Neutral Citation Number: [2023] EWCA Crim 710

Case No: 202202090 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEWES
Mr Recorder Trimmer QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2023

Before:

LORD JUSTICE MALES
MR JUSTICE JAY
and
HER HONOUR JUDGE ROSA DEAN

- -

Between:

REX	**Respondent**
- and -	
FREDERICK LAKE	**Appellant**

- -
- -

David Emanuel KC (instructed by **Funnell & Perring**) for the **Appellant**
Barnaby Shaw (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 13 June 2023

Approved Judgment

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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 his or her lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of the offence. The prohibition applies unless waived or lifted.

Lord Justice Males:

1. This is an application by Frederick Lake, now aged 30, for an extension of time of approximately nine months in which to apply for leave to appeal against his conviction for rape in the Crown Court at Lewes on 3rd September 2021 following a trial before Mr Recorder Trimmer QC and a jury. He was sentenced to seven years' imprisonment, which he is currently serving.

2. The application for an extension of time arises because the applicant relied initially on his trial counsel's advice that there were no arguable grounds of appeal. He has now sought advice from new lawyers and trial counsel accepts that there were some flaws in the Recorder's legal directions. We grant the extension of time. The appeal is arguable and we grant leave to appeal.

3. As we shall explain, the appellant accepted that sexual activity took place. The issue was whether the complainant consented or the appellant reasonably believed that she consented. In a sentence, the essential dispute was whether the complainant was asleep when the appellant penetrated her or whether she was awake and gave every impression of being a willing participant.

The facts

4. The events in question took place as long ago as Friday 19th October 2018. The complainant went out for the evening in Hastings for a work colleague's leaving drinks. They went to a number of different bars and enjoyed drinks and dancing. By the time the complainant left the last venue it was approximately 3.00 am. In a kebab shop near the taxi rank the complainant bumped into a friend, Daniel Laidlaw. He was with three male friends whom she did not know. Mr Laidlaw suggested that they go back to his flat and watch a film and so the five of them left, in two separate taxis to go to his home. Mr Laidlaw's evidence was that the complainant was quite drunk and was stumbling all over the place. Her evidence was that, although she had been drinking, she was not seriously affected by alcohol and at all times was conscious of her actions. (We note that this is not a case where the issue was whether the complainant's capacity to consent was affected by drink; the issue was whether she did not consent and could not reasonably have been thought to consent because she was asleep).

5. At Mr Laidlaw's flat the group sat in the living room, although Mr Laidlaw went to his room to check on some work emails as he was working the next day. The complainant found him there and asked to borrow a pair of his jogging bottoms so that she could change out of her jeans, which were not comfortable. She changed, then returned to the living room where she sat on the sofa with two of Mr Laidlaw's friends that she thought were brothers. They were the appellant and his brother Henry.

6. After a period of time the complainant said that she was going to bed. There is a dispute about what was said at this point. The evidence of Mr Laidlaw, who was a witness for the prosecution, was that the complainant said to the applicant "Shall we go to bed?" The appellant's evidence was also that she asked him if he would like to go with her. The complainant, however, denied saying anything of the kind. The appellant did not go with the complainant at that stage. Her evidence was that she went into the bedroom and fell asleep, wrapped up in the duvet and wearing her top, jogging bottoms and underwear. She thought it was about two hours later that she was suddenly aware of

someone in the bed. Unclear if she was dreaming, she moved away and the person moved closer. She realised that her jogging bottoms were no longer on and her knickers were halfway down her legs. When the complainant spoke with the police later she said that she thought someone was having sex with her from behind and that was what woke her up. However, she did not say this in her Achieving Best Evidence interview on 1st November 2018, but only that she became aware of another person in the bed, but could not say whether anything had happened. She denied having previously told the police that the appellant was having sex with her. It was also her evidence in cross examination at the trial that she first became aware of the appellant in the bed when she saw him lying next to her. It is, however, common ground that sexual intercourse did take place. The appellant accepts that he penetrated the complainant's vagina with the tip of his penis for about 10 seconds. His case is that the complainant was awake and that it was consensual.

7. The complainant then jumped out of bed and ran into the living room where the others were still awake. She shouted her surprise that there was someone in her bed, to which she said that Mr Laidlaw responded by saying something like "You said it was OK". The complainant demanded that Mr Laidlaw order her a taxi and went back into the bedroom to collect her clothes. She dressed and then left the flat to look for a taxi herself.

