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(subject to editorial corrections)* | **26/2/2016**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY KC FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE POLICE SERVICE OF NORTHERN IRELAND

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KC's Application [2016] NIQB 29

MAGUIRE J

Introduction

[1] The applicant in this case is a man who was born on 4 February 1991. He is now 25 years of age. He will be known in these proceedings as KC.

[2] On 6 January 2011 a 14 year old girl who the court will refer to as "the complainant" made a formal statement to police alleging that she had been in a relationship with KC between August 2008 and November 2010. The relationship, *inter alia*, involved sexual intercourse. During the relevant period the applicant would have been aged 17 to 19 years and the complainant would have been 12 to 14 years. As a result of the complainant's revelations she was made the subject of an Achieving Best Evidence ("ABE") interview conducted jointly by the police and a social worker. The interview was recorded. In her interview the complainant claimed that she formed a relationship with the applicant in or about August 2008. At an early stage she alleged that the applicant had put his hand down her trousers and committed sexual acts. After a period of sickness in or about November 2008 during which she was hospitalised they began a pattern of sexual activity involving sexual intercourse. On the first occasion this occurred in a park and then later it occurred at a variety of locations. After April 2009, there was sexual intercourse in the back of the applicant's car. The complainant described how after sex the applicant cleaned himself with cloths or other items such as socks which were in the back of the car. She also described how the two of them had had sexual intercourse

in the applicant's mother's house when his mother was away on holiday or at week-ends when she was away. The complainant described the interior of his mother's house and his bedroom in the house. The complainant also said that she had told some of her friends about the relationship which seems to have ended in or about November 2010.

[3] On 26 January 2011 the applicant was arrested and interviewed under caution on several occasions. When the complainant's allegations were put to him, he denied them. While he said they had become friends, this was because he was trying to help her with problems she was experiencing. He said he became like a brother figure to her. He claimed that he had not been involved in any form of sexual activity with the complainant, whether in a park, his car, his mother's house or elsewhere. At this time, searches were carried out at his home and car. The search of his car recovered two socks, one of which tested positive for semen.

[4] Police enquiries continued over the following months. The applicant was interviewed again on 21 July 2011. On this occasion the applicant tendered to police a prepared statement but refused otherwise to answer questions put to him by the police. Shortly thereafter the applicant was charged with a total of 11 offences in respect of a range of sexual matters in relation to the complainant.

[5] The applicant pleaded not guilty to all charges and a trial took place in the Crown Court between 15 and 25 April 2013. In the course of the trial the complainant gave evidence. So also did the applicant. At the end of the trial the applicant was acquitted by a unanimous verdict of the jury.

[6] In early 2014 KC applied for two positions in which, if successful, he would be in contact with children or young people. One was as a child care assistant in a specialist school. The other was as a volunteer within a community organisation. Because of the nature of the work involved the applicant had to obtain an Enhanced Criminal Record Certificate ("ECRC"). Such a certificate must record two categories of material. It must contain every relevant matter held in Central Records. This, in effect, encompasses convictions and cautions. In addition, and secondly, it must contain details of any information which in the opinion of the police "might be relevant" for the purpose in hand and which "ought to be included in the certificate". In the applicant's case, as he had no convictions or cautions this element produced a nil return. However the police were of the view that there was material which might be relevant and ought to be included in the certificate in the form of information about the fact that he had been prosecuted, as described above, and acquitted in relation to allegations made by the complainant.

[7] In advance of any disclosure being made the police advised the applicant that they proposed to disclose the information above. This led to an exchange of correspondence between the applicant's solicitors and the police about whether the disclosures should be made and about the text of any disclosure made.

[8] The form of words which ultimately the police favoured was communicated to the applicant's solicitors in June 2015. It read as follows:

> "…the information held by police is that the applicant was reported to police in 2011 and later charged with rape and other sexual offences which were alleged to have occurred between 20 August 2008 and early November 2010. There was a single female complainant who, during the relevant period was 12 to 14 years old and the applicant who was 17 to 19 years of age. Following a trial, the applicant was acquitted of all charges by a jury at Belfast Crown Court on 25 April 2013. The applicant denied all of the charges throughout the police investigation and trial."

[9] These proceedings impugn the lawfulness of the above disclosure proposed by the police. They seek declarations that the proposed disclosure has breached the applicant's Article 8 rights and are unfair and unreasonable. The essence of the challenge is best found formulated at paragraph 3(a) of the Order 53 statement where it is stated that:

> "The respondent [the police] is acting in breach of the applicant's rights under Article 8 of the European Convention on Human Rights. In particular, the respondent is, by reason of its insistence that it disclose information about the applicant's trial for sexual offences against a child, acting in a manner that is disproportionate given that the applicant was unanimously acquitted of all charges against him."

The relevant law

[10] The relevant law for the purposes of this application has not been the subject of dispute between the parties and can be set out economically for present purposes.

[11] As far as statute law is concerned, the most relevant provision is section 113B of the Police Act 1997. The relevant provisions in this case are concerned with child protection and were introduced in the aftermath of the well-known Soham murders. The scheme of the legislation is as follows:

(i) The Department of Justice has a duty to issue the certificate where it receives an application by an individual who requires it for a prescribed purpose [section 113B(1)].

(ii) Prescribed purposes include taking up a position (voluntary or employed) which involves exercising authority over or having contact with children or other vulnerable persons.

(iii) The application must be co-signed by the registered person (i.e. the prospective employer) [section 113B(2)].

(iv) The certificate is sent both to the individual and the registered person [section 113B(6)].

(v) The certificate must contain:

- Every relevant matter recorded in Central Records (i.e. all convictions and cautions) [section 113B(3)].

- Non-conviction material, sent to the Department of Justice, at the discretion of the Chief Constable [section 113B(4)].

[12] Section 113B(4) provides that before issuing an enhanced Criminal Record Certificate the Secretary of State must request the Chief Officer of the relevant police force to provide information which he reasonably believes to be relevant for the purpose and which ought to be included in the certificate.

[13] The key feature of section 113B(4) is that the Chief Constable has discretion to decide whether non-conviction material held in police records might be relevant and ought to be included in the certificate. Once he has made a final decision and provided the information to the Department of Justice, it must be included in the certificate and disclosed to the employer.

[14] There is no dispute between the parties that, with the exception of the judgment made by the Chief Constable as to whether he was of the opinion that the information ought to be disclosed in the certificate, the terms of the statute were fulfilled in this case. There was no contention (in the court's view correctly) that the Chief Constable was other than entitled to reach the view that the information might be relevant in the sense required by (4)(a).

