APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 12
HCA/2025/000038/XC

Lord Justice Clerk
Lord Matthews
Lord Armstrong

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

YZ

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Dean of Faculty (Dunlop KC), Culross, McMillan; Pryde & Co, Solicitors
Respondent: Solicitor General for Scotland (Charteris KC), Harvey AD, Ferguson AD (sol adv); the Crown Agent

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5 February 2026

Introduction

[1] The appellant challenges his conviction of sexual and violent offences on the ground of failures by the Crown to disclose information that he maintains was of such importance to his defence that his trial was unfair, there has been a miscarriage of justice and his

convictions should be quashed. The Crown's position in the appeal was to concede, in respect of five distinct documents and a sixth and seventh category comprising certain entries in social work records relating respectively to the two complainers, that their failures of disclosure had occasioned a miscarriage of justice. The Crown's stance left the court to evaluate these aspects of the appeal in the absence of competing submissions. Accordingly, we must consider the whole circumstances in some detail.

Procedural history

[2] On 9 November 2022, a jury at the High Court of Justiciary at Stirling convicted the appellant of six charges including assault, rape and lewd, indecent and libidinous practices (sexual abuse of a child). At an adjourned diet on 13 December 2022, the judge imposed an extended sentence comprising a seven-year custodial term together with an extension period of two years.

[3] Charges 2, 3 and 4 featured the first complainer, AA, and charges 7, 8 and 9 featured the second complainer, BB.

- Charge 2 specified repeated assaults on AA at address 1 in Edinburgh and at address 2 in Midlothian between 12 September 2007 and 6 December 2017, when AA was between 5 and 15 years old, by punching, kicking and slapping her on the head and body, seizing hold of her, pushing her and placing a pillow over her face and restricting her breathing, all to her injury;
- Charge 3 comprised a single act of rape at address 1 between 11 June 2008 and 11 September 2010, when AA was between 5 and 7 years old.
- Charge 4 comprised a different single rape of AA at address 1 during the same period as charge 3.

- Charge 7 specified repeated assaults on BB at addresses 1 and 2 between 13 May 2008 and 25 August 2019, when BB was between 3 and 15 years old, by striking her on the body with a belt, pushing her, causing her to fall down a flight of stairs, inducing another child to repeatedly strike BB on the body with a plastic pole, punching and slapping her on the body, covering her mouth and striking her on the head with a remote control, all to her injury.
- Charge 8 specified a single instance of indecent conduct between 11 June and 30 November 2010, when BB was 6 years old, at address 1 by lying on top of her and touching her vagina with his hands.
- Charge 9 specified sexual assault of BB on various occasions between 1 December 2010 and 10 June 2017, when she was between 6 and 12 years old, at address 1 by lying on top of her and touching her vagina with his hands.

Previous appeal proceedings

[4] Initially, the appellant appealed to this court on the ground that the Crown had acted unfairly and oppressively by not including on the indictment a third charge of rape of AA. The appellant maintained that AA's third allegation of rape was demonstrably false, although he could not disprove the allegation during his trial when the state of the law of evidence did not permit him to adduce such evidence in the absence of a charge. In the alternative, he maintained that his lawyers had failed to represent him competently by not making the necessary application to adduce such evidence under section 275 of the Criminal Procedure (Scotland) Act 1995. Leave to appeal was refused by a judge at first sift and by three judges at second sift. Following sundry procedure, leave to appeal to the UK Supreme Court was granted and a hearing was convened on 21 October 2024.

[5] At the outset of that hearing, the Solicitor General advised that, in respect of numerous documents, the Crown had failed in its duty to disclose information to the defence in advance of the appellant's trial. She stated:

> "The situation in relation to disclosure is profoundly regrettable and deeply unsatisfactory. I have now been provided with assurances by both the Police and the Crown Office and Procurator Fiscal Service that disclosure is now complete. The circumstances of the late disclosure will be reviewed in greater detail as the extent of the additional material and the lateness of it are obviously a matter of obvious concern to me. There will also be a more systemic review at a wider level […] On review of the material, it became clear to me that in respect of some of the material which is not disclosed, the first part of the *McInnes* test has been met."

The Solicitor General was referring to *McInnes* v *HM Advocate* [2010] UKSC 7, 2010 SC (UKSC) 28, where the United Kingdom Supreme Court set out the two questions to be answered in an appeal contending that a trial was unfair under Article 6 of the European Convention on Human Rights on the grounds of non-disclosure. At para 19:

> "…The first question is whether the material … withheld from the defence …ought to have been disclosed. The test here is whether the material might have materially weakened the Crown case or materially strengthened the case for the defence… failure to disclose [such] material …is incompatible with the accused's Art 6 Convention rights."

The court proposed a second test, at para 20, for an appeal court to assess the significance and effect of non-disclosure in the context of the trial, to which we will return.

[6] The Crown conceded that there had been a breach of the appellant's right to a fair trial under Art 6 and that the matter ought to be remitted to the High Court of Justiciary for determination of whether there has been a miscarriage of justice.

[7] On 19 November 2024 the Supreme Court refused the appellant's appeal and remitted the case to this court to determine whether there has been a miscarriage of justice.

Proceedings in this court

[8] Following the Supreme Court's remit, on 6 March 2025 this court allowed the original Note of Appeal to be amended late to include a new ground of appeal relating to the Crown's disclosure failures and granted leave to appeal for the new ground of appeal concerning non-disclosure. The appeal hearing was part-heard on 24 July 2025 when Ms Culross advanced the appellant's submissions and concluded on 13 November 2025 when the Dean of Faculty did so.

[9] The issue before the court is therefore a narrow one, turning on the second stage test in *McInnes*: taking all the circumstances of the trial into account, was there a real possibility that the jury would have arrived at a different verdict had the Crown fulfilled its disclosure obligations? To answer that question, we must examine the full circumstances of the trial, including the evidence led, speeches made and directions given to the jury, before turning to the undisclosed material.

The evidence

[10] The complainers' evidence comprised pre-recorded Joint Investigative Interviews (by a police officer and a social worker) and evidence on commission (the recording of questioning of a witness by prosecution and defence lawyers before a judge). The Crown also led evidence from Detective Constable Jade Wardell, Jenny Osinska, Lee Diey, Kimberley McKenna, Jennifer Rodger and Lynzi Donnelly. The appellant adduced evidence from his wife, EE. The appellant did not give evidence. The first witness adduced was DC Wardell, a trained Sexual Offences Liaison Officer, who had conducted several of the interviews to be used as evidence. DC Wardell was experienced in working with children and families in the context of domestic and sexual offending and had been involved in conducting hundreds of JIIs. She explained that children tend to be guarded in answering

questions about abuse carried out by a parent or carer. Children may not be ready to disclose what has happened to them and may only be able to when they are older or when their circumstances have changed. It is common for increasing amounts of information to emerge from a child in subsequent statements. She had conducted the first JII of AA, who had been able to speak about the appellant's violence and her bad relationship with him, but did not speak about sexual matters. Interviews at that time from BB, and two other, younger, sisters (CC and GG) had not provided any supporting evidence.

Joint Investigative Interview of AA – 23 November 2016

[11] DC Wardell and Siobhan Hannan, social worker, jointly interviewed AA on 23 November 2016 at her school when AA was 14. She described incidents taking place when she lived in Edinburgh with her three sisters, her mother and the appellant. She first explained that the appellant hit her and shouted mean things at her. He bullied her by "beating her up," suffocating her and "hoping that [she died.]" She was scared of him. He only did this to her and not to her sisters. She recalled an occasion when the appellant became angry at something on his phone. He screamed and shouted at her before kicking, punching and slapping her on her legs and face. He carried on assaulting her until her mother physically stopped him. He would do this sort of thing every few days. AA described another occasion at the start of the summer holidays. She and the appellant were talking about bullying in the downstairs living room. He grabbed her right wrist and dragged her up the stairs. He pushed her onto her bed and began to kick and punch her on the face and leg. He put a pillow over her mouth and pressed down so that she could not breathe for several minutes. She tried to kick him away from her. Her mother watched the assault but did nothing to help. When he stopped he was making a groaning noise. AA's

mouth was sore and she could not breathe properly for between 10 and 30 minutes after the attack.

