CASE NO SC/CRIM/07/17

IN THE SUPREME COURT
OF THE FALKLAND ISLANDS
ON APPEAL FROM THE MAGISTRATES COURT

Courts and Tribunal Service
Stanley
Falkland Islands

Date: 20th April 2018

Before:

JAMES LEWIS QC
(CHIEF JUSTICE OF THE FALKLAND ISLANDS)

- -

BETWEEN:

REGINA

Respondent

-and-

ANDREW FINLAY

Appellant

- -

Stuart Walker (Crown Counsel) for the **Respondent**

Sarah Lindop (instructed by Falklands Legal) for the **Appellant**

Hearing date: 19th April 2018

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Judgment

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THE CHIEF JUSTICE:

Introduction

1. On 10th October 2017 the appellant was convicted after a trial before Senior Magistrate Kushner of three indecent assaults. The offences were against two separate complainants and the three charges were tried together. The offences were:

> Charge 1: Andrew Finlay on a date between 17th day of September 1986 and the 30th December 1987 indecently assaulted AB[1] a female child aged 6 or 7 by placing your fingers on her vagina.
>
> Charge 2: Andrew Finlay on a date between 1st day of July 2003 and the 31st Day of October 2003 indecently assaulted CD a female child aged 10 or 11 by placing her hand on your penis.
>
> Charge 3: Andrew Finlay on a date between 1st day of July 2003 and the 31st Day of October 2003 indecently assaulted CD a female child aged 10 or 11 by placing your fingers in her vagina.

2. In summary the prosecution's case on charge 1 was that the appellant had babysat AB when she was around 6. AB was in her night clothes and the appellant had got AB to sit on his knee and put his hand into her dressing gown and touched her vagina.

3. On charge 2 the appellant was said to have sat on the sofa with CD to watch television. The appellant had unbuckled his jeans, grabbed CD's hand and pushed it down on his penis.

4. On charge 3 while CD was having a bath it was alleged the appellant went into the bathroom and started soaping CD's back. He then put his hand between her legs and rubbed and washed her vagina.

5. The appellant's defence was that he denied absolutely these offences. In relation to AB he said if it happened it was not him and she mistook his identity. In relation to CD he said the events never occurred.

6. On 15th January 2018 the appellant was sentenced to two and a half years imprisonment on Charge 1 for the indecent assault on the first complainant AB, and three and a half years imprisonment each for the indecent assaults on the second complainant CD, on Charges 2 and 3. All sentences were to run concurrently.

7. This is an appeal against all three convictions. There is no appeal against sentence.

[1] The names of the complainants have been anonymised.

Grounds of Appeal

8. There were 7 grounds of appeal advanced:

    1) The Learned Senior Magistrate erred in respect of ordering one trial of the two separate complainants and refusing the application for severance.
    2) In respect of the evidence in the charge relating to AB there was no evidence of the commission of the offence as charged (touching her vagina).
    3) The evidence from AB was of a vague and tenuous nature and insufficient for a court to be satisfied so as to be sure of the guilt of the appellant.
    4) The Learned Senior Magistrate failed to give sufficient weight to the inconsistencies in the account given by CD.
    5) The Learned Senior Magistrate failed to give sufficient weight to the inconsistent accounts given to others by CD.
    6) The Learned Senior Magistrate failed to give sufficient weight to the good character of the appellant.
    7) In all the circumstances of the case the convictions recorded are unsafe.

9. These grounds can conveniently be divided into four themes. Namely, severance; no sufficient evidence on charge 1; tenuous and inconsistent evidence on charges 1,2 and 3; and failure to give sufficient weight to the appellant's good character.