8. Daniel Laidlaw gave evidence. He described the complainant as being quite drunk, all over the place and stumbling about. As already noted, he described her saying "Shall we go to bed?" to the appellant before going into the bedroom, although the appellant did not go with her at that time. Mr Laidlaw was concerned that the complainant might be sick on his bed, so he checked up on her by going into the bedroom and turning on the light. He found the complainant sound asleep. His evidence was that, after this, the appellant followed the complainant into the bedroom, which was about 15 or 20 minutes after she had gone in. He said that he checked the bedroom twice more after that, and found the complainant and the appellant both asleep, the first time with the appellant on top of the duvet and the second time with his legs underneath it.

Evidence of complaint

9. There was evidence from a number of sources of what the complainant told others shortly after the event.

10. The complainant's friend, Adam Scott, gave evidence that he had received a phone call from the complainant early on the morning of 20th October and that, "she was almost like hyperventilating, very obviously distressed and upset." This phone call was shortly after the complainant had left Mr Laidlaw's flat. Mr Scott said that the complainant had told him that she was in a bed, lying on her front, and then she just felt somebody on top of her. She was not sure what was going on to begin with, but she quickly realised that the person's penis was in her and said to him, "What are you doing?" Mr Scott advised her to go to the hospital, which she did.

11. At the end of Mr Scott's cross-examination the Recorder asked him to confirm what he had already said, that the complainant sounded as if she was hyperventilating. It may be that this request was for the purpose of clarification, or possibly to catch up with note-taking, but it had the effect of giving some emphasis to the complainant's distress.

12. While at the hospital the complainant made a 999 call which was played to the jury. Prosecution counsel had told the jury in opening that the recording would enable them to assess the complainant's demeanour and emotion at the time, which might be useful evidence for them to consider. The recording lasted for seven minutes. For much of the time the complainant was sobbing and crying. She reported being a victim of a sexual assault, but did not give details at that stage. The Recorder commented in his summing up that the complainant was obviously distressed during the call. It was not suggested that the recording had any other relevance.

13. Police officers attended at the hospital and took a first account from the complainant which was recorded on a body worn camera. She said that a couple of hours earlier she had woken up to a male having sex with her.

14. Later in the day the complainant rang another friend, David Naylor. She left a message for him in which he described her as crying and sounding petrified. He met her in order to accompany her to the Crawley rape centre and she told him what had happened. He said that as she did so, she would go quiet, well up, and cry, and then would change the subject. She told him that she went to bed and woke up to someone's face in front of her, with her knickers between her knees and her ankles, and then she panicked, pushed or brushed the person off, got up, went to leave the apartment, and someone shouted to her, "I thought you said it was OK". In cross-examination Mr Naylor said that the complainant had said that she could not really see the face of the person on top of her.

The defence case

15. The police arrested the appellant on suspicion of rape. He was interviewed and gave his account. His case, in interview and at trial, was that the complainant invited him to go to bed with her and that all sexual activity between them was consensual, or that he reasonably believed that it was.

16. His evidence was that he had gone out after work drinking in Hastings with a friend, Tom Cooper, and had also used a small amount of cocaine. At some point during the evening they met his brother Henry and, at the kebab shop next to the nightclub, they met Mr Laidlaw and the complainant. He estimated that he had drunk around six pints, four rum and cokes, and maybe a few shots, and described himself as drunk. They all decided to go back to Mr Laidlaw's flat and took two taxis there. He had not met Mr Laidlaw or the complainant before that evening. In the living room of Mr Laidlaw's flat, he sat on the sofa with his brother Henry and the complainant between them. Everyone carried on drinking save for the complainant. He said he chatted to the complainant for approximately 30 minutes to an hour and got to know what she did. He told her he was a window cleaner. The atmosphere was good and he did not think the complainant was particularly drunk. He recalled the complainant changing from her jeans into some jogging bottoms in Mr Laidlaw's bedroom. He said he was lying on the sofa at one point with his head on her knee and she stroked his hair. He made a comment about feeling like a cat.

17. The appellant said that the complainant got up from the sofa and he asked her where she was going. She said she was going to bed and asked him if he would like to go with her. The others all heard what she said. He carried on talking to Henry and Tom and did not think much of it. He recalled that Henry commented that he was jealous and Tom said "you're in there" or words to that effect, acknowledging what the complainant

had said. He said that after about 10 or 20 minutes he knocked on the bedroom door and went in. The complainant was in bed. She looked at him and said “Oh hello you” or something similar. He got onto the bed next to her on top of the covers. The complainant was under the covers.

18. He described how they shimmed towards each other and ended up spooning with them both facing the door and him behind her. He said the complainant reached over and pulled his arm over her. He described them spooning like this for approximately 20 minutes and said that he remembered Mr Laidlaw opening the door and looking into the bedroom. Nothing was said and he thought the complainant was awake at that point. He described how the complainant’s bottom began pushing into his groin. At some point he got under the covers with her and they carried on where they had left off, spooning, holding hands and pushing into each other’s groin area. At this point he could not remember if he was still wearing his jeans or had removed them. The complainant was still wearing Mr Laidlaw’s joggers.