[12] AA also spoke to the appellant being verbally abusive. He called her a "mongo," a "bitch" and a "retard." He said these things in front of people including her sisters and her mother. On one occasion AA's bed broke, prompting the appellant to tell her that nobody cared about her, nobody loved her and she should run away. She went outside for a while. She felt scared when she was at home.

[13] When asked whether there was anything more she would like to report, she replied "No, just name calling and beating up that's about it".

JII of AA – 26 April 2018

[14] PC Jennifer Nattan and Ewan McKinnon, social worker, jointly interviewed AA when she was 15 on 26 April 2018 at her school.

[15] AA said the appellant raped her when she was about six or seven years old on various occasions. On the first occasion, she was undressed in her bedroom and about to dress to go outside. The appellant appeared behind her, naked. He turned her around, pinned her down on the floor and penetrated her vagina with his penis. She screamed at him to get off, but he refused. She tried to wriggle free, but he had a tight grip on her. She thought it went on for about an hour. Her mother was out. She could not remember whether her sisters were in the house. When it was over, she locked herself in her room.

[16] The second occasion occurred a month or so later. She was in her bedroom. She "saw him coming" and tried to run but the appellant closed the door so she could not escape. He pinned her down on the bed and put his penis into her vagina. He told her that it would happen again if she told anyone.

Evidence on commission

[17] AA's commission was recorded on 3 October 2022 when she was 20. In a very brief examination-in-chief, she spoke to the appellant putting a pillow over her face when she was between 11 and 14 at address 2. Before they moved there, they lived in a flat in Edinburgh. She described lying on her bed and the appellant starting to scream at her. He picked up a pillow and put it over her. Her sister, GG, saw what had happened but left the room because she was scared.

[18] AA explained that she had been "battered" by the appellant on lots of occasions at both address 1 and address 2. He shouted at her and called her names. Her sisters also called her names, and the appellant encouraged it. AA's granny and grandad had told her not to give evidence. AA did not specify whether she was referring to maternal or paternal grandparents. There was no cross-examination.

JII of BB - 23 November 2016

[19] DC Wardell and Ms Hannan, jointly interviewed BB on 23 November 2016 at her school when she was 12. BB is AA's younger sister. She also lived with her mother EE, her three sisters and the appellant at both address 1 and address 2. She shared a bedroom with her younger sister, CC. BB said she had a positive relationship with the appellant. He would take her out, make her laugh and play with her. She had a poor relationship with AA who would be quite nasty to her and tell her that she hated her. AA was also nasty to her mother and the appellant, making them cry by telling them that she hated them. AA would sometimes get upset when she got into trouble with the appellant because he could be quite loud. She had not witnessed any violent or abusive behaviour by the appellant towards AA.

JII of BB - 6 June 2018

[20] DC Wendy Angus and Mr McKinnon jointly interviewed BB on 6 June 2018 at her school when she was 13. BB denied having seen or heard of the appellant raping AA. She did not think that the appellant would do such a thing. The appellant was "no[t] like that." AA had told lies about the appellant and hated him. AA had said the appellant battered her, but this was not true. BB had never seen this happening and she did not know why AA did not like the appellant. BB enjoyed the appellant's company. He was her "best friend." She did not see AA with any bruises, although she fell over all the time. BB argued frequently with AA.

JII of BB - 9 January 2019

[21] DC Lauren Morrison and Mr McKinnon jointly interviewed BB on 9 January 2019 when she was 14. The JII was prompted by BB's disclosures to a guidance teacher. She explained that when she had been interviewed in 2016, she had not told the truth. She had wanted to protect the appellant, who used to hit AA all the time. She described an occasion when AA was about 14. AA and the appellant were arguing over a broken phone. The appellant grabbed AA by the hair with two hands and dragged her up a flight of stairs. When they reached the top of the stairs, he kicked AA in the ribs and hit her. AA screamed in pain. Her mother remarked, "just give her two painkillers, she'll be fine." AA had a large bruise on her ribs after the attack. BB explained that the appellant would hit AA "all the time," at least once a week. On another occasion, AA and the appellant were standing outside of the house. The appellant hit AA. A neighbour noticed and shouted, "that's no way to treat a bairn." BB saw that AA had lots of bruises on her legs.

[22] BB explained that the appellant did not like AA. They were never close, whereas she and the appellant had been close. AA and the appellant frequently argued. The appellant had never hit BB.

[23] The reason why she had not told the truth before was because the appellant had told them he could go to prison should they speak up. He told her she had to be careful about what she said and not to say anything. He knew about her disclosures to her guidance teacher and told her she should not have revealed anything that happened in the house. Although he was angry at her for making the disclosures, she felt safe going home again.

JII BB – 5 September 2019

[24] DC Morrison and Sarah Linton, social worker, jointly interviewed BB on 5 September 2019 when she was 15. She explained that her sister, AA, was now living in care and that she was not allowed to see her. She described an occasion where the appellant instructed her sister, GG, to "batter" BB with a plastic pole. She and the appellant had been arguing at home. She told him to shut up. She hid in her bedroom, but GG entered and used a long black plastic pole to hit her on the leg and arm. BB had four bruises on her arm that she showed to her guidance teacher.

[25] BB explained that the appellant hurt her all the time. She described the first time he hit her. She was between 4 and 5 years old. He hit her with a belt on her legs. She could not say how many times it happened to her, but it happened a lot when she was younger. Her mother saw the appellant hit her.

[26] BB described a recent incident when the appellant threw a remote control at her. She and the appellant were arguing when she could not find her school jeans and the appellant accused her of hiding them. The argument became heated. He told her that she could not

be in the same house as him and she should move in with AA. He began to scream in BB's face. He became very angry and accused her of recording him. He had a remote control in his hand. As he left the room he threw it at her, hitting BB's face and causing her lip to bleed. She started to cry. Her mother saw her bleeding lip afterwards.

[27] BB described a change in her relationship with the appellant. She used to get on well with him but that had started to change because she was a witness at court about the appellant and AA. The appellant told BB that she should "take it back in court," meaning that she should retract her statement. He and her mum told her that they would "kick [her] out" of the house if she told the truth in court. They told her that "what happens in [the] house stays in [the] house."

JII of BB – 6 December 2019

[28] DC Morrison and Mr McKinnon jointly interviewed BB on 6 December 2019 at a children's unit when she was 15. She was generally reluctant to provide information throughout this interview. She explained that it was hard for her growing up. The appellant used to hit her. She recalled the appellant hitting her with a belt that was hung on her bedroom door. She was about 5 when this started. He hit her with the belt nearly every day until she was about 12. He hit her on the legs and stomach. She always had lots of bruises. Her mother saw the appellant hit her with the belt, but she did nothing about it.

[29] By referring to things she had written on her phone, and what she had told a guidance teacher and Lynzi Donnelly, BB described the appellant touching her private parts. It was a slow process and plainly difficult for her to clarify that she meant her vagina. This happened four times. The first took place at the "old house," address 1. She was 6 or 7 at the time. She was in her bedroom, lying on the top bunk of her bed next to AA. BB's initial

account was that she was wearing pyjamas and the appellant took her pyjamas off, but later in the interview she explained that she could not remember what she was wearing. The appellant touched her private parts underneath her clothes. He lay on top of her and put his hand on her private parts. He also touched AA's private parts. A few days later BB told her mother about the incident. Her mother showed her a video on her phone of people having sex and asked BB whether what was on the screen was what had happened.

[30] The second sexual assault was also at address 1. She was about 12. BB now had a single bed. She was trying to sleep. She was lying on her back in bed, underneath the covers. The appellant came in and got underneath the covers with her and lay on top of her. Her mother came home and the appellant left her bedroom. When giving this evidence it would have been clear to the jury that BB was very uncomfortable. She answered a lot of questions by either shrugging or saying that she did not know. At one point she explained, "A canny talk about it anymare" and that "I get like flashbacks in ma heed." She agreed with the interviewers that she found it difficult to talk about these events. When the questioners revisited the subject of sexual touching later in the interview, BB said that both the second time and third time occurred when she was 12. The third time was at address 2.

[31] BB spoke to further physical assaults. The appellant often shouted at her and told her that he would "kick our… C-U-N-Ts in." She did not tell anyone about the assaults because she loved him and did not want to get him into trouble. He would tell her that, "whatever happens in the house stays in the house." He would shout at AA, almost every day. The appellant would tell AA to run away. He also hit AA all the time. She saw him kick her in the stomach. BB and AA were always covered in bruises. BB's primary 4 teacher, Mrs Purdie, saw the bruises and asked the appellant where the bruises came from. He told her that they had come from playing rugby. BB did not play rugby in primary 4.