Submissions by the parties

Severance

10. It appears that initially the prosecution at the pre-trial hearing in August 2017 asked for joinder of the charges. They submitted the correct test was that set out in Rule 3.21(4) of the England and Wales Criminal Procedure Rules. The Senior Magistrate rejected the submission that those Rules applied because they related to trials on Indictment and section 177(5) of the Criminal Procedure and Evidence Ordinance 2014 required her to have regard to the practice and procedure of a District Judge (Magistrates Court) in England. She accordingly relied on the House of Lords case of *Clayton v Chief Constable of Norfolk* [1983] 2 AC 473. In that case their Lordships formulated the correct joinder and severance test as: 'whether it is in the interests of justice to hear the

charges together'. The judgment of Sachs J. in *R v* Assim [1966] 2 QB 249 was approved by the House as being the touchstone for charges being tried together. It is clear on the application for joinder the Senior Magistrate applied the correct test.

11. Ms Lindop for the appellant on the first day of the trial on the 9th October 2017 applied for severance of the charges. The application was refused. The appellant submits the Senior Magistrate was wrong to refuse the application for severance saying there was no legal or factual nexus between the sets of offences; it is submitted that they did not form part of a series of similar offending.

12. Moreover, Ms Lindop submits that the Senior Magistrate in considering the questions of cross admissibility or bad character misdirected herself in applying those facts to the legal test for severance. She submits that the Senior Magistrate should not have had regard to questions of cross admissibility or bad character when considering whether there was a legal or factual nexus between the offences.

13. The prosecution disagree saying the Senior Magistrate applied the correct legal test, namely, whether it is in the overall interests of justice to try the charges together taking into account any risk of prejudice to the defendant. In addition the prosecution say the Senior Magistrate was entitled to hear the charges together as each allegation was capable of cross admissibility.

No sufficient evidence

14. The appellant submitted that there was no evidence of the appellant touching AB's vagina. The way in which it is put in her skeleton argument bears repetition. Ms Lindop says:

> "The evidence in relation to the allegation made by AB came predominantly from her. In her ABE interview she gave an account that when she was about 6 years old she had been babysat by the appellant. She was in her nightclothes, although could not remember if she had pyjamas or a nightie on, with a dressing gown on. Her younger sister was also in the room. They were watching a video on TV and as there had been some disagreement about what should be viewed the appellant was alleged to have told her to sit on his knee. She then indicated that whilst she was sitting on his knee he had put his hand through the slit of her dressing gown and touched her vagina [page 5 of 27]. She went on later in that ABE [15 of 27] to add when asked "how far did his hand go?" to say "I just remember it being on the front. Like it didn't go underneath or anything. Just on top". It was clarified in the ABE that the touching was on the front area and she agreed. She was cross examined about her nightclothes, it being pointed out that to access her vagina would involve different actions depending on whether she had a nightie on or pyjamas, she could not assist with this at all. In cross examination she was asked how she had been sitting on his knee and how long the incident was said to have lasted for; she could assist on neither of those two important factors. In addition she demonstrated how he had placed his hand on her skin and that involved her placing a flat hand on the front of her pubic area in a place where the front of

someone's underwear would be. The account which she gave was vague and lacked any form of detail."

15. No application of no case to answer at the end of the prosecution case was made before the Senior Magistrate .

16. The prosecution say there was abundant evidence capable of supporting the finding of fact that the Senior Magistrate came to. They point out that the Senior Magistrate specifically found that the appellant had indeed touched AB's vagina. They point to the passages in the evidence from AB. In particular:

AB And he'd – then I sort of sitting on his knee, he put his hand, like through the slit in my dressing gown and touched my vagina.
…
Anita (police) Okay. So you said he put his hand on your
AB Yeah
Anita -on your vagina
AB Yeah
…
AB Um, he just went and touched it and then
…
AB Or anything. Just on the top.
Anita On the front area?
AB yeah