[15] As far as the case law is concerned, it is clear that these provisions have given rise to extensive litigation. The leading authority governing the exercise of discretion by the police under section 113B(4) is a decision of the Supreme Court in R (L) v Commissioner of Police for the Metropolis [2010] 1 AER 113. The parties were in agreement that the description of the principles enunciated in this case contained in the respondent's skeleton argument was accurate and appropriate and in those circumstances the court will set these out. The L case concerned a challenge to the decision of the police to disclose in an ECRC that the applicant had come to the attention of the police under the category "neglect" on the basis that she had failed to exercise sufficient control over her son who had repeatedly missed school and

engaged in criminality. The leading judgments were by Lord Hope and Lord Neuberger. A number of general principles were established:

> "(i) The scope of the rights protected by Article 8 included the ability to establish and develop relations with others, not to be excluded from employment in a chosen field, protection of good name and reputation and retention of personal information for the purposes of disclosure to third parties. Accordingly, decisions on whether or not to make disclosure of personal details of an individual's past, fell within the scope of Article 8(1) rights in every case [Lord Hope at [24]-[28]].
>
> (ii) The actual disclosure of information on the certificate to the prospective employer was likely to amount to an interference with Article 8(1) rights in "virtually every case", thus requiring justification [Lord Hope at [29] and [40]].
>
> (iii) Decisions are made under statute and hence 'in accordance with law'. They also pursue the legitimate aim of protecting the rights and freedoms of others. When determining whether or not disclosure did or would amount to a violation of Article 8, the issue is 'essentially one of proportionality'[Lord Hope at [42]].
>
> (iv) In deciding whether the proposed disclosure might be relevant for the purpose of the certificate '… it is for the Chief Constable or his delegate to form an opinion on that issue. Informing his opinion on relevance, the officer must ask himself whether the information might be true, and if it might be true he must consider the degree of connection between the information and the purpose described …' [Lord Hope at [39]].
>
> (v) In deciding whether the information 'ought to be disclosed' police must consider the impact of disclosure upon the private life of the individual. They must determine whether

there will be an interference and, if so, whether it can be justified. The correct approach is to carry out a balancing exercise in which police balance the need to protect children and vulnerable adults against the impact which disclosure is likely to have upon the private life of the individual. In approaching that task, there should be no presumption in favour or against disclosure [Lord Hope at [40, [44] and [45]].

(vi) In cases of doubt '… where it is unclear whether the position for which the applicant is applying really does require the disclosure of sensitive information, where there is room for doubt as to whether an allegation of a sensitive kind could be substantiated or where the information may indicate a state of affairs that is out of date or no longer true"…the correct approach is to offer the individual an opportunity to make representations before the disclosure is made [Lord Hope at [46]].

(vii) Lord Neuberger gave some guidance as to the factors which might be taken into account in deciding whether information 'ought to be disclosed'. These were:

- The gravity of the information involved;
- The reliability of the information upon which it is based;
- Whether the applicant has had a chance to rebut the information;
- The relevance of the material to the particular job application;
- The period of time which has elapsed since the events occurred;
- The impact of disclosure upon the applicant's job prospects (for example, might it be a 'killer blow') [at [75]].

The decision-making process

[16] In this case it is necessary to set out the decision-making process in further detail and to identify the particular aspects of that process which have been subject to argument in these proceedings.

[17] The process began in or about March/April 2014 when the applicant applied to Access Northern Ireland for an ECRC. As part of Access Northern Ireland's procedures, the matter was referred to the Police Service of Northern Ireland ("PSNI).

[18] Initially the decision-maker in the case for PSNI was an Assistant Chief Constable ("ACC"). A file of relevant papers was prepared by his staff. These concentrated on the material which had led to the prosecution. This included the Investigating Officer's ("IO") case summary; the ABE interview with the complainant; the PACE interviews with the applicant; a pre-prepared statement from the applicant dated 21 July 2011; various witness statements, including from acquaintances of the complainant and the applicant; forensic reports; a sketch of the applicant's mother's house made by the complainant; and a Valentine's Day card, which the complainant alleged had come from the applicant.

[19] Importantly the file did not contain any substantial information about the trial or about why the applicant was acquitted. The fact of a unanimous acquittal was known but it appears that while the Public Prosecution Service ("PPS") was invited to provide information about why the prosecution had failed, no such information was provided. Neither a transcript of the hearing nor one of the Judge's charge to the jury was available at this stage. There were no notes or records of the hearing from any source.

[20] Notwithstanding the absence of the materials noted above, the decision-maker received recommendations from his staff that disclosure should be made. The basis for these recommendations appears to have been the views of one or more assessors of the material in the file. In particular, the IO's summary appears to have been influential. In it the IO had expressed certain views in her outline of the case which appeared to have found favour with the assessors. For examples –

- The IO had quoted the complainant as saying that "sexual stuff happened" and that the applicant "had showed her what to do". These phrases recur in documents as the decision-making process progressed.

- The applicant, while denying the allegations, according to the IO, had contradicted himself on several issues during his interviews and was "inconsistent in his version of events" and was "inconsistent with his answers". Again these comments are to be found quoted in later documents, as the decision-making process progressed.

[21] Notably the IO's outline of the case offered no evaluation of the quality of the complainant's evidence.

[22] After the process of assessment had been completed by his staff, the ACC was provided with the papers in order to reach a decision on the case. However, it seems to be the case that he was asked whether he wished to proceed without information from the PPS as to why the trial produced a not guilty outcome. The ACC's response was that he should proceed. At this stage he had before him staff assessments which indicated to him not only that the applicant had given an inconsistent account to investigators but also that the complainant had given a consistent account. One assumes this was the particular assessor's own view. Another assessor referred to the complainant being the victim of a serious offence. Again one assumes that this was that assessor's own view. The assessor suggested no other person as possibly being responsible for this serious offence, other than the applicant.

[23] The ACC accepted the case for disclosure. He, however, suggested that the applicant should be provided with the proposed form of disclosure so that he could make any representations he wished to make about it.

[24] In accordance with the above, a letter was sent to the applicant on 16 July 2014. It indicated what the terms of the proposed disclosure were to be and offered to him the opportunity to make representations to the decision-maker.

[25] The proposed disclosure was in these terms:

> "The information held by police is that the applicant was reported for an alleged rape and other sexual offences in 2011. It was alleged that he had been involved in a relationship with a 12 year old female in which `sexual stuff had happened' and that `he had shown her what to do'. This included digital penetration, oral sex and full intercourse. The applicant's account was shown to be contradictory and often inconsistent. He was acquitted at Belfast Crown Court on 25/4/2013".