[32] BB described an incident when she was in primary 6. She and the appellant had an argument at the top of the stairs at address 2. The appellant started to shout at her. He became "raging" and chased her down the stairs. As she turned the corner, the appellant pushed her down the remaining stairs. She thought she fell seven steps. The appellant had a trumpet at the top of the stairs and threw it at her, damaging it. She ran out of the house and went to hide in some bushes around the side of the house. Her mother came out to find her and told her it was time for her to go back inside.

[33] BB spoke of an incident occurring six days prior to the interview. The appellant received a letter about attending court. He knew that BB had given a statement to the police. He told her that if she did not change her statement she would "ruin it" for her younger sisters and that they "wouldny have a dad." Her mother told her something similar adding that she could not live without the appellant. She said that she needed the appellant to keep the house. Her granny, FF would tell her all the time to change her statement. The appellant took her to his solicitor's office. He asked the receptionist about how BB could change her statement. The solicitor was unavailable to speak with the appellant. The appellant had told her he would get put in jail if she told anyone what happened.

JII – 8 May 2020

[34] DC Morrison and Ms Linton jointly interviewed BB on 8 May 2020 at a social work centre when she was 15. Their purpose was to elicit further information about the appellant sexually abusing BB, who mostly responded with "I dinnae ken." BB confirmed that she spoke most days by telephone and text message with AA, who no longer lived with them. BB confirmed that the appellant did not touch her with his penis during the incidents she had described in her JII of 6 December 2019. She described occasions where the appellant

would hold AA down on the bed and put pillows in her mouth to prevent her from screaming for help. The JII transcript conveyed that BB was upset during the interview and had wiped her eyes, suggesting that she was crying.

Evidence on commission

[35] BB's commission was recorded on 11 July 2022 when she was 18. She confirmed that she had undergone JIIs in 2018, 2019 and 2020. She wanted to talk to the police but was uncomfortable when doing so. She preferred to write things down in her interviews rather than speak aloud. She had written notes on her mobile phone and taken screenshots of them. The notes explained that she had been hit by the appellant with a belt "when [she] was wee until [she] was about 12". She had lots of bruises on her legs and belly where she had been hit. Her primary 4 teacher saw the bruises and had questioned the appellant about them. Another note read:

> "Once, when I was in P6, [the appellant] was mad at me about something. I can't remember why he was so raging. He chucked my instrument then me down the stairs and kicked me out. And my mum tried to stop him and [he] pushed her and she fell to the floor and then she followed me out. There was once when he came to my room with a knife because I wouldn't down (sic) for my dinner. He actually threatened to kill me. And I didn't know what to do. I kept shouting my mum, but she didn't care. He also threw controllers at me for saying that I wanted my big sister home. And I blamed my (sic) because I didn't want to cause more bother. He used to say all the time that he didn't want me to be there and that I was to run away and get killed somewhere. And then when we got told about the court case and I went to social work and he said I couldn't be there, he got my sister to hit me all the time. But when he was mad at me, he would hit me."

[36] Another note read:

> "There was a time when I was in bed with [AA] beside me and [the appellant] came through and was lying next to us. And then all I remember is that he was on top of us, but he still had his clothes on but he would touch me in places I shouldn't be touched. But then days later I told my mum what happened and she showed us a video of these (sic) having sex."

[37] BB confirmed that she was the author of the notes. She was 15 or 16 at the time she prepared them. She showed the notes to Lynzi Donnelly.

[38] In cross-examination, BB said that she had left home about three years ago. She accepted that, prior to her and AA leaving home, it was not always a happy home. Social workers would come to the house to check that everything was okay. There was an incident when BB was quite young that instigated police and social work involvement with the household. She was unable to comment on whether things in the house improved following that involvement. BB accepted that the appellant and AA did not get on. The appellant found AA difficult to deal with. AA and her mother, on the other hand, got on okay.

[39] BB accepted that she had given six JIIs to the police and that she had given more information in some of those interviews than others. She confirmed that she was trying her best to tell the truth. She refuted that the only problem in the house was AA, although she accepted that the house sometimes became quieter once AA had left. She denied that AA bullied her, and she denied that she was frightened of AA.

[40] BB accepted that she had renewed contact with AA after she had moved out. She knew that AA had made serious allegations against the appellant. After BB left home she kept in contact with AA. The last two JIIs were given after BB had left home. She accepted that she had only made allegations of sexual abuse in the final two JIIs. She denied that those allegations were untrue. She denied that she had exaggerated the violence she had spoken about in the JIIs. She accepted that she had told social workers and the police that she loved her mum and the appellant.

Jenny Osinska

[41] Ms Osinska was a neighbour of the family at address 2. She lived in a semi-detached house adjoining their house. She recalled them moving in in July 2012. It was a couple and four girls. She could hear the children "kicking off" and there being shouting and the children getting into trouble. She heard the appellant shouting at the children and telling them off, often once a week. She recalled an occasion two or three years after they had moved in. She and her husband were in bed, it was dark outside and she heard shouting from outside and could hear the appellant's angry voice. There was another voice of one of the girls from next door. She was upset and was shouting back at the appellant across the road. Ms Osinska went to the window to see what was happening and saw the girl sitting beside the grit-bin just outside the house with her arms wrapped around her knees and appearing upset.

Lee Diey

[42] Mr Diey was a neighbour at address 1. He lived in a flat directly beneath them until they moved in 2012. He was about 14 when the appellant and EE moved into the flat above. There were no children at first. He did not get on well with the appellant. He complained about the noise being made by the appellant and his household. He could hear the appellant and his wife having sex, footsteps and "general living noise." He complained about the noise to the local authority. He recalled four children. He described hearing "domestic abuse noises" coming from their flat. He could hear the children in a state of distress and had concerns for their welfare. On one occasion he heard a commotion in the stair. He could hear a child's voice screaming, using words implying she was addressing

the appellant. It sounded as though it was in a "terror tone". He thought that the child was scared. He looked through the spy hole in his front door and saw the appellant dragging the second oldest child up the stairs by the "scuff" of her jacket. The child was very distressed and upset. He felt sick and called the police.

[43] Mr Diey accepted in cross-examination that he had complained repeatedly to the council about the appellant and that the appellant also complained about him. He accepted that he and the appellant attended mediation sessions and that he did not like him.

Kimberley McKenna

[44] Ms McKenna was a recently qualified social worker and before that she was a Children and Services practitioner between August 2013 and November 2021. Her role was to work directly with households to support them overcome adversity and to better meet their health and welfare needs. On 4 December 2017 she was asked to meet AA at her school. AA was refusing to go home from school because of concerns she had raised about the appellant assaulting her. Ms McKenna was aware of AA's prior disclosures to this effect. AA appeared quite "matter of fact" about her experiences. She did not need additional support and was very open. Ms McKenna did not see any physical evidence of abuse, although AA did offer to show her bruising on her legs. She fed back her observations to her team leader, who instructed her to take AA home. She met her team leader outside the house to discuss a safety plan for the evening. When she entered the house, AA's body language changed. She appeared quite anxious and nervous. AA needed a lot of reassurance that the conversation would be managed to the best of Ms McKenna's ability, and that she would be safe. When Ms McKenna entered, she was met by the appellant and AA's mother. Emotions were running high. The appellant was highly defensive about her

attendance. He was angry from quite early in the conversation. He used a loud tone of voice and was shouting quite a bit. He directed his behaviours towards AA, repeatedly calling her a liar. After a while AA's sisters joined in the conversation. They were quite emotional and were very aggressive towards AA. The appellant appeared to be instigating their upset. The appellant made Ms McKenna feel very uncomfortable. She could see that AA was being "scapegoated" by the entire household. She recommended that the appellant leave for the night to ensure AA's safety. The appellant did not want to leave and said, "Why do I have to leave when she's the liar?" AA's sisters became more emotional and pointed at AA telling her, "It should be you who leaves, not [him], you just need to get out of here, you're not wanted here." In the event, the appellant did leave that evening.

[45] Ms McKenna recalled having some limited dealings with AA after that incident. She recalled that AA was placed in foster care. She was tasked with assisting AA with emotional literacy.

