing, including for the commission of a full transcript and an explanation from the transcriber in question, Ubiqus.

69. We now have a complete and accurate transcript of the summing-up. It is clear that, as she had intended to all along, the Judge had (accurately and fairly) summed up IS' evidence - and for a good 20 minutes or so. She then gave legal directions on good and bad character, before stating that she had completed her review of the evidence.

Reconsideration

70. It is well established that this court has, like any other court, an implicit power to revise any order pronounced before it is recorded as an order of the court in the record of the relevant court. The relevant court here is the Crown Court. (See *R v Yasain* [2015] EWCA Crim 1277; [2015] 2 Cr App R 28; [2016] QB 146 ("*Yasain*") at [19] to [22]).

71. If the relevant court has recorded the order, then the general rule is that the order is final and there is only a strictly limited jurisdiction to revise it (see *Yasain* (at [19] and [23] to [41]); *R v Gohil* [2018] EWCA Crim 140; [2018] 1 Cr App R 30 (at [96] to [111]).

72. Here, our order allowing IS' appeal and quashing IS' convictions has not been issued and sealed by the Registrar, and not been recorded in the Crown Court. It is therefore open to us to revise it under our general implicit power in the light of the true facts as now established.

73. It is clear that there was no proper basis for any appeal to be advanced on behalf of IS on the basis of any failure on the part of the Judge to sum up his evidence. We have no hesitation in exercising our power to revise our order. It is self-evidently in the interests of justice to do so. Indeed, but for what was a purely fortuitous encounter between defence counsel and the Judge, a serious miscarriage of justice would have occurred. That is a sobering thought.

74. We revoke our earlier order. IS' appeal against conviction will be dismissed.

75. Moving on, it is right to record at the outset that counsel have very properly apologised for not paying attention to the Judge's summing up and for what is described as their "blind reliance" on the accuracy of the transcript.

76. There are a number of lessons to be learned from this sorry tale. First, the importance of accurate transcription is obvious. Following the court's request for an explanation, the reason appears to be inadvertent human error. Again, it is right to record that the individual transcriber and Ubiqus have offered their sincere apologies to the court. Ubiqus has taken steps to ensure that there is no repetition of such a grave error and has assured the court of its commitment to the highest standards of service. However, its failure here has had serious consequences.

77. But the transcriber's failure cannot absolve counsel who cannot have paid any attention to, let alone made any meaningful notes of, the Judge's summing up. We underscore that it is a core duty of trial advocates, both for the prosecution and defence, to focus on the judicial summing-up at the time that it is given. This is necessary for the proper discharge of the advocate's overriding duty to the court in the due administration of justice (to which the advocate's duty to act in the best interests of his or her client is subject). In particular, it is the advocate's duty to raise promptly with the Judge what appears to be a material error in the summing-up, whether it be of law or fact, at the time of the summing-up. To do so is not inconsistent with the advocate's duty to the client, not least since a failure to raise complaint or suggestion at the time of a summing-up may be regarded on an appeal as relevant to the validity of any later complaint (see *Reynolds* at [61] and [66]).

78. Here counsel's earlier acceptance of the incomplete transcript as accurate suggests that they can have had no actual recollection of the summing up of the defence evidence (at least). In the absence of such a recollection and any meaningful notes, given that it would have been a most unusual omission by a Judge who was obviously otherwise well-prepared and methodical in her approach to the summing-up, it is further to be regretted that counsel did not check the audiofiles for themselves at least by the time of the full appeal hearing. The position was then compounded at the hearing: we

asked in terms whether the (incomplete) transcript was accurate. Counsel (incorrectly) confirmed to us without equivocation that it was. They ought at the very least to have indicated that they had no direct recollection of the summing-up and that they had not themselves checked the accuracy of the transcript.

79. Making all due allowances for the sometimes difficult circumstances in which the publicly funded criminal Bar has to operate, we regret to say that there simply can be no acceptable excuse for what has happened here.

Sentence

80. In the light of the dismissal of the appeal against conviction, we must now deal with IS' renewed application for leave to appeal sentence. We can do so shortly. It is unarguable: the Judge was fully entitled to categorise Counts 7 and 8, 11 and 12 as Category 2A offending, which carries a starting point of 8 years' imprisonment for a single offence with a range of 5 to 13 years. Two sentences of 4 years' imprisonment in respect of each of the two incidents, to run consecutively, was not arguably wrong in principle, nor did it result in a sentence that was disproportionate. The incidents were separate in time and involved offending at different locations. The sentence of 30 months' imprisonment for controlling prostitution for gain was ordered to run concurrently. The further consecutive sentence of 6 years' imprisonment on the count of oral rape also cannot be impugned. The Judge gave IS the benefit of the doubt when she placed the offence in category 2B within the Guideline (with a starting point of 8 years' imprisonment and a range of 7 to 9 years). She came down to a term of 6 years' imprisonment to take account of IS' available mitigation, including his age and character, and for totality. There is no arguable basis on which to contend that the overall sentence of 14 years' imprisonment for this serious offending was manifestly excessive.

Conclusion

81. The position now is as follows: the renewed applications by MG and IS for leave to appeal against conviction have already been dismissed, as has MG's appeal against conviction. IS' appeal against conviction now also stands dismissed, as does his renewed application for leave to appeal against sentence.

82. The reporting restriction under s. 4(2) of the Contempt of Court Act 1981 over our written reasons of 3 March 2021 ([2021] EWCA Crim 291) is lifted.