17. And that in cross examination AB said:

Q: So, you describe in your interview how, as you put it in the first instance of giving detail, you said that I was sort of sitting on his knee. He had put his hand like through the slit in my dressing gown and touched my vagina. Yeah? Remember that?
A: Yes.
Q: Yes. There was then a lot of questions about other matters around what your routine was like, your accommodation and things like that. You were asked about whether you had pyjamas or a nighty. You say you don't know. You've told us now you don't remember. But what you did tell the police was that you knew that there was skin to skin contact.
A: Yes.
…
A: I don't know. He, I remember the hand going through the dressing gown. I can't remember if then pulled up or the hand down but it touched.
…
Q: And yet this is something that you say occurred to you and when you saw the article in Penguin News that made you think that you needed to find out the process to report it and yet your detail of the event is simply lacking, isn't it?
A: No. I know he touched me. It's wrong. That's why I wanted to come forward.
…
Q: And so far as you are concerned, I just want to be clear on what you describe. Bear with me for one moment if you would. You said to the police during the course of your interview that, although in fact I think it was more the police were saying it to you that he put his hand on your vagina. Is that right?
A: On the, it didn't go right down but on the vaginal area, yes.
Q: Do you remember whether or not your legs had to be parted in order to do this? Did they?
A: No. I can't remember. I just remember the touch. I don't, I can't remember the details exactly where my legs were.
…
Q: So, in fact not on your vagina.

A: Well, not at the opening but the hand was there on top.
Q: And what did the hand do?
A: I just froze and stopped. I said there was no penetration or anything. I just remember feeling it there and freezing.

Tenuous and inconsistent evidence on charges 1,2 and 3

18. The appellant submits that there were a large number of inconsistencies in the evidence from both complainants, and that the evidence from them was vague and tenuous.

19. In respect of AB, Ms Lindop effectively repeats her submission on Ground 2, putting it that the evidence of AB was vague and tenuous.

20. In respect of CD Ms Lindop points out that CD had given a witness statement to PC Forbes at Elgin Police Station in the UK on 17th February 2017. That statement was served as part of the prosecution case. CD gave an account in evidence that was different from her statement in a number of areas. In addition when she was cross examined she gave further details which had not formed part of her statement or her evidence in chief.

21. Ms Lindop points out that the first incident of which CD made complaint was said to have involved the appellant sitting next to her on the sofa and putting her hand on his penis and whilst he had his hand over hers he caused her to rub his penis. CD gave various different accounts as to how that activity started and where the appellant's penis was. These included an account of the appellant taking his penis out from his trousers (statement account, page 3), his penis being exposed but with no evidence as to how that came to be (evidence in chief, page 14 to 15 of transcript) and thirdly not knowing if his penis was out from his trousers moving to it not being exposed and her feeling the zip catch the back of her hand (cross examination, page 28, 30, 33 to 37 of transcript).

22. Ms Lindop submits that CD was so inconsistent with the detail of this alleged assault to the extent that her credibility on this account alone should have caused the court to be unsure of the appellant's guilt to the requisite standard.

23. On the third charge the appellant was said to have gone into the bathroom of the home where CD was staying. Ms Lindop submitted that in evidence she said it occurred at the same time as the previous assault but in her witness statement she told the police that the incidents happened over the course of a couple of months and that she had refused

to go and stay with him and that her grandmother could speak of her being "afraid of him and not wanting him near her". That latter part was not supported in those terms by her grandmother.

24. Next Ms Lindop pointed out the discrepancies in CD's disclosure to others of the incidents. CD told PC Forbes that she did not disclose the incident to anyone during her childhood and only disclosed to the incident to her ex-boyfriend and family at the time she reported the incident to the police in the Falklands around 3 years ago.

25. CD told the court that the first person she had disclosed events to was the ward manager when she worked at the hospital. She said that she was 18 at the time which would have made that complaint in 2010/2011. She said that she had also told her then boyfriend. She went on to say that she next told Karen Rimicans the CPN at a later date.

26. CD said that the next person she told was her ex-boyfriend and that was around the time that she went to the police and made a complaint to PC Janie Lorrimer. This was in 2013 and she said that she had asked to see a female officer and that everything was noted in a notebook. However the investigation wasn't continued and she wouldn't do a video link because of her anxiety. She stated that Janie Lorrimer had taken a statement in her notebook which she signed. She also said that after she had told the police she had told her grandmother.