19. As things progressed he remembered that the complainant’s hand was on his and that by moving her legs she helped him remove her joggers. He said she was fully conscious and through small noises and cues there was an air of agreement between them. He described the noises as little grunts and intimate noises. Although difficult to remember, he thought her knickers were partially removed to halfway down her thigh at some point. He put the tip of his penis into her vaginal area. It lasted approximately 10 seconds and consisted of a small degree of penetration. The complainant stopped, moved away, then stood up and left the room. The appellant confirmed that when his penis entered her vagina she was awake. He said that the complainant pushed back towards him. He said that he was confused because if somebody was pushing their backside into you and helped you take off their clothes, it was natural to assume that was what she wanted him to do.

20. The appellant said that he watched the complainant go into the front room, and could hear her talking. She said something along the lines of, "Oh, what's the guy doing there?" He heard her shouting, but could not say what was being shouted. After a period of time he too went into the lounge area. When everyone asked what was going on, he said, "I don't know".

21. Under cross examination the appellant denied that there was an uncomfortable atmosphere in the flat after the complainant had left. He maintained he was only questioned once and believed that was by one person as to what had happened. He did not say he had not done anything, rather that he had not done anything wrong. The appellant said that he was not aware of Mr Laidlaw coming into the bedroom on a second occasion and maintained that the complainant was awake for the intimate moments between them as he had described in his evidence. He said that he thought maybe she had a boyfriend when he realised that she did not want him to continue what he was doing, but acknowledged that he only found this out at a later stage.

22. An important issue at the trial was whether the complainant was asleep, as she maintained, when the sexual activity took place. In his interview the appellant described himself and the complainant as “just falling in and out of sleep” after he went into the bedroom, but nevertheless insisted that the complainant was awake and giving every sign of consenting while the sexual activity which he described took place. In cross

examination, however, it was put to him, and he agreed, that his account in interview was that:

> "Right. She's awake, she acknowledges you, you get into bed spooning, first on top of the duvet, then underneath the duvet. She is awake throughout."

23. This was somewhat unfortunate, because the phrase "awake throughout" was ambiguous. The appellant's account in interview had indeed been that the complainant was awake throughout the sexual activity which took place, but he had not said in interview that she was awake for the whole period after he entered the bedroom. However, prosecution counsel went on to ask the appellant whether he was saying "that throughout the period in time that you were both in bed, that you were both wide awake throughout". This appears to have been the first use of the phrase "wide awake", which had not up to that point been the appellant's evidence. Perhaps surprisingly, however, the appellant answered "Yes". What he had said in interview was then put to him. He agreed that he could not say that the complainant was awake the whole time they were in bed together.

The grounds of appeal

24. There are five grounds of appeal, namely that:

(1) the jury were misdirected in relation to the complaint evidence;

(2) the jury were not directed as to the evidential value of the complainant's observed distress at the time she made her complaints;

(3) the jury were not directed as to the evidential value of the complainant's observed distress at the time she gave her evidence;

(4) the Recorder gave a flawed direction on adverse inferences under section 34 of the Criminal Justice Act and Public Order 1994; and

(5) the Recorder descended into the arena by cross examining the appellant in a way that could only have indicated to the jury that he did not believe him.

25. Mr David Emanuel KC, who did not appear below, submits that as a result the appellant's conviction is unsafe. For the prosecution, Mr Barnaby Shaw accepts that there were flaws in the summing up, but submits that the conviction is nevertheless safe. We deal with each ground in turn.

Ground 1 – the complaint evidence

26. The direction which the Recorder gave, referring to the evidence of Mr Scott and Mr Naylor of what they had been told by the complainant, was that "Simply because the allegations were repeated to others, largely them, does not make for more evidence". He added two points. The first was that the jury should consider the informal setting in which the allegations were made and should consider whether the complainant had a motive to lie or was simply telling the truth at an early stage to those she trusted. The second was that the jury should consider whether "within the bounds of what you think is reasonable, the disclosure to others [was] consistent with the later accounts to the

police": if her account was broadly consistent with her later ABE interview, that might support her credibility, while conversely inconsistent accounts might damage her credibility.