[26] The above formulation of the proposed disclosure was, in the course of the hearing, heavily criticised by the applicant's counsel, in the court's view, with justification. It appears to contain an unnecessarily graphic description of what was alleged. It also is potentially misleading in that it gives the impression that it was at trial that the applicant's account was shown to be contradictory and often inconsistent. Moreover, it offers no view about the complainant's evidence so that a reader might well regard the disclosure as indicating that her evidence lacked the flaws which the applicant's evidence was said to suffer from. In this area, as it stood, the disclosure was, at least arguably, unbalanced. It relegated to a single sentence at the end the fact that the applicant was acquitted at court. It provided no

explanation for this. It was not mentioned that the acquittal was unanimous or that it was made after the jury had heard both from the applicant and the complainant.

[27] The applicant's reaction to the PSNI's letter was to issue a pre-action protocol letter to the police threatening judicial review. He also sought an undertaking from the police not to disclose the information while the decision-making process was ongoing. Such an undertaking was given by the police. The line taken by the police *vis a vis* a potential judicial review was that such was not necessary as the decision-making process remained ongoing.

[28] Interestingly at this stage the applicant did not offer any detailed response to the allegations or any information about why he was acquitted. This stance on his part appears to have held sway with him throughout the remainder of the decision-making process with one exception, which will be referred to in due course. The applicant's position by inference, if not expressly, appears to have been that his acquittal spoke for itself. Certainly the applicant appears to have chosen throughout not to do more than assert his innocence in general terms. Neither he, nor his solicitors, offered any rebuttal of the various particulars of the allegation as made by the complainant or gave their version of why the applicant was found not guilty.

[29] At this stage in the decision-making process – the beginning of September 2014 – a new decision-maker, as a delegate of the Chief Constable, entered the picture. He was a Superintendent and, unlike the ACC who preceded him as decision-maker, he has sworn a substantial affidavit in these proceedings. The court will simply refer to him as the "Superintendent". It is not explained in the papers why he took over from the ACC but the court is prepared to accept that it was not for a reason related to this case.

[30] However it does seem clear that the Superintendent had been involved in the case prior to him being nominated as the decision-maker. This is evidenced by the terms of paragraph 15 of his affidavit where he refers to the file being "returned" to him. What his exact past involvement had been is not a matter explained in the papers.

[31] At all events, the Superintendent has averred that while he noted the ACC's decision in favour of disclosure he determined not simply to adopt it. Rather he decided to review the entire matter afresh (see paragraph 15). The Superintendent then explained at some length how he went about this. However while it appears clear that he conscientiously and carefully considered the file and also considered the applicant's limited representations, he does not appear to have taken steps to rectify the absence of information about what happened at the trial save that he e - mailed the investigating officer on 15 September 2014 asking why the trial failed. On the next day he spoke to her by telephone. She (the IO) had in between times been in touch with prosecuting counsel and had spoken to him/her. The IO, the Superintendent avers, told him as follows:

(a) She believed that the applicant had raised sufficient doubt about the allegations with the result that the jury could not be satisfied beyond reasonable doubt.

(b) She indicated that in his evidence the applicant had been contradictory and had been unable to explain satisfactorily why he had continued even a non sexual relationship with a 12 year old girl.

(c) She could recall two issues which she felt were likely to have been influential with the jury:

(i) the forensic evidence relating to the presence of semen on the applicant's sock had been diminished due to the possibility of cross-contamination in the washing machine.

(ii) it had been demonstrated that the complainant had lied to her mother about her whereabouts on the evening of a fire at a disused factory.

[32] By way of comment, it seems to the court that the materials which had been, in the way described, uncovered need to be treated with considerable caution. First of all, their source was the IO whose views had to be read in the context of the role she had performed. Indeed, in this area, Mr Anthony BL, on behalf of the applicant, asked the court to take the view that it was improper for the officer to have consulted the IO at all – as she had a vested interest against that of the applicant. In the court's view, in the circumstances of this case, where previous efforts to have obtained information about the trial had to this time produced nothing of substance, it was not impermissible for the Superintendent to have made the inquiry he made but he did need to be cautious about how he assessed the response received both because of its source but also because the trial had taken place some 17 months before and the response appears to have been based on the memory of the IO and the prosecuting barrister, and not on anything in the nature of a contemporaneous note or record of the proceedings. Secondly, another reason for caution was that, on analysis, the views imparted by the IO to the Superintendent contained only a limited amount of new information. What was contained at (a) above, in reality, told the Superintendent little. Perhaps it excluded some form of cataclysmic prosecution failure to explain the outcome of the trial but in its terms it did not take the inquiry very far forward. The material at (b), which seems to coincide with IO's pre-trial views, tended to do damage to the applicant's case and thus appears to the court to constitute scant material on which to base the acquittal of the applicant. As regards the material at (c), this offered some, albeit limited, explanation (at least taken by itself) for the acquittal. The semen found on the sock in the applicant's car was no doubt a factor in support of the prosecution's case so any possibility of cross-contamination, it can be appreciated, from the prosecution's point of view, would be damaging. Likewise, any discrepancy in the complainant's account, as compared

with the account of other prosecution witnesses, could also discredit the prosecution case.

[33] Unfortunately this particular aspect of the decision-making process highlighted the need for the Superintendent to have been more proactive in seeking information about the trial process itself. As Crown Court proceedings are recorded, it seems to the court, that efforts could and probably should have been made to obtain at least the Judge's charge to the jury, if not more. Alternatively, the Superintendent should, it seems to the court, have chased the Public Prosecution Service in the quest to obtain more information.

[34] The contents of the Superintendent's affidavit which described his decision-making process leading to his conclusion in favour of disclosure also, it seems to the court, revealed some concerning features. These are as follows:

(a) When the officer read the complainant's ABE interview he referred to her account as appearing to have been given spontaneously (see paragraph 16(b)). In the court's view, such a comment from an experienced officer tends to suggest that he had a predilection in favour of accepting the complainant's account. This is because reading an interview is very different from listening to an interview. In the latter case, it may be entirely appropriate to reach a conclusion that the interviewee give her account spontaneously but in the former case it would usually be difficult to offer such a comment - as what appears on paper tells you very little about how the evidence was given. This is why at trials the emphasis is upon the jury hearing the tape of what had been said at interview.