[46] In cross-examination, she accepted that she became aware, after her visit to address 2 in December 2017, that there had been some previous social work involvement with the household. She was aware that a JII was to be conducted with AA after the incident. She was not aware of the JII given 13 months before December 2017. She accepted that on the evening of 4 December 2017 the discussion in address 2 had become heated between the appellant and AA. She reinforced her evidence about what had happened there that evening. She accepted that BB was one of the girls who became emotional. The appellant had encouraged the children to tell her that AA was a liar. She accepted that AA had made no disclosure to her about any sexual abuse. She also accepted that she had formed the view that AA had attention seeking behaviours.

Jennifer Rodger

[47] Ms Rodger was a Children and Families practitioner in Midlothian. She met AA in early 2017. Her role was to meet with AA and work with her on certain behavioural issues. She saw evidence in address 2 of AA being "scapegoated" by the others. "Scapegoating" in this context meant being isolated and being treated differently. She witnessed them calling AA names, forcing her to sit on the floor while everyone else sat on the sofa and explained the "terrible things" AA had been doing. She witnessed AA being called "stupid" and a "bitch." AA told her that she had been called a "mongrel." It was the appellant doing most of the name calling but AA's sisters also took part. AA was generally quite reserved around the appellant. It appeared that AA did not like him, was scared of him and would try to do things to get out of his way.

[48] Ms Rodger recalled the appellant being very aggressive towards AA on several occasions. He appeared to be quite controlling of Ms Rodger's time within address 2. He would phone her multiple times per day and raise his voice at her. On one occasion she was sitting on the sofa at address 2 when the appellant stood over her and raised his voice. She felt it concerning that he thought it appropriate to treat a professional adult in that way. She was concerned about how the appellant might treat the children. She also heard the appellant being angry towards AA. He would raise his voice and stand over her. More than once she asked the appellant to leave the room because of his aggression towards AA. Ms Rodger recalled the appellant "[be]coming out of control with his behaviour." He treated AA very differently to the other children. She witnessed the appellant showing affection towards the other children but never witnessed any of his affection directed towards AA. During the summer of 2017 AA advised that she no longer wanted to meet Ms Rodger.

There had been a reduction in police reports by that time and it seemed appropriate to end her involvement.

[49] In cross-examination Ms Rodger said that when she met AA she was not aware of her having given any JII evidence however she soon learned that she had done so. She accepted that her involvement with AA came about because of AA's concerning behaviour at school and not because of disclosures made in a JII. She was aware that there had been an allegation some years ago about BB being hit by the appellant with a belt. She accepted that BB appeared to be affectionate towards the appellant during her home visits.

Lynzi Donnelly

[50] Ms Donnelly had been a Children and Families practitioner in Midlothian. She was placed in a residential home where her primary role was building relationships with children and young people, to do meaningful work with them and to prepare them for life in the community. She met BB in August 2019. BB was very closed and very scared when Ms Donnelly first met her. It took a long time to develop a relationship with her. On 5 December 2019 BB was upset and quieter than normal. She was obviously emotionally distressed. She was crying. She asked BB if she wanted to talk about it. BB agreed and the pair went out for a coffee and to the shops. BB became more relaxed and was in better spirits when they returned to the care home. When the pair were in the living room, BB exhibited notes that she had written on her mobile phone. BB told her that she had spoken to a guidance teacher at school about what had been going on at address 2 before her move to the care home. BB had shown her teacher the notes on her phone. BB asked her whether she could "keep a secret" and showed her the notes disclosing physical, emotional and

sexual abuse perpetrated by the appellant. BB's body language was closed. She was upset and ashamed and it was obvious that she was frightened.

EE

[51] EE gave evidence in support of the appellant. She spoke to being separated from him since 2019. She is the mother of four children and suffered from post-natal depression. She had also had a miscarriage. The household was busy and noisy when the children had been growing up. She and the appellant would often argue. The appellant did not cope very well with various pressures, and he quite often lost his temper. On one occasion the appellant hit BB with a belt when she was about 4 years old. BB told the police that she had been hit, and the police attended the following day. After that there was increased social work involvement. A social worker named Audrey would speak to the children one-on-one quite a lot. She would also work with EE on her self-esteem issues and with the appellant on anger management. The appellant was taught techniques and strategies to manage his anger. As time went on, she and the appellant continued to argue. It was very difficult for six people to live in a 2-bedroom flat. In 2012, they moved from a flat in Edinburgh, to a three-bedroom house in Midlothian. By then social work involvement had come to an end. One day in 2016, AA ran away from home. This came out of the blue. She was away for about two hours. She and the appellant looked for her everywhere but could not find her. When she came back on her own, she looked like she was on drugs, and she would not say where she had been. A month or so later, AA made allegations about the appellant.

[52] EE explained that the appellant has a loud voice. At times he would give the girls a telling off. He was not aggressive, and he would never try to scare them. Apart from the incident with the belt, she had not seen the appellant use violence towards his children.

[53] AA continued to live with them after she made allegations about the appellant in 2016. The atmosphere changed. The appellant was not allowed to be on his own with the children unsupervised, creating a layer of tension. On 4 December 2017, two social workers accompanied AA home from school. There was a lot of emotion that evening. The appellant had to leave that night and, over the course of the next few days, arrangements were made for AA to move out. When asked whether it was her hope that AA would return, EE explained:

> "I don't know, do you know, I'm not gonna lie, I don't know. It was difficult you know, it wasn't just, if it was just me, yes. But the trauma that she put her sisters through, that was the hardest thing, you know, I had my youngest daughter who was about 7 at the time, she was sleeping on a mattress on the floor with her sisters because [AA] had told her she was going to kill her when she was sleeping."

[54] EE denied witnessing the appellant perpetrating any violence against AA. She would not have tolerated it if she had. She denied witnessing the conduct described in AA's two JIIs. She denied that she was simply supporting the position of the appellant and confirmed that "[her] girls come first."

[55] EE explained that BB and the appellant got on "extremely well." They would play darts together. They shared a different relationship than that between AA and the appellant. She denied witnessing the appellant assaulting BB. She explained that she had not seen the appellant shouting at BB very much. If there was anyone the appellant would be shouting at, it would have been AA or the youngest child. She denied witnessing the appellant instructing GG to assault BB, although she accepted that she did have to intervene on an occasion to prevent GG from assaulting BB with plastic poles. She also denied that BB had told her that the appellant had inappropriately touched her and AA. She denied showing AA and BB a sex education video, or anything of the sort.

[56] In cross-examination, EE rejected the proposition that the appellant was intimidating. She accepted that standing above a female professional and pointing at her would be intimidating albeit she could not remember that happening. She accepted that the appellant did not tell her about the incident with the belt until the police arrived the following day. She rejected the notion that the appellant struggled to manage his temper after his work with Audrey (a social worker). She denied that the appellant and the other children used inappropriate language to describe AA without parental correction by EE. She denied turning a blind eye to the appellant's physical and sexual abuse. She did not recognise the phrase, "What happens in the house, stays in the house."

Speeches

Crown

[57] The Crown case was that the appellant was an angry man who snapped at his children and physically and sexually abused them. The Advocate Depute invited the jury to find that, on the evidence, the appellant acted in "remarkably similar ways" towards both BB and AA. The basis for any conviction was mutual corroboration. He invited the jury to find that the offending spoken to by the complainers was similar in time, place and circumstances such that there was a systematic pursuit of a course of abusive conduct. He set out the cogent similarities in the background of time, character and circumstances of sexual offending focussed on the vagina.

[58] The Advocate Depute invited the jury to find the evidence of AA and BB to be credible. He invited them to consider the evidence of DC Wardell, who spoke to children often giving gradual disclosure of offending, particularly as they age and mature. That was a proper explanation for their respective delayed disclosures. The turning point for both

complainers was when they got out of the house, which was when the true picture began to appear. He reminded the jury of DC Wardell's evidence that children could be protective of their parents, that they are loyal to them and it can take time before wrongdoing is disclosed. The jury required to look at the evidence through the lens of their own life experience. In what was a clear reference to the assertion by AA that she had been raped by the appellant for around an hour, the Advocate Depute submitted that the jury ought to reflect on their own life experience that children measured time in a different way to adults. BB clearly accepted that there had been good times with the appellant and that acceptance reflected well on the candour of her evidence. Her evidence should be viewed through the prism of her being a schoolgirl, and in the context of the threats made by the appellant that she would be taken into care if allegations were made against him.