Submissions

27. Mr Emanuel criticises this direction in two respects. The first is that the Recorder did not direct the jury that what the complainant said to others was not independent evidence. He referred to what was said in *R v Pritchard* [2011] EWCA Crim 2749 at [31] to [33]:

> "As the evidence of recent complaint is not evidence from a source independent of the complainant, a direction in that regard should routinely be given. The authorities to which we were referred speak as to principle with one voice. Such a direction should routinely be given. The authorities differ in their outcomes not because of any uncertainty as to principle, but because of the differences in the individual cases between either the facts or the other directions given by the judges in those cases. … If such a direction is not given, it may render the conviction unsafe."

28. *Pritchard* was a case where the failure to give such a direction was held to render the conviction unsafe.

29. Mr Emanuel identified a number of later cases where this direction was not given. In some of these an appeal was allowed (*R v SB* [2013] EWCA Crim 899; *R v Thompson* [2014] EWCA Crim 743) although, as Mr Emanuel accepted, these were cases where this was not the only failing in the summing up. In others (*R v Hunter* [2015] EWCA Crim 631, [2015] 2 Cr App R 9 at [136] and [137]; *R v Waqaar Khan* [2021] EWCA Crim 142) it was held that the failure did not render the conviction unsafe.

30. The second respect in which Mr Emanuel criticises the summing up is that although the Recorder directed the jury to consider whether the complainant's accounts in her various statements were consistent, he did not identify the respects in which there were important inconsistencies.

31. Mr Shaw acknowledges that the Recorder did not say in terms that the statements made to Mr Scott and Mr Naylor did not amount to independent evidence, but submits that what he did say ("Simply because the allegations were repeated to others, does not make for more evidence") amounted to the same thing and was simple for the jury to understand. He accepts also that the Recorder did not identify the inconsistencies in the complainant's accounts when giving this legal direction, but submits that they did not go to the essential issue in the case, which was whether the appellant penetrated the complainant while she was asleep. Further, Mr Shaw submits that the Recorder did direct the jury as to the importance of assessing the evidential value of the complainant's accounts by considering whether she had a motive to lie and that inconsistency might damage her credibility. Finally, the Recorder set out the various accounts given by the complainant when he came to summarise the witnesses' evidence.

Decision

32. We find it hard to see any good reason why the Recorder did not follow the guidance in the Crown Court Compendium (June 2022). Chapter 14-12 indicates that:

> "**Directions**
>
> …
>
> 3. The jury must be directed about the following: …
>
> > (2) Evidence of W's complaint is evidence about what W has said on another occasion and so originates from W him/herself. Consequently it does not provide any independent support for W's evidence.
>
> 4. The jury should also be directed about the following, as appropriate: …
>
> > (4) The consistency/inconsistency of the complaint with W's evidence (and sometimes any other complaint made by the same witness). Points of consistency and/or inconsistency should be specified. The jury are entitled to consider this/these when they are deciding whether or not the witness is accurate, reliable and truthful."

33. While we think we know what he meant, in our judgment the Recorder's statement that the repetition of allegations "does not make for more evidence" does not provide the necessary clarity for a lay jury that a statement made to somebody else does not amount to evidence which is independent of the complainant. That is a point which a jury needs to understand.

34. A specimen direction in the Compendium spells this out in clear terms:

> "X gave evidence that on [date] V told (specify). You can take account of this when you are deciding whether W's allegation is true, but you must be aware that this is not independent evidence about what happened between W and D. This is because it is only evidence about what W told X about what W said happened between W and D. X was not there and so did not see what did or did not happen.
>
> The reason you heard about what W said to X is so that you can consider it when you are deciding whether or not W has been consistent in what he/she has alleged, and whether or not W has told you the truth. When deciding this you should consider …
>
> It is for you to say whether the evidence of W's complaint to X helps you to decide whether W has been consistent and whether W's evidence is true, but I remind you that this is not extra or independent evidence of what did or did not happen between W and D."

35. While the use of specimen directions is not mandatory, and they must be tailored to fit the circumstances of individual cases, it is nevertheless necessary to make in straightforward terms the essential points which they contain. It is unfortunate that the Recorder departed so far from the terms of this specimen direction in the present case.

36. Moreover, there were undoubtedly inconsistencies in the complainant's accounts. Thus her account to Mr Scott was that she woke up lying on her front, with somebody on top of her, and quickly realised that his penis was inside her; the account given to the police at the hospital was the same, that she had woken up to a man having sex with her; she also told Mr Naylor that the person was on top of her. However, her evidence at trial was that she became aware of somebody lying next to her in the bed with his face buried in the pillow and that she could only see his hair, but she could not say whether anything had happened and denied having previously told the police that the appellant was having sex with her. There were other more minor inconsistencies, but these were the essential ones.