(b) The officer described – also at paragraph 16(b) – that the complainant's account was consistent throughout "notwithstanding that the social worker had pressed her for details of each aspect of her account". It seems to the court this assertion is very broad and that despite later developments in the case *infra* this aspect was not sufficiently placed under scrutiny. The Superintendent does not appear to have subjected the complainant's account to the detailed examination he subjected the applicant's account to (see paragraphs 17 and 18 of his affidavit). This was so even after the Superintendent had access to new further information, as will be discussed below.

(c) In two rationales which the Superintendent prepared explaining his decisions (on one of 16 September and one of 26 November 2014) the analysis is concerned with the strength of the prosecution case and the weakness of the applicant's account. Neither document has any substantial consideration of the very important point that the applicant was acquitted unanimously by a jury who heard both the applicant's and the complainant's accounts before them and had seen and had

> observed each being cross-examined. In the first rationale, heavy emphasis is placed on the complainant's "detailed" account. While the complainant is said to have presented with some "minor inconsistencies" the applicant is said to have "provided inconsistent answers throughout the interview". In particular, "he could not present a convincing reason why he felt it was appropriate that a 17 year old have a relationship (even if not physical) with a 12 year old girl". The applicant's account that he only wanted to help the victim to deal with her troubled times is countered, in the officer's estimation, by there being "no information to show he had advised her mother or other adults of it". At a later stage, the superintendent went on to comment that "a high volume of mobile phone contact was maintained throughout the relationship suggesting that it was more than the applicant merely seeking to assist the young girl through troubled times". This appears to be based on an acceptance of the complainant's evidence. His conclusion was that the consistency and clarity of the evidence on the file "gives me a reasonable belief that it is accurate". In the later, second, rationale the superintendent reaffirms his views after taking into account further representations.

[35] On 19 September 2014 the Superintendent's decision in respect of disclosure was communicated to the applicant in order for him to make such representations about it as he wished to make. A revised version of the proposed disclosure was provided. This toned down the language of the original proposed disclosure. The key passage on this occasion read:

> "The information held by the Police Service of Northern Ireland is that the applicant was reported to police in 2011 for an alleged rape and other sexual offences. It was alleged that the applicant was involved in a sexual relationship with a then 12 years old female. This sexual behaviour is alleged to have included digital penetration, oral sex and intercourse. The applicant was prosecuted by the Public Prosecution Service and was found not guilty at Belfast Crown Court on 25 April".

[36] The applicant's solicitor responded to this communication on 3 October 2014, arguing that it was inappropriate for the facts which underlay the charges to be included in it. Such an approach, it was said, was "intended to conjure up images in the mind of the person reading it". This, it was stated, was unacceptable. The solicitor attached to his response correspondence in the form of letters from the community organisation concerned and the Principal of the school where the applicant had been working – both of which favourably described the applicant's work with each body. In the latter case, the Principal offered to discuss the content of his letter with the relevant person or body. The Principal also stated that the absence

of a clear security report from the vetting body would make it impossible for the applicant to apply for any formal employment with the school in question or any other school.

[37] The receipt of these materials caused the Superintendent to review the police position. In doing so, he took legal advice. However he reached the same conclusion as before. This further decision was dated 26 November 2014.

[38] A letter was sent to the applicant on 3 December 2014 indicating that the decision-maker was prepared to receive further representations from him before a final decision was made.

[39] On this occasion – the third such – the proposed disclosure was further toned down. It now read:

> "The information held by police is that the applicant was reported to police in 2011 for an alleged rape and other sexual offences. It was alleged that the applicant was involved in a sexual relationship with a then 12 year old female. The applicant was prosecuted by the Public Prosecution Service and found not guilty at Belfast Crown Court on 25 April 2013".

It will be noted that the new proposed disclosure omitted the third sentence of the previous version which had referred to what the sexual behaviour in question allegedly consisted of.

[40] The applicant's solicitor responded on 17 December 2014. While seeking further time before making a formal response, this letter stated that the disclosure contained in the PSNI's letter was not merited. The omission to refer to the "unanimous" verdict of the jury was specifically referred to, as were some other points of detail.

[41] The next development was that on 9 February 2015 a further pre-action protocol letter was sent by the applicant's solicitors to the Police Service. This rehearsed the background and asserted that there should be no disclosure. A confirmation was sought that a "clean" certificate would be provided *i.e.* one which would make no reference to the applicant being charged and acquitted of the offences.

[42] On 2 March 2015 the Police Service responded to the pre-action protocol letter. The response indicated that the confirmation sought could not be given. The police argued that in proposing to make the disclosure it was acting in accordance with its legal obligations. In particular:

> "The decision-maker considered all the information provided by the applicant in detail. He reviewed the entire case file concerning the allegations made against the proposed applicant, spoke to the Investigating Officer and applied his professional experience and training to make an informed assessment of the risk the applicant may pose to children. The fact that the applicant was acquitted was given due consideration. The decision-maker noted the differing thresholds applicable in the context of criminal proceedings and public protection. He formed the reasonable belief that the applicant poses a threat to children".

[43] These proceedings were initiated by the applicant in these circumstances on 16 April 2015. On the same date, the applicant swore an affidavit encapsulating the background. In this affidavit he made the case that the complainant had fabricated the allegations against him; that he had never been in her company alone; that the relationship between them was platonic; that he had co-operated fully with the police; and that any mention of charges of this nature would be such as to end his employment in the school. He accused the police of devising the terms in the originally proposed disclosure with a motivation to deliberately "cause maximum prejudice to me". He was firmly of the view that the PSNI was intending to achieve some sort of "softer victory against me given that it had failed to secure a conviction in the Crown Court". In respect of the originally proposed disclosure the applicant considered the wording "revealing". He believed it showed that the PSNI was determined to stop him from ever pursuing his preferred career.

[44] Of particular importance, the affidavit contained reference (for the first time) to the Judge's summing up to the jury. It is stated that in his charge the Judge had noted "a considerable number of inconsistencies in the complainant's evidence against" the applicant. The Judge also, it was said, made reference to the fact that the applicant was of good character and had given evidence to the court. This might, the Judge said, support the applicant's credibility. The Judge's summing up was exhibited to the affidavit. As far as the court can see, this was the first time the Judge's summing up appears in the case papers. There is no explanation as to how or when the applicant obtained it or why it had not been submitted earlier. Because of its importance, the court will deal with its contents in more detail shortly. But first it will complete the journey through the decision-making process.