[59] The subsidiary witnesses supported and confirmed the accounts of the complainers. Professional witnesses spoke to the appellant being aggressive and of the appellant and his daughters scapegoating AA. Lynzi Donnelly spoke to BB's natural outpouring of emotion prior to disclosing the physical and sexual abuse through the notes on her phone. The evidence of the subsidiary witnesses fitted and flowed with the evidence of the complainers.

[60] EE's evidence did not "add up." It was accepted that the appellant had "belted" BB when she was 4. That EE knew nothing about any of the physical or sexual abuse perpetrated in a small flat did not withstand scrutiny.

Defence

[61] Senior Counsel's main themes were that AA was a liar and a fantasist and BB an incredible and unreliable witness.

[62] There was a marked absence of any medical evidence supporting the Crown case. It was odd that there was no evidence of anyone else observing injuries sustained by either complainer, and no evidence of medical consequences of the rape of a girl of 5-7 by a fully grown man.

[63] Senior Counsel attacked AA for making inconsistent statements. In her first JII she had spoken freely, openly and without hesitation. There was no hint or clue of any sexual allegations. She had every opportunity to make sexual allegations against the appellant in the first JII. It took until nearly a year and a half later to come up with the allegations of rape. When AA was asked at the end of the first JII if there was anything else that she wished to disclose she replied "no."

[64] Senior Counsel invited the jury to find AA's allegations incredible. A pillow over the face for 5 to 10 minutes would not have resulted in her merely being "sore." It was not remotely likely that the appellant could have raped her for an hour without there being any physical evidence of injury. AA could not even remember any bleeding in her vagina. It did not make sense that AA had been violently raped by the appellant, and nobody saw any signs that she was upset or otherwise distressed. Her claims of being raped were inherently improbable.

[65] Senior Counsel invited the jury to prefer BB's evidence from her first two JIIs where she had denied having witnessed any offending by the appellant. She had been "open, cheery, chirpy" throughout those interviews. She must have been "some actor or actress" to put on that display when she was the victim of ongoing violence and sexual abuse herself. She presented, during the early interviews, as an "honest wee girl". There had been a noticeable change in attitude and tone throughout the later interviews. She was no longer speaking freely. She provided a lot of description about one incident but was extremely

vague about everything else. The incident of sexual abuse spoken to by BB had not been spoken to by AA. It was odd that AA, who was so forthcoming with her evidence, did not mention the same incident that BB had recalled.

[66] The jury should consider that by the time BB made allegations of sexual abuse, BB and AA were "in cahoots", since they were in frequent contact by text or phone call.

[67] Senior Counsel reminded the jury of Mr Diey's attitude towards the appellant. The jury should consider whether Mr Diey was "truly trying his best to tell […] the truth, or truly trying his best to make things difficult for [the appellant]." Ms McKenna was very surprised that AA had made an allegation of rape as she had a very good rapport with AA and she had not mentioned it to her. Ms McKenna's evidence supported the view that AA was a disruptive influence in the house and that BB preferred the appellant to AA in 2018. That evidence was not compatible with the evidence that BB was the subject of physical and sexual abuse at the time.

The judge's directions

[68] To convict of any charge the jury would have to accept the substance of the evidence of the complainer relating to that charge and find corroboration. On the sexual charges, mutual corroboration from the evidence of the other complainer on another charge of the same general kind was the only potential source of corroboration. The jury would have to determine if the evidence of witnesses was truthful and reliable. In doing so the jury could test a piece of evidence against other acceptable evidence and have regard to internal consistencies in a witness's accounts. The jury could accept some parts of the evidence of a witness whilst rejecting others. The appellant was presumed innocent, and it was for the prosecution to prove otherwise, and beyond reasonable doubt, on each charge. The

appellant did not have to prove his innocence. Corroboration was a requirement only for the prosecution. Whilst the age of the children on the sexual charges was crucial, it was established in this case by operation of law (section 255A of the 1995 Act.)

[69] There had been delays in the complainers disclosing what had occurred, and the jury would have to consider them, but they could also consider evidence they had heard from DC Wardell and a social worker about the prevalence of delay in disclosures of child abuse.

[70] Anything reported to have been said by the appellant was admissible as evidence. (This latter direction was something of an over-simplification favourable to the appellant: *McCutcheon* v *HM Advocate* 2002 SLT 27 at para 16).

[71] The evidence of AA and BB was essential to the Crown case and to convict the jury would have to accept their evidence as credible and reliable. The credibility and reliability of their evidence was the essential battleground between Crown and defence. Senior counsel for the appellant had offered reasons for the jury to reject their evidence and the jury must consider them. It might not be a straightforward issue to resolve whether their evidence was credible and reliable or false. This was very much for the jury to determine. If the jury believed any evidence exculpating the appellant, or if it left them in reasonable doubt on a charge, then the jury must acquit him of it.

The undisclosed material

[72] The Crown disclosed 58 previously undisclosed items at various junctures after trial. The Solicitor General accepts that stage 1 of the *McInnes* test is met for 36 of the items. In his written submissions the appellant maintained that stage 2 of the *McInnes* test was met in respect of 22 of the undisclosed items, the last being hundreds of pages of social work

records from which several distinct entries were identified as potentially meeting *McInnes* stage 2. That number reduced to 15 following the hearing on 24 July 2025.

[73] The Crown accepted that stage 2 was met for 7 of the undisclosed items and, at the hearing on 13 November 2025, suggested that there was a further aspect of the social work records that would meet stage 2. During the appeal hearings, the appellant made some specific concessions and ultimately founded only on the items conceded by the Crown to meet the second stage test.

Relevant law

[74] The European Convention on Human Rights and Fundamental Freedoms states:

> "Article 6: Right to a fair and public hearing
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> 3. Everyone charged with a criminal offence has the following minimum rights:
>   - to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him
>   - to have adequate time and facilities for the preparation of his defence
>   - to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require
>   - to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him
>   - to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[75] The European Court of Human Rights inferred from the terms and purposes of Art 6 that criminal proceedings should be adversarial and there should be an equality of arms between the prosecution and defence if an accused person is to have a fair trial. This principle has been said to underlie the requirement of the prosecution to disclose certain material: A*ffleck* v *HM Advocate* [2010] HCJAC 61, 2010 SCCR 782; *Yalçinkaya* v *Turkey* (2024) 78 EHRR 30 at para 306. In *Yalçinkaya*, the European Court adopted what was said in *Rook* v *Germany* (2020) 70 EHRR 25 at para 58:

> "…Failure to disclose to the defence material evidence, which contains such particulars which could enable the accused to exonerate himself or have his sentence reduced, would constitute a refusal of facilities necessary for the preparation of the defence."

[76] These principles are given effect in Scotland in part 6 of the Criminal Justice and Licensing (Scotland) Act 2010:

> **"121 Prosecutor's duty to disclose information**
> (1) This section applies where in a prosecution—
> (a) an accused appears for the first time on petition,
> (b) an accused appears for the first time on indictment (not having appeared on petition in relation to the same matter), or
> (c) a plea of not guilty is recorded against an accused charged on summary complaint.
> (2) As soon as practicable after the appearance or the recording of the plea, the prosecutor must—
> (a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and
> (b) disclose to the accused the information to which subsection (3) applies.
> (3) This subsection applies to information if—
> (a) the information would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,
> (b) the information would materially strengthen the accused's case, or
> (c) the information is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused."

[77] The duty is a continuing one and applied in the proceedings against the appellant. The Crown accepted that it failed in its duties to make disclosure in respect of numerous items and the issue in this appeal is the effect of that failure on the fairness of the appellant's trial was such that there has been a miscarriage of justice. The approach to be taken was set out in *McInnes*. In this appeal we are concerned with the second stage of the test:

> "… A trial is not to be taken to have been unfair just because of the non-disclosure. The significance and consequences of the non-disclosure must be assessed. The question at the stage of an appeal is whether, given that there was a failure to disclose and having regard to what actually happened at the trial, the trial was nevertheless fair and… as a consequence there was no miscarriage of justice… The test that should be applied is whether, taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict."