37. These inconsistencies ought to have been identified, however briefly, so that the jury could focus on whether they were such as to call into question the complainant's reliability as a witness. We do not accept that they were immaterial because the essential issue was whether the complainant was asleep during sexual activity. On the contrary, they were potentially important for the jury to consider in assessing the complainant's reliability, as the Recorder's general comment about inconsistency recognised.

38. A separate and more difficult question is whether the Recorder's failure to make clear that the complaints did not amount to independent evidence and to identify the inconsistencies in the complainant's accounts has the effect of rendering the appellant's conviction unsafe. We shall return to this question after dealing with the other grounds of appeal.

Grounds 2 and 3 – the complainant's distress

39. We can take grounds 2 and 3, which are both concerned with the obvious distress exhibited by the complainant when making her original complaints, when giving her ABE evidence, and during her cross examination at the trial, together.

40. It was a prominent aspect of the evidence given about the complaints made by the complainant shortly after the incident, and of her evidence at trial, that she was in considerable distress. Mr Scott's evidence, emphasised (perhaps inadvertently) by the Recorder, was that she was hyperventilating and obviously distressed and upset when she spoke to him on the telephone. This was obvious also from the seven minute 999 call which was played to the jury, on which the Recorder commented, and from the evidence of Mr Naylor. During her ABE interview, which was played to the jury unedited, the complainant became upset and angry on two occasions. The audio recording of her cross examination reveals that she was distressed and crying for much of her evidence. All this cannot fail to have had a considerable impact on the jury.

Submissions

41. Mr Emanuel submits that the Recorder should have directed the jury not to treat this distress as an indication that her account was true.

42. As to the complaints made at the time, Mr Emanuel refers to Chapter 14-12 of the Crown Court Compendium (June 2022), which notes that:

> "It is often the case that a complainant will have shown distress when making a complaint to a third party. In this event the jury must be directed about how they should approach evidence of distress: see Chapter 20-7."

43. As to the complainant's evidence in her ABE interview and at trial, Mr Emanuel refers to Chapter 20-7 of the Compendium, which gives the following as an example of a direction which may be given when a complainant displays emotion or distress when providing an account to the police or when giving evidence:

> "You should not assume that the way W gave evidence is an indication of whether or not the allegation is true. Witnesses react to giving evidence about allegations of rape/sexual assault in a variety of ways. Some people will show emotion or distress and may cry. But other people will seem very calm or unemotional. The presence or absence of emotion or distress when giving evidence is not a good indication of whether the person is telling the truth or not."

44. In this case no direction at all along these lines was given.

45. For the prosecution Mr Shaw accepts that a direction in accordance with the Compendium ought to have been given, but points out that the Recorder did give a general direction warning to the jury to avoid an emotional reaction to the evidence, adding:

> "You must focus on the evidence and analysis of that. Consider, if you wish, the emotions and demeanour of witnesses but do not let your own emotions take over."

46. The Recorder also warned the jury to guard against assumptions about how a victim of rape may behave and that he directed the jury to consider whether the complainant had a motive to lie or was telling the truth at an early stage to those she trusted.

47. Mr Shaw submits that in those circumstances the jury were able to consider the complainant's evidence properly and fairly despite the absence of a direction specifically concerned with the complainant's distress.

Decision

48. In our judgment the jury ought to have been directed as to the evidential value of the complainant's distress, particularly in a case such as this where that distress had been a prominent aspect of the evidence and was strongly relied on by the prosecution. Often, the reason why such a direction is necessary is that the jury will need to consider whether a witness's distress is genuine or feigned. In such a case, factors such as whether the distress has been observed close in time to the circumstances of the alleged offence and whether the complainant was aware that she was being observed will often be particularly relevant.

49. In the present case Mr Emanuel does not suggest that the complainant's distress was feigned, but he points out correctly that it was not necessarily indicative of the appellant's guilt. It was the appellant's case that the complainant's response to penetration, springing out of the bed and leaving in a state of agitation, was consistent with immediate regret on her part (she had said in her ABE interview that she had a boyfriend and would never have agreed to go to the bedroom with someone else), or with a failure to have appreciated what she had encouraged in circumstances where she was sleepy or drunk.

50. In such circumstances the jury should have been directed to consider at least the possibility that genuine distress could have been for reasons which did not support the appellant's guilt, such as remorse and anger with herself at having allowed matters to progress as they did while she was affected by alcohol, or failure on her part to appreciate the signals she was sending. If, having considered that possibility, the jury had rejected it, as they might have done, they would have needed to be careful not to attribute undue significance to the complainant's distress, but we see no reason why they should not have been entitled to regard it as providing some support to her evidence. As it was, however, the Recorder left them with the impression that there was no need to consider such a possibility and that the complainant's distress was itself potentially important support for the prosecution case.