27. The evidence from her boyfriend was that towards the end of their relationship in 2011/2012 CD had mentioned something to him about it but had not named the appellant.

28. The evidence from Janice Dent was that CD had worked at the hospital. She had disclosed to Ms Dent that she had been sexually abused by the appellant. Ms Dent told the court that this disclosure was not long before CD left her job. The circumstances of how the disclosure was made differed from the account given by CD.

29. The statement of Karen Rimicans was read to the court and the date of her appointment was noted as being 08/04/2011. The disclosure made to Karen Rimicans was that when she was 11 she was made to touch the appellant; she did not expand on this information. No mention was made of any touching of her.

30. CD's grandmother gave an account that in 2015 before CD left the Falkland Islands she was given a note from CD in which she recalled CD stating that the appellant had forced CD to touch him. That note was thrown away. No mention was made of the appellant touching CD. In addition the grandmother contradicted the account from CD in that CD had told the court that she didn't like going to see the appellant out of Stanley whereas her grandmother said that she had loved going there.

31. The prosecution say that notwithstanding the inconsistencies the Senior Magistrate was in a proper position to assess the credibility of the complainants and did so coming to findings of fact she was entitled to come to.

Good character

32. It is agreed the appellant is of good character. The complaint by the appellant is that insufficient weight was given to this fact when weighing his evidence and propensity to commit the offences. Ms Lindop points not just to the fact the appellant has no previous convictions but that he is of positive good character and he called witnesses to that effect.

33. The prosecution say the Senior Magistrate directed herself correctly and gave appropriate weight to his good character.

Discussion

34. The approach of this court on an appeal such as this is clear. It reflects the position in England as it was under the unamended section 2(1) of the Criminal Appeal Act 1968. This court will allow an appeal if the conviction is unsafe or unsatisfactory; there has been a wrong decision on any question of law; or there was a material irregularity in the course of the trial, see section 663 of the Criminal Procedure and Evidence Ordinance 2014. This is subject to the proviso in section 663(2).

35. Of particular importance is that the Senior Magistrate came to findings of fact. The approach of an appellate court to a judge's findings of fact is well trodden ground. Lord Thankerton's speech in *Thomas v Thomas* [1947] AC 484 , 487-488, is the oft quoted starting point. He said:

> "(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by

> the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

36. This approach was cited with approval in the recent Privy Council case of *In Chen v Ng (British Virgin Islands)* [2017] UKPC 27. Indeed in that case they also cited with approval what Lord Hoffman said *Biogen Inc v Medeva Plc* [1997] RPC 1, at page 45:

> "The question of whether an invention was obvious had been called "a kind of jury question" (see *Jenkins L.J. in Allmanna Svenska Elektriska A/B v. The Burntisland Shipbuilding Co. Ltd. (1952) 69 R.P.C. 63, 70*) and should be treated with appropriate respect by an appellate court. It is true that in *Benmax v. Austin Motor Co. Ltd. [1955] A.C. 370*[5] this House decided that, while the judge's findings of primary fact, particularly if founded upon an assessment of the credibility of witnesses, were virtually unassailable, an appellate court would be more ready to differ from the judge's evaluation of those facts by reference to some legal standard such as negligence or obviousness. In drawing this distinction, however, Viscount Simonds went on to observe, at page 374, that it was "subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge". The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (*as Renan said, la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

37. This approach is trite law and applies in this jurisdiction. Indeed the Falkland Islands Court of Appeal said in *R v Alfred* [2018] COA-CRIM-0317, at [29]:

> "It is not for us to substitute our view of the witnesses for that of the trial Judge. She had the opportunity to see and hear the witnesses. It is the function of a trial to test the evidence of the witnesses and to assess their credibility. The Judge was in a much better position that we are to assess the witnesses and decide where the truth lies."