[45] Once the judicial review papers had been served the next event to occur appears to have been that on 9 June 2015 the Crown Solicitor's Office, acting on behalf of the PSNI, indicated that a still further version of the proposed disclosure had been prepared. At this stage leave to apply for judicial review had not been granted. The new version – the fourth version – read as follows:

> "… The information held by police is that the applicant was reported to police in 2011 and later charged with rape and other sexual offences which were alleged to have occurred between 20 August 2008 and early November 2010. There was a single female complainant who, during the relevant period was 12 to 14 years and the applicant was 17 to 19 years. Following a trial, the applicant was acquitted of all charges by a jury at Belfast Crown Court on 25 April 2013. The applicant denied all of the charges throughout the police investigation and trial."

The author invited any representations the applicant wished to make on this text. This version is the final version referred to above at paragraph [8].

[46] The Superintendent's affidavit described above was filed on 1 October 2015. It exhibited the most relevant papers relating to the case. These ran to around 200 pages. Of particular interest are the contents of paragraph 25 which referred to the Superintendent being supplied with a copy of the judge's charge to the jury. No date for this supply is given, but the author confirms that he had not previously seen it and it was not part of the prosecution file. The Superintendent averred that he had noted "a number of areas in which the complainant's evidence was [in the judge's view] inconsistent with either her account during the ABE interview or the evidence of other witnesses". The Superintendent then went on to assess those. He concluded as follows:

> "Overall, it was apparent that the [applicant's] – [this should read complainant's] evidence at trial had contained some inconsistencies, I did not regard these as of sufficient magnitude to dispel my ultimate belief that her allegations were likely to be accurate … The judge's charge gave me no insight into any credible explanation provided by the applicant for any on-going relationship, whether sexual or not, with a girl of the complainant's age … My consideration of the judge's charge did not therefore change the previous conclusion regarding disclosure or the content of the text."

[47] On 28 October 2015 a rejoinder affidavit was filed by the applicant. This repeated the applicant's views as expressed in his first affidavit and accused the Superintendent of retrying him and having scant regard to the fact that he was acquitted. In particular, he challenged the statements found in the Superintendent's affidavit at paragraph 25 to the effect that the judge's charge gave no insight into any credible explanation provided by the applicant for any on-going relationship, whether sexual or not, with a girl of the complainant's age.

The judge's charge

[48] The judge's charge runs to some seven closely typed pages and contains a mixture of standard directions to the jury and some comments by the judge on the facts. In respect of the latter, the jury was, as is normal, told that they were entitled to ignore such comments at their discretion. For present purposes the following extracts from the charge are of interest:

Page 3 – Your task is to decide whether you are sure that the complainant has given up a truthful and reliable account of her experiences.

You have to be sure that the complainant is telling you the truth, and that her evidence is accurate and reliable.

One criticism of the complainant which you will need to consider is that she has given inconsistent accounts of her experience.

Inconsistent accounts may be an indicator that, on the whole, the account is not true.

[49] The judge then lists for the jury in the region of eight inconsistencies in the complainant's evidence (see pp. 4-5). His statement of these is provided in an appendix to this judgment. Of course not all of the inconsistences will deserve the same weight. Notably, however, there is among them plain evidence of confusion on the complainant's part, for example, as to when temporally intercourse first occurred. There is also a telling passage which refers to the complainant having deleted the entire message history and call log of her mobile phone, including a call made to the applicant on 4 January 2011 just a few hours before she provided the phone to the police. Reference is made also to a substantial discrepancy between what she told a girlfriend about incidents in which she had had sex with the applicant and the friend's evidence as given to the court. He then dealt with the delay in the complainant reporting the matter. He said:

> "You must take into account that with the passage of time the defendant [the present applicant] may now be prejudiced in defending himself" (page 5).
>
> He noted that "there is no medical evidence to assist you". (page 6).
>
> Moreover: "The police were unable to recover information the complainant had deleted from her phone."

"No forensic investigation of the defendant's car took place, which might have established the presence or absence of semen" (page 6).

"You may feel that the defendant suffers a real prejudice. The case comes down to a dispute between two people, with one person's word against the other" (page 6).

"You are entitled to act on the complainant's evidence, whether it is independently supported or not, provided you have regard to the need for caution" (page 6).

"The defence say the complainant is lying, in considering this you should have regard to the inconsistencies of the complainant's evidence" (page 6).

"You may also feel there is support in the forensic evidence you have heard, the phone history on the defendant's phone showing contact with the complainant and the presence of low level semen found on a sock in the defendant's car. The complainant gave evidence of the defendant using items such as socks to clean himself after ejaculation" (page 6).

"You have also heard that the defendant is a young man of good character but good character cannot itself provide a defence to a criminal charge…you should take it into account in his favour in the following ways: firstly, the defendant has given evidence, and as with any person of good character it supports his credibility. This means that this is a factor which you should take into account when deciding whether you believe his evidence. In the second place, the fact that he is of good character may mean that he is less likely than otherwise might be the case, to commit these offences. These are matters you should have regard to in the defendant's favour. It is for you to decide the weight you give them in this case" (pp 6-7).

The applicant's case

[50] The core of the applicant's case relates to what counsel described as four overlapping headings expressed as follows:

(a) Breach of the proportionality aspect of Article 8.

(b) Unfairness at common law.

(c) Wednesbury unreasonableness.

(d) Misdirection in law.

[51] In terms of proportionality, the applicant argued that the respondent had failed to adopt a balanced approached to the assessment of the facts relevant to disclosure. Insufficient regard was had to the fact of the applicant's unanimous acquittal. The Superintendent effectively re-tried the applicant on the basis of the prosecution's evidence alone. Reliance was wrongly placed on the IO's verbal response to the Superintendent about why the prosecution failed. When challenged about this, supposition on the IO's part was turned into facts which informed his decision. It was alleged that, in effect, the trial process was set at nought. The Superintendent substituted his views for it. The Superintendent manifestly failed to emphasise the great weight that should have been given to the fact of an unanimous acquittal. By omitting to do so, he had failed to balance all the relevant facts in accordance with the demands of proportionality. At paragraph 25 of the Superintendent's affidavit he effectively dismissed the judge's charge to the jury as insufficient. In so doing he replaced the judge's view of what was important with his own view.

[52] The applicant also argued that to disclose the information, given the severe consequences which would inevitably follow from this step, would be disproportionate in view of the multiple frailties in the complainant's evidence and the applicant's good character; his hitherto good record; his unanimous acquittal; and the good references he had been able to produce.

[53] As regards the ground of unfairness the applicant's emphasis was placed on the extreme prejudice which would result to the applicant from the decision made. This aspect was also central to the charge of unreasonableness – the third head of challenge.

[54] Finally it was alleged that the decision-maker misdirected himself by failing to accord due weight to the primacy of the criminal process.