51. Again, however, it will be necessary to consider whether the absence of an appropriate direction renders the appellant's conviction unsafe.

Ground 4 – adverse inference

52. The Recorder directed the jury that they were entitled to draw an adverse inference from the appellant's failure to mention in interview that he and the complainant were both wide awake throughout the time in which they were both in the bed. After referring to the caution administered to the appellant and to the fact that he had said in evidence that the complainant was awake throughout, which he had not mentioned in his interview, the Recorder continued:

> "You decide whether the defendant could have been expected to mention this fact which he now relies on.
>
> You may conclude that then he'd not thought through the detail and only later has come out with this part of the account. You may draw such a conclusion against it [sc. him] only if you think it's a fair and proper conclusion and that when he was interviewed, he could reasonably have been expected to mention this fact [and] that the only sensible explanation for his failure to mention this fact is that he then had not formulated this account and the prosecution case against him is so strong, it clearly calls for an accurate answer by him. Take account of all the circumstances when you decide whether the defendant could have been expected to mention this fact which he now relies on."

Submissions

53. Mr Emanuel submits that if such a direction was required, the direction given was deficient in three respects: (1) the Recorder failed to direct the jury that they should not convict wholly or mainly on the strength of any adverse conclusion they drew; (2) he did not remind the jury of the appellant's explanation for not mentioning the fact in question and did not direct them that they should not draw an adverse inference if they thought that was a genuine reason for the omission; and (3) he wrongly told them that they could not draw an adverse inference unless they were sure that the prosecution case "is so strong" as to call for an answer when he should have directed them that it was only if the prosecution case as it appeared at the time of the interview was such as clearly to call for an answer.

54. For the prosecution Mr Shaw accepts that the jury should have been directed not to convict wholly or mainly on the strength of any adverse inference, that the Recorder did not refer in his legal directions to the appellant's explanation for what he had said in interview (which was nothing more than that he was "not very eloquent" and was tired and terrified at the time of the interview) although he did refer to these when summarising the appellant's evidence, and that the Recorder's use of the present tense was incorrect. He submits, however, that these were not significant omissions or failings, and that the jury would have understood the direction as referring to the strength of the prosecution case as it appeared at the time of the interview.

Decision

55. We have already set out what the appellant said in the interview and the way in which he was invited in cross examination to agree that his evidence was that he and the complainant were both wide awake from the time when he entered the bedroom. We confess to feeling some discomfort with this line of cross examination, premised as it was on the mistaken understanding that this was what the appellant had said in interview: plainly if that had been so, there would have been no question of an adverse inference direction. However, the appellant did in the end say that they had both been wide awake throughout, although we question whether that was really a fact on which he was relying. The fact on which he was relying was that the complainant had been awake during the period in which sexual activity took place and had given every appearance of willing participation, and on that point the appellant was consistent throughout his interview and his evidence. It would have been preferable, in our view, if instead of giving an adverse inference direction, the judge had invited the jury to consider whether there was an inconsistency in the appellant's account which affected the reliability of his evidence. Mr Shaw accepted in the course of his submissions that this would have been a better way of dealing with the point and, in fairness, the prosecution did not suggest at the trial that an adverse inference direction was necessary.

56. However, it is not a ground of appeal that no adverse inference direction should have been given. Rather, the point is that if such a direction was to be given, it needed to be accurate. Plainly the Recorder should have directed the jury not to convict wholly or mainly in reliance on any adverse inference drawn and should have given a direction by reference to the strength of the prosecution case as it appeared at the time of the appellant's interview. There is, however, less force in the complaint that the Recorder did not refer in his legal directions to the appellant's explanation for not saying in his interview that the complainant was awake throughout.

57. Overall, this was in our view a material misdirection. We shall return to the issue as to the safety of the conviction.

Ground 5 – descending into the arena

58. At the conclusion of the appellant's evidence the Recorder asked some questions of his own as follows:

> "Q. By the time you had all intercourse for, you say, some 10 seconds or so, how much time had you spent actually talking to her?
>
> A. What, as in – sorry? All
>
> Q. At all, the whole day.
>
> A. A few -- a few hours.
>
> Q. Talking to her on her own?
>
> A. On her own, no.
>
> Q. How long on her own?
>
> A. It was only in the room briefly.
>
> Q. So how long?
>
> A. 10, 20 minutes.
>
> Q. Right.
>
> A. I mean, I spoke to her on the sofa, but as in just me and her, very little.
>
> Q. I think you said you weren't flirting with her, is that right?
>
> A. Not particularly.
>
> Q. Or at all.
>
> A. I mean, I cannot recall every –
>
> Q. No, I understand that. Did – did you want to go out with her? Did you want to have a relationship in the future with her?
>
> A. No.
>
> Q. Right. Did any part of that conversation involve discussion of sex?
>
> A. I don't believe so, no.