38. The approach of an appellant court to the exercise of a Judge's discretion, such as in deciding severance or joinder, is also clear. Devlin J's judgment in *R. v. Cook* [1959] 2 Q.B. 340 at 348 sets out the principle:

> "It is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision."

39. This passage of the Court of Appeal was cited with approval by Viscount Dilhorne in *Selvey v. DPP* [1970] A.C. 304 at 342, HL. In *R. v. Quinn* [1996] Crim.L.R. 516, the Court of Appeal approved the statement by the editors of Archbold (1995) to the effect that in relation to an exercise of discretion the Court of Appeal would only interfere if there has been a failure to exercise any discretion, a failure to take into account a

material consideration or a taking account of an immaterial consideration. In such event, the Court of Appeal would itself consider how the discretion should have been exercised, but not otherwise.

Severance

40. This was an exercise of discretion by the Senior Magistrate. It is clear that she directed herself correctly. She said at the hearing for joinder, having set out passages from *Clayton* [ibid]:

> "On that basis it appears to me, and I essentially direct myself that it is a matter of my discretion taking in to account those guidelines. It goes on, giving support to what I say, "To give magistrates' courts the discretion… to that end and not otherwise"
>
> Once one looks at the authority in its entirety, one sees it is of course a matter of discretion for the magistrates to consider what is fair in all the cirumstances and ask themselves, as I ask myself, would it be fair and just to allow joinder of the offences."

41. No complaint can be made of that direction. At the application for severance she said, according to the agreed note from counsel, in relation to the two sets of offences dealing with legal and factual nexus:

> "The prosecution point to a number of other matters. Similar environment. Perfunctory nature. No grooming or lead up to it. Begins and ends quickly. Pre-pubescent girls. Nature of the environment.
>
> The prosecution also point to cross admissibility. Its right that if one looks at it in this way, if severance is ordered then prosecution would call AB in respect of bad character. Giving evidence twice is impractical. Cross admissibility of lots of evidence. The prosecution refer to authorities of the English courts, and refer to a bad character application. The evidence does fall within s.375(1)(d) and would be cross admissible."

42. It was clearly open to the Senior Magistrate to find as she did that it was fair and just to allow joinder of the offences. Indeed in my judgment the submission of Ms Lindop that it was wrong of the Senior Magistrate to take account of cross admissibility and bad character in determining joinder or severance is wrong. Indeed cross admissibility is one of the principle reasons why charges should be heard together. In *DPP v. P* [1991] 2 A.C. 447 the two certified questions were:

> "(1) where a father or step-father is charged with sexually abusing a young daughter of the family, is evidence that he has also similarly abused other young children of the family admissible (assuming there to be no collusion) in support of such charge in the absence of any other 'striking similarities'; and (2) where a defendant is charged with sexual offences against more than one child or young person, is it necessary in the absence of 'striking similarities' for the charges to be tried separately?"

43. In the course of a speech with which the rest of the appellate committee agreed, Lord Mackay set out the test to be applied in answering the first certified question (now superseded by the "bad character" provisions). The Lord Chancellor went on to say that

the answer to the second certified question is "no", provided that there is a relationship between the offences of the kind described in his answer to the first certified question. It follows as a matter of reasoning where there is bad character cross admissible evidence, absence specific prejudice to the defendant, the charges should be tried together. This accords with principle and common sense and prevents there being two trials with the same witnesses instead of one with all the consequential disadvantages two trials would bring. It follows this ground of appeal fails.

No sufficient evidence

44. This ground can be dealt with shortly. The passages set out above at paragraph [16] and [17] above make a clear evidential foundation for the finding that the Senior Magistrate made. The Senior Magistrate said in her judgment:

> "[10] It is said on behalf of the Defendant that the evidence is not there to make it out as charged. But in ABE interview it is clear that he touched her vagina though there was no penetration. Her Evidence in Chief in court she describes, my note is perhaps the pubic bone not the pelvic bone, that's my very clear note and later she said clearly his hand didn't go right down but it went onto the vaginal area, I can't remember if my legs were parted during this I just remember the touch.
>
> [11] I find that he touched her vagina."