The respondent's case

[55] In the respondent submission, at the heart of this case was the question of proportionality. The decision was proportionate and in line with the principles set out in the authorities, in particular Re L (*supra*).

[56] Emphasis, it was submitted, should be placed on the relatively recent nature of the allegations and the applicant's full opportunity, at the time and subsequently to answer them, especially during the police investigation: January-July 2011. The police, it was argued, had the benefit of an extensive investigation, the fruits of which were available to the decision-maker. These materials, it was argued, were carefully considered by the Superintendent and formed the basis for his perfectly proper opinion that the allegations might be true. This meant that the threshold for disclosure was properly regarded as being passed.

[57] In carrying out his decision-making process the respondent made the point that the applicant was given multiple opportunities to participate in it. Anything he said was fully considered. The process was both fair and reasonable.

[58] Moreover the Superintendent conducted a careful balancing exercise and in this he gave due consideration to the impact disclosure may have upon the applicant's private life.

[59] Reliance was placed on the full range of aspects which the Superintendent considered and the detailed deliberations he afforded to the materials available to him when he arrived at his view. In particular, Mr McLaughlin BL, for the respondent, assisted the court by taking it through the highlights of the material contained in the papers – the 200 or so pages which constituted the prosecution file. The court was also referred in a very carefully composed skeleton argument to the important submission of the respondent that on any view the evidence supported the allegations. Moreover, the trial had been subjected to an extensive analysis and a full consideration. The gravity of the decision could be taken as a given. It was acknowledged by the Superintendent who carefully took the potential impact of it on the applicant into account.

[60] The assessment process, the respondent reminded the court, was not about guilt or innocence, as established to a criminal standard of proof, but concerned an aspect of risk assessment for the purposes of public protection. The police are not required in this context to apply a criminal standard.

[61] In all the circumstances the respondent contended that the judicial review should be dismissed.

The court's assessment

[62] The starting point, it seems to the court, is that there is no legal dispute about the approach which Re L says ought to be adopted. This has been dealt with earlier in this judgment. There is also no dispute between the parties that in an acquittal case disclosure nonetheless can perfectly properly and lawfully be the decision which is appropriate in relation to the alleged offences at issue. This is shown by cases such as R (RK) v Chief Constable of South Yorkshire Police [2013] EWHC 1555 Admin; R (AR) v Chief Constable of Greater Manchester Police [2013] EWHC 2721 Admin; R (L) v Chief Constable of Kent Police [2014] EWHC 463 Admin, and R (S) v Chief Constable of West Merica Police [2008] EWHC 2811 Admin. In each case it will, however, be necessary to consider the particular circumstances.

[63] In this case the broad circumstances are as set out above. The questions for the court are whether there was lawful consideration of these having regard to the requirements of public law, including and in particular, those of fairness, and whether or not the decision arrived at was a proportionate decision. The court acknowledges that there could be a case where, even if there had been failures in the decision making process, a decision may nonetheless be proportionate and lawful.

Fairness

[64] The case did not follow a standard pattern. This fact simply cannot be avoided. Of significance, it seems to the court, is the fact that the decision-maker neglected to ensure that he had before him the full picture so that in making his decision he could carry out the necessary balancing exercise implicit in arriving at a proportionate decision. The problem, the court regrets to say, was evident from the earliest stages of the decision-making process. The decision-maker was largely, if not completely, in the dark as to the reasons why the applicant was unanimously acquitted. It was in these circumstances, the court thinks, incumbent upon him to defer a decision until he had exhausted all reasonable avenues which could be pursued in the investigation of this factor.

[65] When the ACC was decision-maker he was asked whether he could make a decision in the case or whether he needed to pursue the quest to obtain information about why the outcome of the trial was as it was. The court is in little doubt that the answer should have been that the latter had to be pursued. The seriousness of the issue for the applicant required such an approach. At this stage of the process there appears from the papers to have been scant contact with the PPS. It had not apparently responded to an earlier request for information but there appears to have been no real, or little, effort made to pursue the issue. In the court's view, the PPS should have been pursued with vigour. It was, to put the matter simply, unacceptable for the decision-maker not to do this. It must have been completely evident to the ACC that to make a decision to disclose when blind as to the possible reason or reasons for the unanimous acquittal risked creating an unbalanced

assessment with undue reliance being placed on the crime file. The decision-maker was in the dark as to what at trial had actually happened.

[66] There appears, moreover, from the papers to have been a degree of consciousness at the time that Crown Court proceedings were recorded and that, as a result, it was possible to seek a recording of the judge's charge to the jury – an aspect of the criminal process likely to shed some light on what the issues before the jury in respect of the particular case at this stage were.

[67] Again, the court regrets to say, that notwithstanding this consciousness, this avenue to information about what occurred at the trial was not pursued. It is the court's estimation that the approach taken, for the reasons already given, was flawed.

[68] Nor when the Superintendent took over was there any change of approach in this regard. Quite plainly the Superintendent was aware of the lopsided nature of the information available – indeed, in fairness to him – he did seek to make an informal contact with the IO, but this exercise was not, in the court's view, any real substitute for obtaining information officially from the PPS, which one suspects will have had notes of the hearing, or going down the road of obtaining a transcript of the summing up by the Judge from the court authorities. The steps which could have been taken were not mutually exclusive and all lines could have been pursued together.

[69] However – again unsatisfactorily in the court's view – the Superintendent was left with the same or substantially the same lopsided picture of the case which he inherited.

[70] Indeed it can be said with confidence that had it not been for the last minute production of the transcript of the judge's charge to the jury by the applicant, this void of what occurred at trial would have remained largely unfilled.

[71] In the court's view this would have been unsatisfactory even though the court can accept that it is far from inevitable that in every case the receipt of the Judge's charge or other information as to what had occurred at the trial will be informative or enlightening. But in the normal case reasonable steps should be taken to acquire such information.

[72] Provided such reasonable steps to acquire the information are taken the court can readily accept that there may well be cases where, despite the steps taken, no information or no information of substance emerges. If this occurs, it may very well be the case that the decision maker must nonetheless press on and make a decision. The legal outcome of that situation will then be fact sensitive.

[73] In this case the Judge's charge to the jury, however late in the day that it was received, has provided the information which was lacking. In the court's view, there

are clear respects in which it is helpful in terms of understanding what occurred at trial. It is evident from it that the complainant's evidence at trial, in terms of its credibility, sustained some serious damage. Unfortunately, this is not acknowledged in the Superintendent's affidavit where the new information which had been provided is batted off somewhat peremptorily.