> Q. At any stage was the question of a condom ever mentioned?
>
> A. No.
>
> Q. Did that ever occur to you?
>
> A. Only later.
>
> Q. So you tell this jury you believe she was consenting to unprotected sex with somebody she had known for less than half an hour?
>
> A. A few hours, and, yes, that's what I'm trying to tell the jury.
>
> Q. I have no other questions. Thank you."

59. The fact that no condom had been used, or even discussed, had not previously featured in the evidence.

Submissions

60. Mr Emanuel submits that this questioning was unnecessary and inappropriate. It was not a clarification of the appellant's evidence, but rather was classic cross examination. He accepts that the Recorder was entitled to ask whether there had been any discussion of the use of a condom, but submits that the damage lay in the way in which the Recorder asked these questions. He built up the point he wanted to make slowly and surely, concluding with the assertion which it appears he always intended to make at the end, "So you tell this jury you believe she was consenting to unprotected sex with somebody she had known for less than half an hour?" In particular, the words "So you tell this jury …" were not befitting of a judge asking a question, but were words which a prosecutor would use, and clearly indicated that the Recorder did not believe the appellant's account. The damaging effect of this questioning, and in particular its concluding "So you tell this jury …", was not alleviated by the Recorder's standard direction in his summing up that any views which he held, or which the jury might think he held, were irrelevant because it was their view of the facts which mattered, which in any event referred to what he was about to say in the summing up and not to the cross examination which had already occurred.

61. Mr Shaw submits that the questions asked by the Recorder may have been on the mind of any member of the jury and that the Recorder was entitled to ask them. He accepts that the phrase "So you tell this jury …" is the kind of phrase which is used by some prosecutors, and that if it had been used repeatedly by the Recorder, it may have been characterised as the kind of "sniper fire" from the bench (*R v Perren* [2009] EWCA Crim 348 at [35]) which is inappropriate. However, in this case it was used on a single occasion and was balanced by the Recorder's direction that his own views, if any, were irrelevant.

Decision

62. In our judgment the Recorder was unwise to raise this issue in the way that he did and he should certainly not have built up to it by what had every appearance of being skilful cross examination ending with a flourish introduced by the words "So you tell this jury

…" No doubt this was not his intention, but this intervention could hardly fail to convey to the jury that the Recorder did not believe the appellant's version of events. It was not sufficiently balanced by the later direction that any views of the Recorder were irrelevant. Although the phrase was only used once, it was at the very end of the appellant's evidence and would very likely have been understood by the jury as demonstrating the Recorder's considered view of that evidence. Accordingly it detracted in our judgment from the fairness of the trial. Moreover, it took no account of the fact that, under the influence of alcohol, people may sometimes behave in a sexual context in ways in which they would never behave when sober.

Safety of the conviction

63. Accordingly we accept Mr Emanuel's criticisms of the summing up and of the way in which the Recorder questioned the appellant. However, the issue is not whether there were failings in the summing up, or whether the Recorder's questioning of the appellant was inappropriate, but whether these matters render the appellant's conviction unsafe. The answer to that question must depend on all the circumstances of the case, including consideration of the summing up and the evidence as a whole (*Pritchard* at [34]).

64. We would be inclined to accept that, if any one of these grounds of appeal had stood alone in what was otherwise a strong case against the appellant, it would be unlikely to satisfy the statutory test.

65. For example, if we consider ground 1, this was a fairly short trial in which the issue of consent was starkly raised, the essential issue being whether the appellant had penetrated the complainant while she was asleep, with no dispute about the fact that sexual intercourse had occurred. It is to be expected that the inconsistencies in the complainant's various accounts had been highlighted in the closing speech by the appellant's counsel, so that the jury would have had them in mind, and that (albeit this would not have had the authority of a judicial direction) counsel would also have made the point that the complaints did not amount to independent evidence. In relation to grounds 2 and 3, it was not suggested that the complainant's distress was feigned, while the Recorder's directions warning against the making of assumptions went some way (albeit not far enough) in the right direction. As to ground 4, it may be said that the real point was not that the appellant was saying something different in his evidence from what he had said in interview, but that (if this is what he was really saying) his suggestion in evidence that, despite being very tired, the complainant had remained awake for at least two hours while she and the appellant were in the same room was thoroughly implausible. Finally, as to ground 5, although the phrase "So you are telling this jury …" should not have been used, if this were the only complaint about the trial it is doubtful whether it would have been sufficient to render the conviction unsafe. Indeed Mr Emanuel accepts that it would not.