Submissions

[78] The appellant accepted that on charges 2 and 7 there was straightforward corroboration in that for each complainer there was at least one instance of the other complainer witnessing and speaking to instances of assault. The credibility and reliability of each complainer's testimony on these matters was just as important as it would be for mutual corroboration. The appellant's defence was that the complainers were lying about the allegations they made against him. He adduced EE with a view to contradicting aspects of the evidence of the complainers but chose not to give evidence himself. The material founded upon in the instances conceded by the Crown would have given rise to a real possibility of different verdicts on each charge he was convicted of. As we have explained, the Crown agrees that this test is met for certain parts of the undisclosed material. We shall examine the material still founded on by the appellant, as proposed by the Supreme Court in *McInnes*.

Analysis

EE's statement to the police 26 June 2018

Appellant

[79] This statement contained information that could have been elicited from EE had the statement been disclosed:

(i) that EE was completely shocked when she learned that AA had made known her allegations on charges 3 and 4;
(ii) there were no issues when AA was growing up and no concerns from social work about AA until about two years earlier (2016) when social work attended because of allegations of violence;
(iii) EE and the appellant were begging social work and CAMHS for help between November 2016 and February 2017 and this would not have happened had AA's allegations been true.

Crown

[80] The Crown agreed that evidence that the appellant and EE were seeking the assistance of the social work department regarding AA's behaviour would lead to a real possibility that a different verdict would have been reached.

Assessment

[81] Neither party specifies which charge or charges would be affected. We are unconvinced that EE being shocked to learn of AA's allegations of violence, if it was admissible at all, which we doubt, would have been of any material assistance to the defence given EE's testimony at trial that she did not witness and was not aware of such conduct. The social work records disclose that there were many issues when AA was growing up, including reports from various sources about the appellant's violence towards her. Concerns raised by members of the public first prompted social work involvement with the household in 2005.

[82] If the content of the social work records had been adduced before the trial court, the jury would have known that allegations of violence had been made over the years and that if EE purported to be shocked by them then it would be apparent that she was being untruthful in expressing shock. Had there been no history of social work intervention in this household, there may have been some weight to the proposition that for the appellant and EE to seek the assistance of social work in late 2016 and early 2017 might seem surprising if he had been sexually abusing children of the household. It might offer an argument for the appellant to advance but it might also be seen as an attempt to cast doubt on such allegations. It would have very little weight in relation to the charges of raping AA which were said to have occurred at least six years earlier.

[83] We consider that there is no real possibility of this material prompting a different verdict on any of the charges.

Statement of BB on 27 August 2020

[84] BB was 16 when DC Morrison interviewed her at a police station in Midlothian. In her statement she described events at address 1 when she was 5 years old. She slept on the top bunk of a bunk bed with AA sleeping on the bottom bunk. She recalled the appellant being in her bed wearing only a red T-shirt, lying on top of her and raping her, causing her to scream and cry. At some point she said that EE came in and saw it happening but walked out again without intervening. He continued raping her. On receiving sex education at high school, she came to understand what had happened and that it was wrong but felt unable to tell anyone as the appellant always said, "What happens in this house stays in this house." She explained that she was now ready to report it as she no longer lived with EE and the appellant. She had not wanted to describe it in video recorded interviews as she was too

embarrassed. She recalled that her mother would call the appellant a "paedo" when they argued. She had seen the appellant touching AA's vagina as she had already told the police.

Appellant

[85] To elicit this would require a section 275 application as it was not the subject matter of any charge. If allowed, EE could have been adduced to contradict the complainer's account. This exercise would have been unlikely to have been permitted under the law as understood in Scotland prior to the Supreme Court issuing its judgment but should now be seen in a different light. That court's decision in respect of AA, as set out at para 185, could not just be read across to this material relating to BB. There is a closer connection in time between what was alleged by BB under reference to charges 8 and 9, albeit these offences were different in nature to what AA said had happened to her. It would not have required a protracted inquiry to ask EE if this had happened and, under the law as explained by the Supreme Court, a section 275 application would have been granted to introduce evidence of what BB had said and to negate it via the evidence of EE.

[86] It now transpires that BB had given the same account to a social worker, Bernadette McShane, on 26 July 2020. We note that Ms McShane also recorded that EE was terrified of the appellant.

Crown

[87] At the time of the trial, an application under s 275 would not have been granted to elicit such evidence, although if the Crown had known of this information it was possible that a charge of rape of BB would have featured on the indictment. If so, the appellant could have denied it and EE could have refuted it. Following the Supreme Court's decision, a

section 275 application may well be granted and the Crown now wished to concede that the second stage of the *McInnes* test was met.

Assessment

[88] Whilst we were told that trial counsel would have sought to use this information had it been known at that time, it would have been highly risky and forensically unwise. If the jury accepted that what BB said was true, it would damage the appellant in the eyes of the jury and, if these statements became evidence by adoption or because BB confirmed them in cross-examination, provide an even stronger source of mutual corroboration for the rape charges featuring AA that were by far the most serious charges on the indictment. Had the defence given notice that this material may be adduced in the trial, it would have been open to the Crown to adduce evidence from the social worker of BB's explanation that EE was terrified of the appellant or to get that information from BB directly. The verdicts suggest that the jury were not impressed with EE's testimony and it remains unlikely that she would have won a credibility contest with BB.

[89] Nevertheless, we shall proceed on the assumption that the defence would have sought to use this material. We are not convinced that the Supreme Court's judgment demonstrates that a section 275 application should be granted in respect of it. We have no basis to think that BB would accept that what she said was untrue. The conduct is markedly different and substantially more serious than that in charges 8 and 9 and, whilst it is closer in time to charge 8, it is not contemporaneous with it. Making the kind of assessment favoured by the Supreme Court at para 185, we envisage that such evidence would not meet the requirements of s 275(1)(b) and (1)(c) because:

> "…To ascertain the truth would have required an investigation into an issue which was distinct in time and circumstances from the subject matter of the charges, prolonging the trial and potentially distracting the jury from the proper focus of their attention. Essentially, the jury would be invited to decide whether the accused was guilty of another rape in addition to the [lesser sexual offences against BB] with which he was charged…"

Accordingly, there is no real possibility that had this information been disclosed there would have been a different verdict.

Statements by FF on 27 May 2008 and 9 June 2020

27 May 2008

[90] The background is that on 27 May 2008, BB told the police that FF (her maternal grandmother) had observed the appellant hitting her. FF refuted this on being interviewed on the same day. She said that she had never seen the appellant or EE lift their hands to BB or any of the other children. If the children misbehaved, they would be sent to their rooms and might be shouted at. She said that she had never heard EE or the appellant threatening the children with a belt or anything like that.

9 June 2020

[91] In this statement, FF was rather more circumspect and said, "I have never seen [the appellant] hitting any of the girls but I don't know what goes on when I'm not there." She continued:

> "I have never seen any of the children with any injuries and I have never witnessed anything that has made me concerned. I know that when they lived at [address 1] they had social work involvement and this was because [the appellant] had hit [BB] with a belt, I never seen this but [the appellant] stayed with me that night. I asked [the appellant] about it, he admitted doing it but he said that it was an accident and that he meant to hit the bed. He said they were carrying on and [BB] jumped on the bed and he hit her with the belt. I never seen [BB's] injuries at the time but I know

> that she did have marks on her relating to a belt. I don't know any other reasons for [the appellant] and [EE] having social work involvement.
>
> I also know that at some point after the belt incident, [the appellant] went to anger management due to his temper, he could go daft at silly things. He would raise his voice a lot but that was when they lived in [address 1] but he has mellowed a lot since moving from [address 1]."

Appellant

[92] In 2008 the witness said she had not seen BB being struck with a belt, and this could contradict the evidence of BB that FF had seen this. She did speak to BB having an injury near her eye and had only seen injuries on AA's shins. The latter statement was detailed, confirming that FF did not see concerning injuries on either complainer or anything untoward and there was some value in evidence that she was not concerned by such injuries as she saw on the complainer. FF's evidence could have been used to undermine BB's evidence that her grandmother was present when the appellant belted her. This would indirectly undermine BB's evidence that her mother was present when the appellant had hit the children and support EE's evidence that she had not seen any such occurrence.

Crown

[93] The Crown, somewhat surprisingly, agreed with these propositions and added that the jury would have been impressed by the appellant's candour in admitting the assault to FF.