[74] In this case the court finds itself uncomfortable with how the decision making process unfolded and with the approach taken at critical points both in relation to the obtaining of relevant information and as to the way in which it was evaluated

The proportionality of the decision

[75] Despite the above, it is the court's view that the key issue in this case is that of whether the decision ultimately arrived at was a proportionate one. In considering this issue it is trite law that given the human rights dimension of the decision the court must approach this question applying a high intensity of review – what is sometimes referred to as anxious scrutiny. However, the court reminds itself that it is not itself the decision maker and despite the more intensive standard of review, there has been no shift to merits review. In matters of policy, discretion and judgment the court must give due weight to the views of the primary decision maker.

[76] In this case the guidance given by Lord Neuberger in Re L (referred to above at paragraph [15] (vii)) only takes the investigation of proportionality so far. The information here under consideration is of real gravity and the impact of its disclosure on the applicant's job prospects is such that disclosure will be likely to be a "killer blow". Equally, the information at issue is sufficiently contemporary to make its disclosure, if otherwise required, relevant for present purposes.

[77] The most significant issue, in the court's eyes, relates to the reliability of the information upon which the proposed disclosure is based.

[78] The decision maker has in various places in the papers offered views about his evaluation of the materials before him. For example, at paragraph 20 of his affidavit he said that his assessment of the totality of the evidence left him with a reasonable belief that the allegations were accurate. In the light of this, there was, in his mind, a risk to children with whom the applicant may come into contact. Hence, he felt, that there was a need for disclosure. It seems to the court that the key to this reasoning lies in what he describes as his reasonable belief that the allegations were accurate. If this assessment stands the court can see little reason to question substantially what the decision maker views as the consequences flowing from it.

[79] The court's approach to the reliability issue is to accept to begin with, that it would rarely be the case that certainty can be achieved in an assessment of this sort. As the Judge put it to the jury at one point in his summing up, the case (at least in large part) pitted one person's word against the other. In assessing this situation, it is

appropriate first to look at the complainant's allegations. These were not made contemporaneously with the events she described, though this is far from conclusive of anything. The person making them was a young person. While she did offer during the ABE interview conducted with her a detailed account, it can be ascertained from the Judge's summing up to the jury that in the course of the trial inconsistencies and discrepancies appeared in her evidence. As noted earlier some of these were substantial and some less substantial. In the court's view, it is not difficult to see that these may have been influential in the outcome of the trial when placed beside the fact that the complainant as well as the applicant gave their evidence and were cross-examined before the jury. As is clear, the jury in the end unanimously acquitted the applicant of all charges. On any view this must be regarded as a significant outcome which should not be neglected. But it must also be borne in mind that in this case the Judge while drawing attention to flaws in the complainant's evidence did not withdraw the case from the jury as would be the case if he had thought there was no case to answer, though the court can accept that often judges by the end of a trial may be of the view that it is appropriate to leave factual issues to the jury. It seems to the court that what should be taken out of the acquittal is at least that the jury was not satisfied, probably by reason of the quality of the complainant's evidence, that the case against the applicant was proved beyond reasonable doubt.

[80] In these circumstances it is necessary also to evaluate the applicant's account as far as it is known. It is plain that the decision maker was unimpressed with the applicant's interviews which he had before him. He comments on this repeatedly and there can be little doubt that indeed there were within the crime file a range of inconsistencies and discrepancies. Some of these were, in the court's view, significant and some less significant. They ranged over a wide area: relating to how often the two met; his depiction of the complainant's father; the use of his silver Nokia mobile phone, which, *inter alia*, had messages to the complainant on it as well as texts; telephone conversations between the applicant and the complainant, in part, overheard by a witness; and so on. While the court has sought carefully to assess them all, it has found the applicant's account in respect of two issues, of particular concern. These relate to how he dealt with the complainant's allegations that she had had sex with him in his mother's house on a number of occasions when his mother was away and the issue of the discovery of a sock in his car which later was on examination found to have semen traces on it.

[81] As regards the first of these issues it is important to note that when the applicant was first asked whether he had brought the complainant to his mother's house he denied this. His response was that she was never at the house. When pressed about this the applicant changed his account and adopted a new position *viz* that on one occasion she had been in his car with others when the car was stopped outside the house when he went inside for a short time. He was clear that she did not enter the house and stayed in the car. This version of events, however, was subject to still further change as the interviews progressed. It was put to the applicant that the complainant had been able to identify and map out the interior of

his mother's house. When confronted with this the applicant altered his position by accepting that in fact the complainant had once stayed the night in the applicant's mother house. What had happened, he said, was that the complainant and others had started a fire at factory premises at Finaghy and he had had to go and collect them from the premises. He said he took them to his mother's house. His mother was not there. He did not stay in the house but left the persons he had collected there. They then stayed in the house overnight. It was this single episode which explained how the complainant had been able to describe the interior of his mother's house. He maintained that the complainant's account of the two of them having sex in the house was mendacious. In the course of the relevant interview, the applicant told his interviewers that he told a friend about the incident. The papers disclose that the police interviewed the person named who was unable to confirm the account given by the applicant.

[82] The second matter relates to allegations by the complainant that on a number of occasions she had had sexual intercourse with the applicant in the back of his car. A particular aspect of her account was that she recalled that after intercourse he had cleaned his penis using a polishing cloth or an item of clothing, like a sock. During his interviews the applicant was asked about having sex with the complainant in the back of the car. He denied this. He also denied the specific allegation about the manner in which he cleaned himself afterwards. Following his arrest his car was searched and in the back of it two socks were found. These were subsequently examined forensically. The outcome of this examination was that traces of semen were found on one of the socks. It was not possible however for the examiner to say that the semen was in fact a DNA match with the applicant. When later in July 2011 the applicant was confronted with this information, he refused to comment. At the trial the defence made the case that this evidence was unreliable as there had been a risk that the sock had become contaminated in the washing machine and that this was the explanation for semen being found on it.

[83] The court draws attention to all of the various matters above because the issue before it is whether the view arrived at by the Superintendent – what he describes as his reasonable belief that the allegations were accurate – should be viewed as proportionate. In the court's view, from the point of view of reliability, the applicant's account given during interviews when measured against other evidence, suffers from significant frailties. The Superintendent at the relevant time was expressing a view which he had arrived at for the purpose of considering the issue of disclosure which was before him. He was not determining a criminal charge but making a judgment and assessment about risk for a quite different purpose than the purpose being performed by the jury in the trial. The court must, of course, bear this in mind.