45. This was a finding of fact open to her. She had heard and assessed the witness. No submission of no case to answer was made. The submission that Ms Lindop makes is really one of disagreement with the Senior Magistrate 's finding of fact, not that there was insufficient evidence for the Senior Magistrate to find as she did. It follows that this ground of appeal fails.

Tenuous and inconsistent evidence on charges 1,2 and 3

46. Given the correct approach of an appellate court as identified above it is only necessary to ensure that the Senior Magistrate directed herself properly on the issues raised. For the sake of completeness I will set out her judgment on this issue in some detail. The Senior Magistrate said :

> "For the record again I state that I am looking at the offences separately and consider them independently each one on a standalone basis. However, there is a chronology of disclosures, a timeline and it is useful to look at that timeline not least because on behalf of the Defence it is submitted that I should look at that timeline because, and it shows inconstancies and discrepancies certainly in the content of the allegations. Although that has to be set against the timeline of the disclosures themselves. There is little detail in the disclosures as such until 2017. There is a problem over the order of the disclosures, whether the first was to Janice Dent or to Karen Rimicans, I find that its likely to be the first to Janice Dent, to whom the first disclosure as there was the referral from her to Karen Rimicans as a result of what CD said to Janice Dent. The referral is clearly towards the end of 2011 from a note taken from Karen Rimicans. In fact CD says the first time she made any complaint was to

Janice Dent and that would take it back to 2011. As for Janice Dent's evidence it may be as far as she was concerned before CD's partner or it may be after or around the same time. Janice Dent puts the timing of the disclosure to her at around 2013, as I have said I think it is unlikely that a disclosure at this time would have prompted a referral to Karen Rimicans in 2011.

I find that the first disclosure was to Janice Dent in or around 2011 and although she thought it shortly before the time CD left employment at the hospital, I find that Janice Dent is mistaken about that date. However, that is the first disclosure. Janice Dent says she had been sent out of Stanley for school holidays and that CD had told her that she had been sent out of Stanley for school holidays and she had been touched down below whilst her step-father was washing her. She said that, she reports CD saying she vividly recalls a strong smelling cheap soap. Although there was no further detail and no further disclosure the impression given to Janice Dent she said was that it was on more than one occasion although what happened on other occasions was not said. It was also said by CD that she voted with her feet and didn't go back.

The second complaint was to Karen Rimicans her statement was read and she is the Community Psychiatric Nurse, and the complaint to her was that she was made to touch him there was very little else said. As I said Karen Rimicans statement was read and in cross-examination on the question of why she had not disclosed both incidents to Karen Rimicans, CD said in the witness box that when she has seen someone for the first time she is not going to pour everything out.

I should also state this, of the evidence of Karen Rimicans which was read, that as well as the, what she said about that she was made to touch him, Karen goes on to say this; 'She did not expand on this, she told me that it had been niggling away and that this was the worst she had felt. That she was living near him, that she would see him out and about and would feel dirty and it doesn't feel right. CD told me that she doesn't talk to him when her sister is about but she has never been alone with him since then. She named her abuser as Andy Finlay.' So that's the statement, that was the disclosure of 2011 to Karen Rimicans and I noted this point that she remarked to Karen Rimicans that she was, that CD was living near him.

The next in time probably to her then partner. She was trying to confide to him something about Andrew Finlay and in his words it was eating her up. If she gave detail he couldn't remember, his evidence doesn't take matters much further. Although, some consistency does lie in her trying to make a disclosure and her difficulties in being forthcoming.