Assessment

[94] What is missing here is any acknowledgment of how the trial was conducted. EE confirmed that she knew that the appellant had struck BB with a belt albeit she had not seen

it happen. At one point she said something that suggested she had seen it, although that was not the general tenor of her evidence. Senior counsel for the appellant put it to her, "it turns out, there's no dispute about it, that he struck her with a belt." He then proposed that there was no possible excuse for it, and she did not demur. In due course the appellant admitted to her that this had happened. She said that a social worker called Audrey got involved with the appellant to work on his anger management.

[95] We consider all of this to be relevant context. We note also that a child recalling many years later that her grandmother had been present when what had happened is that the appellant had told FF on the same day what he had done, and this had become known to her mother and led to social work involvement, would almost completely dilute any possible effect on the credibility of the evidence of BB. There is no real possibility that FF speaking to these facts would have led to a different verdict.

Police interview transcript and recording 2 February 2021

[96] The appellant was subject of a video recorded interview on 2 February 2021 from 1315 to 1411 having been arrested for rape at common law, the allegation being that he had raped BB when she was 5 years old. He was cautioned of his right to silence and told of his right to have a solicitor informed, to consult with a solicitor and have a solicitor present during interview. He said he did not wish any of these facilities. At page 4 of the transcript, he was asked about raping BB and responded by stating "no comment." He thereafter answered personal questions about himself including confirming his association with the complainers and their siblings. At page 12 of the transcript, he was asked BB's age and he responded, "no comment."

[97] At page 14, he said of address 1,

> "To be honest I cannae remember [address 1] so ah'm jist gonnae gie you no comment because ah can't remember it. Ah don't know if that's because ah chose not tae remember it, ah jist don't remember it...Ah don't want to remember that house, I don't want to remember things that have went wrong, ah want tae look positive and look forward…"

On then being asked about whether he had a sexual relationship with BB he responded "no comment" as he did on being asked if he was sexually attracted to her and on being told that it had been reported that when BB was 5, he had raped her there.

[98] On being asked about the details as BB had provided them in her statement of 27 August 2020, he responded "no comment." When he was asked if he had ejaculated, he asked if they could stop the interview, which happened before questioning resumed 2 minutes later. Once again, he reverted to making no comment before answering some questions confirming personal information he had given earlier. He continued to make no comment on being asked about raping BB through pages 21, 22 and into 23. At that point he volunteered that he had a bad relationship with a neighbour down the stairs at address 1 and life went wrong there, it was impossible to fit so many people into such a small flat. At page 24 he refuted a suggestion that he was struggling to answer questions about BB because he knew he raped her before adding, "No, no, no, no, no now ah want ma lawyer." He then changed his mind and said he would speak to his lawyer the following day. The interview stopped, for a minute, and he confirmed again that he did not wish to speak to a solicitor.

[99] On page 25 he again responded "no comment" when asked if he found BB sexually attractive and had sexually assaulted her, before deciding to answer. He said that it made him physically sick to be asked if he found her sexually attractive and he did not. On being asked how he felt about her report to the police he made no comment. He then said his

relationship with her was gone and, on being asked why, said he did not know. The exchange continued:

> "I don't know, go and speak to her about that because she was, I, I, I done a, an incident when she was 5, I hit her wi' a belt, I done something wrong then I got questioned by you'se, I got 'hingied, I done aw the work wi' [social worker named Audrey], ah don't know why she's comin oot wi' this now because this is jist totally utterly rubbish. If you put me in the room wi' her I'll get her tae tell the truth because the truth is that's rubbish."

[100] Whilst this answer generally related to the allegation of raping BB, not charged on the indictment, he went on to make what could be construed as more general denials of the allegations that came to be indicted. He said that his situation with the complainers was a mess, he did not know where they were getting crazy ideas from because he had done one incident, he had hit BB with a belt, he had worked to change his life and tried to develop a good relationship with the complainers. It made him feel destroyed and it was all rubbish to him. He went on to say that the police needed to stop the complainers lying, what they were saying was crazy, it was fantasy. Other than hitting BB with a belt, he had done nothing wrong. The complainers needed proper help. At page 30, it is noted that he began to sob as the recording confirms he did. At page 31 he said he could not do anything to a child and at page 32 he said he would never harm a child. He acknowledged that life at address 1 was, as he put it, "a nightmare for years and years and years."

[101] At page 33 he said that he would not rape BB (not charged on the indictment) before making a general comment that could be construed as a denial of the sexual allegations on the indictment: "I wouldn't go towards them in that way whatsoever." At page 34 he stated emphatically that he did not find BB sexually attractive. At page 35 he clarified that the only thing he had done to BB was to hit her with a belt. At page 37 he said that the only person he found sexually attractive in the household had been his wife.

[102] When the police told him he was going to be charged he stated, at page 39, that he wanted his solicitor, Graeme Clark in Dalkeith, notified, the appellant became very emotional, sobbing and stating that the police would not be releasing him.

[103] At page 42, the police charged the appellant with raping AA, at least twice, at address 1 between September 2008 and September 2010. This appears to refer to the conduct libelled in charges 3 and 4 on the indictment. He repeatedly responded, "No way." He began to wail, stating that he needed a cigarette.

[104] At page 44, on being charged with raping BB, not charged on the indictment, he denied it and stated, "Tell them to stop lyin' please, tell them to stop lyin'."

[105] At page 45, having been charged with conduct at address 1 that would fall within the scope of charge 8, he replied, "Ohhh I'm gonnae die, I'm so goin' tae die" before responding "no" when asked if he wished to reply to the charge.

[106] At pages 45 and 46 he was charged with raping AA on an occasion that appears to be the allegation considered by the Supreme Court to be collateral and inadmissible in the appellant's trial. He did not wish to make a reply.

Appellant

[107] Amongst this material a jury could find not just denials but also could see the appellant's emotional response to the charges. Whilst his denials may not be admissible evidence unless introduced by the Crown, in which event they would be admissible as parts of a mixed statement, evidence of his emotional response to charges and allegations that included much of what was contained in the charges he was convicted of was admissible and compelling evidence. Whilst some of the content of the interview was irrelevant and some of what the appellant stated was inadmissible, it would have been possible to present

passages of the recording to the jury. Had the jury seen this material, and the force of the appellant's emotional response, there was, at the very least, a real possibility that the jury would have returned different verdicts.

[108] In a case where there was a background of the appellant having been subject to numerous discussions with social workers and repeated police interviews over many years, it was unreasonable to expect him to be able to recall this interview in February 2021 and that he had made relevant denials in it.

Crown

[109] The Crown offered no independent analysis and accepted the appellant's submissions as being sound.

Assessment

[110] It is surprising that neither party recognised the true legal status of the appellant's comments made to the police on 2 February 2021. With effect from 25 January 2018, the Criminal Justice (Scotland) Act 2016 amended the 1995 Act by introducing section 261ZA. The effect of subsections 1 and 2 is that a statement made by an accused in the course of being questioned by a constable investigating an offence is not inadmissible as evidence of fact on account of being hearsay. In other words, for interviews conducted from 25 January 2018, it changed what had been determined in a series of cases culminating in the opinion of a full bench of 9 judges in *McCutcheon* at para 16.

[111] Accordingly, whether or not the Crown chose to use this material, if the appellant had introduced admissible parts of the statement, there would have been evidence of fact

regarding direct or implicit denial of some of the allegations on the indictment in addition to the effect of his intense emotional reaction to some of the allegations.

[112] As we have already noted, the Supreme Court determined that allegations by AA of a third occasion when she was raped some years after the events of charges 3 and 4 would not have been admissible in the trial and so the part of the interview noted at para [106] above would not have featured.

[113] In the absence of a charge on the indictment, the effect of our decision at para [89] above about an allegation made by BB on 27 August 2020, that the appellant raped her, means that the appellant's denials and emotional reaction about it would not have been admissible.

[114] It is not an entirely straightforward exercise to work out what a jury might have made of those parts of the interview that would have been admissible. The appellant making no comment to the direct allegation made on 27 August 2020 would not have been admissible but certain passages in which he made no comment could have featured in the trial. These include questions about:

- his relationship with BB (page 12),
- the sleeping arrangements at address 1 (page 13),
- whether he was sexually attracted to BB (page 14 and page 25 albeit the latter was followed by his saying that he did not find her sexually attractive)
- having raped AA as reflected in charge 3 (page 14)
- his comment that life went wrong at address 1 (page 23).