[84] In the end, while the court has given this matter the close scrutiny it deserves, and while it fully appreciates the importance of the not guilty finding in this case, it finds itself unable to say, balancing the strengths and weaknesses of the accounts given in the light of overall factual matrix in the case, that the view arrived at the

decision maker was or is disproportionate. Consequently, the court cannot avoid the conclusion that the interference in respect of the applicant's private life which the making of the disclosure which is now proposed will bring about is other than necessary to secure the objective of protection of young people and children, which is the legitimate aim served by the statutory scheme.

Outcome

[85] In this judgment the court has been critical of the police approach in a variety of respects. However it is of the view that the outcome of this case is not to be determined by those criticisms. In the court's view, the outcome must depend on the substantive issue of whether or not the decision made in this case is proportionate and whether or not consequently there is a substantive breach of Article 8.

[86] As the court is of the view that the interference which will result from the proposed disclosure is proportionate, there would be no advantage in requiring the police, due to the failings identified, to engage in a fresh decision making process. As the totality of the material available is before the court, it is in a position to judge whether any purpose would be served by such a step. The court is of the view that a new decision making process, with a fresh decision maker considering the issues afresh, would reach the same conclusion. While the court declines to interfere with the precise terms of the proposed disclosure the police may wish to consider whether after the words "following a trial", there would be merit in saying "in which both the applicant and complainant gave evidence". There might also be advantage in adding the word "unanimously" after the word "was" in the next line.

[87] The applicant's application for judicial review is dismissed.

APPENDIX

What the judge said in his charge to the jury about inconsistencies is the complainant's account:

> "How then should you approach the evidence of the complainant? Each of the inconsistencies need to be examined with a view to making a decision, whether it has significant in relation to the truthfulness of the complainant's account as a whole, and I will remind you of some of the evidence with that in mind. If, having given due consideration to the defence argument, you are content that the essential part of the complainant's account are true, you will no doubt act upon that conclusion. But if you are left in doubt as to the truthfulness of the complainant's account, because the inconsistencies cannot be satisfactorily explained, you must find the defendant not guilty.
>
> The complainant gave a history of a relationship which started in 2008; in the early stages of the relationship she kissed with the Defendant in the alleyway behind the Defendant's granny's house, this then progressed to digital penetration of her vagina by the Defendant, and by her touching the Defendant's penis. This all occurred in the alleyway. The complainant told you that this happened at times when her friend, [W], and his friend [N] were also present in the alleyway, but were round the corner from where the complainant and the defendant were. She said that they could not be surprised by passers-by, or by friends, and you have seen photographs of the scene. The complainant gave a history of her first sexual intercourse with the defendant, she said it happened on a bench near the pitches at [L]. In her evidence at Court, the Complainant said this took place before she went into hospital in November 2008. She said it occurred between the end of August and whatever date she was in hospital in November. It was put to her in cross examination that she told the police in her ABE interview that it was after she had been in hospital, and she accepted that she had told the police that it was early in 2009, and accepted that there was now some confusion as to when the sexual

intercourse took place, but she insisted in evidence in this court that it was before she went into hospital.

The complainant also accepts that her sister [L] had also went out with the Defendant, but she couldn't remember when that was and couldn't deny that it was October 2008, and she accepted that she had not told the police in her initial interview of the Defendant's relationship with her older sister. She said that she knew that he was going out with her older sister at the same time as her, she said that the defendant said at the time that he had to cover up the relationship, and going out with her sister meant he would be closer to her, and that relationship lasted only a matter of days. The complainant was asked whether she had been having problems with an individual called [C], the complainant was asked whether she knew anyone called [C] and she said that she had a next door neighbour called [C]. The complainant also accepted that she told the police that she didn't know anyone called [C], she initially said that she would not have said that to the police and then accepted that she had. She also accepted that she had the name [C] on her mobile phone, and she didn't know why she had that number on her phone. The complainant had the opportunity to speak to others, and tell them about her relationship with the defendant She spoke to [S], 'her school head, but never mentioned the Defendant or having any sexual relations with anyone. She didn't mention it to [M] her …teacher, and when she initially spoke to her sister [L] on Christmas Eve 2010, she initially said that she told [L] the truth and simply didn't tell her about the sex, she then accepted at cross examination that she had been asked several times by, [L] if she had had sex, and, denied having sex. In the complainant's first account, and first complaint in the early hours of the 4th January, she didn't mention several of the incidents, such as the incident at the [B] hotel carpark, or the first instance of sex on the park bench.

The complainant maintained that she was in daily contact with the defendant by telephone and by text, however when she gave the police her phone, she had deleted the entire message history and call logs, including calls she said she had with the defendant on

the night of the 3rd January 2011. The police attended her house only hours later, in the early hours of the 4th January 2011. There were inconsistencies between the complainant's account and that of her friend, [M]. In relation to the incident where the complainant alleged that she was in the car with the defendant and [M] outside [F's], she gave a date of the 16th August 2010. In evidence, she said that she knew this date because it was [M's] friend's birthday, and she was talking to [M] before she was making her notes before her ABE interview. [M] initially denied that there was any contact or discussion before the interview and then said she couldn't remember any contact in that period. [M] in her interview with the police, did not give the date of 16th August but said the middle of August. You also heard the unchallenged evidence of [A], who said that the defendant was in [N] on the 16th August 2010. The complainant told you she received a valentine's card from the defendant which he handed to her, there was on fingerprint analysis no evidence of the defendant's fingerprints on that card. The complainant told you she kept the card on top of a wardrobe, out of sight, [M] told you that the complainant told her of an incident when [L] her older sister saw the card on the fireplace, asked her who it was from and was told not to bother about it, and the card was then placed above the wardrobe.

During the time when the complainant said she was in an intense relationship with the Defendant, she had also gone out with [W], the Defendant's cousin, and another boy called [R], and the defendant was going out with another girl from the end of 2008, until after the police became involved in January 2011. The complainant says that she told her friend [M] about the incidents of the sex at [B] hotel car park, the [X] road at…Park, and at the defendant's mother's house. In her evidence, [M] denied knowing any of those, and said she only recalled the [O]. The complainant did not mention the [O] to police in her initial interview. When the complainant described her first sexual intercourse on the bench, she said that there was no conversation, that the defendant simply put her on the bench and that she lay there, and it happened. It was put to her that in the note she prepared for her ABE interview, she said that he

"showed her what to do" and [M] also said that the complainant told her that the Defendant showed her what to do before they had sex.

The complainant gave evidence of a phone call at Halloween 2010 when she described how the defendant rang her, that he was shouting at her, and that she kept hanging the phone up. [M] was asked about the same incident and said that she was present with the complainant; the complainant rang the defendant, that they were talking and whispering, and then the complainant was shouting."