In 2014 CD went to the Police Station in the Falkland Islands. She spoke to PC Jane Lorimer, it is common ground that she handed a letter and that she indicated abuse that much is in the notebook. There was some arrangement for an ABE interview although CD's preferred medium as far as she was concerned was a written statement. She wanted to speak to someone she knew. Len McGill was her first choice, what happened thereafter was poor. CD was not properly served as conceded by the Prosecution, no one that was ABE trained was available. Police Sargent Webb was ABE trained but had never used his training was interviewing or detained till 4 o'clock, I am told during the course of this trial he can't even remember CD coming into the Station, although apparently he was involved in making an appointment for an ABE interview but at a different time from that which CD thought it was. Len McGill not ABE trained as far as I can gather but asked for by CD had appointments all day. There was a muddle over the time for the ABE interview, PC Jane Lorimer had persuaded CD to have an ABE interview, but muddle over the timing ….. Thereafter CD was very angry at being what she thought was messed around. Messages were left by Jane Lorimer they were not returned and not carried forward. From CD's point of view she considered that the Police did not get back to her.

…

She gave evidence from in the court from behind a screen, she was clearly distressed I caution myself I draw no conclusions about terms as to whether she is telling the truth or not. But I do comment that she is clearly a vulnerable girl. The discrepancies or absence of detail were put to her in cross-examination for example, his hand over hers rather than by the wrist, the fact that she couldn't recall how it came to an end and she couldn't remember if his penis was outside the trousers or inside. She told Emma Forbes that she remembered him taking his penis out of his trousers but that was not adopted in her evidence before the court. And that is said to be a major inconsistency bearing in mind it is an inconsistency from the 16th of February through to the 17th of February in the matter of a day possibly even hours. She maintained what she said in that it was our little secret.

I remind myself about the directions of inconsistences. These events happened several years ago when she was 11 years old and by her own account she was trying to bury them deep inside her and forget about it. She describes an event that she finds traumatic and deeply unpleasant to Karen Rimicans that would be 8 years later. She said that it had been niggling away and this is the worst she'd felt, that she was living near him and that she would see him out and about and would feel dirty and it doesn't feel right. And her focus would be on the central event the touching. And I pause at this point to say that what she said to Karen Rimicans about seeing him about causes essentially prompts her to making an emotional difficulties at that time. A called to the time when Andrew Finlay was in fact in Stanley in 2011. But I go back to this; her focus in respect in her evidence on the specific incident would be on the central event, the touching. I am not being dismissive by describing matters such as to whether he took the penis out of his trousers or not as peripheral, but I describe it as peripheral in contrast to it being the central action. At call she remembers the unbuckling of the belt, the unzipping of the trousers, her hand being placed by his onto the penis and being forced to rub it up and down and being told it is our little secret. She remembers the zip and I can see a circumstance where the zip would be on the side of her hand, I don't think that is determinative either way. But I do not consider it undermines her evidence at all.

That coupled with what she told Karen Rimicans and her Grandmother supports the narrative she gave in the witness box. Placed in the context of the rift between herself and the Defendant I find that he assaulted her but forcing her to touch his penis. And notwithstanding his good character he knew exactly what he was doing and intended to assault her.

…

In respect of the third charge I again consider the discrepancies and inconsistencies. In each narrative there is a constant that he washed her back, washed her front and went under water, touched her genital area and the smell of soap. On the 16th to Emma Forbes she said that she had run the bath and she had been in the bath for a little while, about 10 minutes before he came in. On the 17th she stated that the Defendant poured the water for her, the Defendant was there whilst she undressed and she asked him to go but he wouldn't. In court she returned to the version of events on the 16th, she was in the bath and he came in. And I have already read the evidence that she gave from the witness box in respect of the bathroom arrangements, but going further with discrepancies there is also a discrepancy whether she said she was hurt or not. In court she said she was emotionally and physically hurt, she described feeling nails but in respect of being hurt she said that it was a scratch. So it is only a day in between the 16th and the 17th so how do such discrepancies arrive. She gave various explanations; digging deep into matters she didn't want to remember, describing her vulnerability, the suicide attempts, the difficulties over relationships, trying to block things out. She also said that in respect to the disclosures that she mentioned it to others particularly to Karen Rimicans and her Grandmother. That she was troubled and deeply embarrassed and she preferred to commit it to paper rather than to disclose it orally.