66. However, as we have explained, each ground of appeal does not stand alone and their cumulative effect must be considered. Taken together, they have considerable force. While individual failings may not affect the overall safety of a conviction, a point must come where multiple errors cannot be overlooked.

67. This is, moreover, a case where there were powerful evidential points to be made on both sides. For the prosecution it was Mr Laidlaw's evidence, which was not challenged, that both the complainant and the appellant appeared to be fast asleep on

two occasions when he looked into the bedroom. Although the appellant said that he was aware of Mr Laidlaw doing so on one of these occasions, he accepted that he was not awake on the other. It is apparent also that the complainant has been consistent in saying from the outset that she did not consent to sexual activity, and that she was asleep when this took place, even if her accounts of how she came to wake up have been inconsistent. On the other hand, there was evidence from Mr Laidlaw (who was, it should be noted, the complainant's friend and who had not previously met the appellant) that the complainant had invited the appellant into the bedroom with her, while the complainant herself accepted that when she ran back into the living room, Mr Laidlaw responded by saying something like "You said it was OK". Although the complainant denied that she had said this, it is a striking feature of the case that her friend thought she had.

68. In these circumstances it cannot be said that the case against the appellant was so strong that his conviction is safe despite the failings in the summing up and the Recorder's intervention in questioning the appellant in inappropriate terms. Clearly there was evidence on which it would have been open to a properly directed jury to convict, but the cumulative effect of the matters to which we have referred does in our view render the conviction unsafe.

69. It is concerning that none of the matters to which we have referred was pointed out by trial counsel at the time, for which defence counsel has said that he takes "full responsibility", but this does not in our view mean that the conviction is safe. Failure to take a point that a direction is inadequate at the time may indicate that a ground of complaint is without substance. But once it is established that a direction is inadequate, as in our view is the position here, the question whether it affects the safety of the conviction must be considered objectively on its merits.

70. Nevertheless this case illustrates once again the responsibility on the judge and on both counsel to consider carefully the proposed directions of law. As we understand it, the Recorder provided his proposed legal directions (not including the adverse inference direction) to counsel in advance, but consideration of them in this case appears to have been inadequate. So far as the adverse inference direction is concerned, we understand that the prosecution had indicated that they did not ask for such a direction and that it was the judge's own decision to include this, without affording counsel prior sight of what he proposed to say before commencing his summing up. While the final decision whether to include such a direction, and in what terms, must be for the judge, it is prudent to afford counsel an opportunity to comment in order to ensure that any oversights are picked up.

71. Once it is concluded (as we do conclude) that a conviction is unsafe, it is obvious that the conviction must be quashed, despite the trauma which this will cause to the complainant, who after all may yet be proved to be a victim of rape. We will therefore allow the appeal, quash the conviction and order a retrial.

Postscript – access to justice

72. One of the issues in this appeal, relevant to ground 3, was whether and to what extent the complainant was showing signs of significant distress during the course of her cross examination. In order properly to advise on this issue, Mr Emanuel (who had been told by the appellant's parents who were present in court, but who could not see the

complainant giving evidence from behind a screen, that she appeared to be deeply distressed) needed to listen to the audio recording of the complainant's evidence, and requested access to this from the Crown Court. Unfortunately this was twice refused, despite Mr Emanuel's explanation of why such access was needed. In the end it was only on a direction from the Registrar (which was only possible because there were other grounds of appeal which meant that the matter was before the Court of Appeal) that the Crown Court made the recording available to Mr Emanuel. As a result he was able to make the submissions about the need for a proper direction on the issue of distress which we have accepted.

73. We are told by Mr Emanuel that this situation is not uncommon. It has the potential to impede proper access to justice for defendants, particularly after a change of counsel.

74. We draw attention to paragraphs 5.5(3) and (4) of the Criminal Procedure Rules which provide as follows:

> "(3) A party who wants to hear a recording of proceedings must—
>
> (a) apply—
>
> (i) in writing to the Registrar, if an appeal notice has been served where Part 36 applies (Appeal to the Court of Appeal: general rules), or
>
> (ii) orally or in writing to the Crown Court officer;
>
> (b) explain the reasons for the request; and
>
> (c) pay any fee prescribed.
>
> (4) If the Crown Court or the Registrar so directs, the Crown Court officer must allow that party to hear a recording of—
>
> (a) a hearing in public; and
>
> (b) a hearing in private, if the applicant was present at that hearing."

75. Accordingly in the case of any hearing in public it is necessary for an applicant to provide a good and sufficient reason for the request and to pay any prescribed fee. Where these conditions are satisfied, as in this case, access to the recording should be provided.