Because of these discrepancies I have considered very carefully her evidence and I watched her give evidence very carefully indeed. The way she gave evidence on key issues and what counsel for the Defence described as the actual criminality the actual core of the offence. However, I take the view that she been, and I find that she has been consistent. When looking at the core matters about what she has been consistent, the washing of the back, the front, the water and the genitalia.

Everything I have said about the delay in the respect of charge two applies to charge two. Coupled again with the rift and with what she told Janice Dent which was after all the first disclosure as I found said as early as 2011 as I have found, and on both the 16th and 17th to Emma Forbes and I am certain so I am sure that in the bath he placed his fingers on her vagina and intended to do so."

47. It is abundantly clear from the passages I have quoted from the Senior Magistrate's judgment that she meticulously and carefully considered all the inconsistencies and submissions of tenuous evidence that were urged by the defence. The Senior Magistrate saw the complainants give evidence and was in the best position to evaluate their credibility and reliability. She clearly directed herself correctly and therefore there is nothing about which this court can or should interfere in her decision. It again follows that these grounds of appeal fail.

Good character

48. It is common ground that the Senior Magistrate directed herself correctly as to both limbs of the good character direction. The complaint that is made by Ms Lindop is that she failed to give sufficient weight to the appellant's good character. This submission is not born out by the judgment of the Senior Magistrate. The Senior Magistrate said in her decision:

> [2] In every case the Defendant is innocent until proven guilty. In this case I am going to start with the character of the Defendant. He is a man of hitherto good character, not simply in the way of having no convictions or cautions against him but his general character is known throughout the community as good. I have seen him give evidence, he is a quiet man, a man of few words, not a man given too much emotion. … I have heard from a number of character witnesses; Steve Dent, Keith Knight, Gavin Marsh, Anna Marsh, not only do they refer to him as good, kind, a good, kind and helpful friend. But also relevantly in the context of this trial someone who is trustworthy and with no concerns about him being with their children. It can sometimes be the case that even if one doesn't quite know why some people give off an air which is creepy, or that you don't quite like leaving your children without supervision. That's not the case here, and in fact I heard from Mr Stephen Dent, a former teacher, who gave a character reference from the witness box, and said that he had specifically asked his children who were young from the time they had known him, if they had, had any concerns about him and there was nothing. I also heard from witnesses such as the parents of the first complainant and Grandmother of the second complainant, and that until they had, had disclosures from their daughter or granddaughter, they had a favourable view of the Defendant. So although quite a solitary man and comfortable in his own company, he is a man respected and liked by the community and friends. Because of the character of the Defendant which I examined with some care the disclosures of the complainants, because the complaints and the character of the Defendant do not sit easily side by side.
>
> …
>
> [11]… I set everything I have said against everything we know about the character of the Defendant. Notwithstanding the character of the Defendant I find the evidence of AB is reliable and credible.

49. The weight to be given for a defendant's good character is in all the circumstances for the tribunal of fact. The Senior Magistrate directed herself correctly and weighed up the good character of the defendant. It is not for this court to substitute its own decision, even if it were different, for that of the Senior Magistrate. This ground of appeal fails.

Unsafe

50. Ms Lindop has an overarching ground of appeal. In the round she says the convictions are unsafe. Under section 2 of the 1968 Criminal Appeal Act from which the provisions of section 663 of the Criminal Procedure and Evidence Ordinance are derived this court must allow an appeal if there is a 'lurking doubt' as to the safety of the conviction. I have carefully considered all the points and papers and cannot say that the conviction is unsafe.

51. The appeal is dismissed.