Whilst the appellant was entitled at any stage to make no comment, the jury would have noted his relatively calm emotional demeanour whilst doing so had certain early parts of the interview been adduced. Some of his comments were not necessarily denials at all and might have been considered an implicit admission albeit of a very general kind eg the passage quoted at para [97] above.

[115] The high points of the material for the appellant include:

- that which we have summarised at para [100] above insofar it may have been possible for the jury to conclude from the appellant's responses that he was in effect denying much of the conduct that featured on the indictment,
- a potential general denial of sexual allegations at page 33, summarised at para [101] above and
- an explicit denial of charges 3 and 4 at page 42 as noted at para [103] above.

In evaluating the appellant's demeanour, the jury would have had to consider whether the real reason for his upset was not innocence as he now proposes but distress at the prospect, as he perceived it, of being held in custody as set out at paras [102] and [105] above.

[116] We feel some unease in applying the *McInnes* test here in a situation where the information relied upon was known to the appellant. He knew he had been interviewed and what he had said on this occasion and yet did not choose to do anything about it in his trial. The appellant's solicitor was notified that the appellant was being charged on that occasion, so he also knew at least something relevant. In *Affleck*, the court noted that where the appellant had known something undisclosed, and made some use of it in the trial, there had not been an inequality of arms and there was no miscarriage of justice.

[117] That said, the material should have been disclosed and whilst it is not all helpful to the appellant, there are parts of the interview where he stated denials and showed emotion. The appellant's solicitor, who had not been present, was denied the opportunity of viewing the recording, as we have done. Viewing it might have persuaded the defence team that there were ways of editing the recording and/or transcript to place before the jury such denials as there were and the appellant's associated displays of emotion. Whilst we recognise that the jury might not have been persuaded by this material, we cannot say that there would be no real possibility of a different verdict. Acceptance of those denials, or their

leaving the jury in reasonable doubt of the appellant's guilt on some or all charges, would have led to a different verdict.

Certain passages in social work records

[118] The Crown obtained extensive tracts of social work records concerning the household comprising the appellant, EE, the complainers and other children. It appears that the Crown had taken receipt of these documents in an email from the reporting officer nearly two years prior to the appellant's trial and at least 9 months prior to the first assigned Preliminary Hearing. It seems that the Crown did not consider this material either for their own purposes or for the purposes of disclosure. There are records of numerous sources of information including admissions by the appellant to various acts of violence against the complainers and reports from members of the public and schoolteachers about concerns that the appellant was violent to children in the household. Had it considered this material, the Crown could have adduced witnesses to speak to admissible facts. It is apparent that there was social work involvement with the household since at least 2005, albeit not for the whole period until AA and BB were removed. Points founded on by the appellant were:

- possible alternative explanations for injuries on the children
- instances of the appellant being candid with social workers and making admissions to hitting his children
- there was a history of tension between Mr Diey's households and the appellant's, supportive of Mr Diey being motivated to give false testimony
- indications in the records that at times the appellant appeared to be the primary carer and the children liked him and responded well to him whilst EE struggled with childcare
- there had been times when the appellant and his partner actively sought social work support in later years and, it was suggested, this would seem odd if the appellant was abusing the children
- there were records of occasions when the complainers did not report sexual assaults that they said had already occurred
- AA had sought to withdraw a statement in February 2020 so that contact could resume with her father

- BB making statements inconsistent with her evidence at trial eg on 28 August 2019 she said she was not assaulted by the appellant since she was small (but the jury already knew that she had not always said that he had assaulted her over that period).

Appellant

[119] The appellant contended that features of the records such as those described above met the second stage of the *McInnes* test because of their potential to undermine the evidence given by both AA and BB.

Crown

[120] The Crown did not contest that the material founded on by the appellant meets the second stage test. In addition, the Crown identified:

- First, an entry in the record relating to AA to the effect that on 14 December 2018 she had told a social worker that the appellant raped her at least twice monthly up to her first year at secondary school when she was 12 or 13; and
- secondly, it was recorded by a social work assistant, Shelley MacKenzie, at page 548 of the records, that on 26 February 2019 BB said that she had lied in her video recorded interview of 9 January 2019 in saying she had witnessed the appellant assaulting AA and EE. She explained that she had lied as she was trying to help make her sister better.

Assessment

[121] Whilst there may be some entries that might be argued to have had some potential exculpatory effect, for the most part we judge that the material would have had little more than a marginal effect and would not meet the second stage of the *McInnes* test. We note that, as a generality, if the defence had sought to use entries in the records to show the making of prior inconsistent statements by the complainers, the Crown would have been able to use other entries to show consistency or to demonstrate, with primary hearsay, that a report had been made by a complainer: *Coyle* v *HM Advocate* 1994 JC 239; *Whorlton* v *HM*

Advocate [2020] HCJAC 36. For the most part, as we have indicated, it is difficult to reach a clear conclusion that entries in the social work records would have founded a real possibility of a different verdict. It is possible that there would be some cumulative effect, but it is entirely artificial to think that had the defence sought to introduce such material that the Crown would not have sought to use the many sources of information supportive of its case. There are references to the appellant telling the children that they had to take a side between him and AA and to him exerting pressure on BB not to report things he had done. The experienced senior counsel who represented the appellant would have had to consider if it was worth the risk of introducing such material if the Crown had not done so.

[122] That said, the entry that within a few weeks after BB had first given information of wrongdoing by the appellant against AA, she was telling a social work assistant that she had lied to try to make her sister better is a piece of evidence that, with some hesitation, we consider does meet the second stage of the *McInnes* test. We hesitate because the jury already knew from BB, as she had explained in this interview, that the appellant had said he would go to prison if she spoke up. The jury may still have concluded, reasonably, that BB became more forthright as she grew up and the appellant's emotional hold over her loosened, particularly when she was removed from her household.

[123] Nevertheless, if the jury concluded, as they would have been entitled to, that BB made a reasonably calculated decision in an interview that constituted evidence to lie in order to provide corroboration to assist AA, the jury might have been disinclined to accept this evidence from BB as credible and reliable when she said she had witnessed the appellant assaulting AA. It might have undermined the jury's willingness to accept BB's evidence of what the appellant did to her. Given the need for mutual corroboration on the sexual charges, and that it would have been an important part of the proof on all charges,

the use of this information might have raised a real possibility of a different verdict on all charges. It may not have had that effect, but since the defence were denied the opportunity to use it by a failure of disclosure the convictions cannot stand.

[124] We find less force in the Crown's second concession noted at para [120] above. In one sense, this was not a prior inconsistent statement because the note is not that the child retracted that she had been raped; but that she reported many more instances of rape than in her earlier JII. It was a different statement (s 263(4) of the 1995 Act) and it may be that something could have been made of this in cross-examination, but we also note that AA was not cross-examined on commission. Unless there was cross-examination of the complainer, the appellant could have made no use of the information in the social work record. Unless the complainer acknowledged that this was not true, the issue of how many extra times the appellant raped her would have involved a collateral inquiry and it is far from clear that its outcome would have been exculpatory. If the complainer was cross-examined on commission and insisted that she had indeed been raped more often and over a much longer period than she had previously disclosed, then the Crown may well have moved to amend the indictment to enlarge the scope of charge 4. The court may well have allowed it in the exercise of its discretion: s 96 of the 1995 Act. On the other hand, the jury might conceivably have found there to be something suspect about AA's different accounts about how many times she was raped. Ultimately, we are not persuaded that this material would have led to a real possibility of a different verdict. That may be a conceivable outcome, but we are not persuaded that this entry passes the second stage of the *McInnes* test.

[125] The Dean of Faculty rested his case on the failures of disclosure in respect of which the Crown had conceded that the second stage of the *McInnes* test was met. That being so

we will not elongate our opinion assessing material no longer insisted upon as causing a miscarriage of justice.

Decision

[126] Of all the failures of disclosure in this case, for which the Crown accepts responsibility, it is only in respect of two pieces of information that we have found the *McInnes* test to be met at the second stage. Nevertheless, it follows that there has been an unfair trial and a miscarriage of justice and the appellant's convictions are set aside.

[127] It is open to the court under s 118(1) of the 1995 Act to set aside the verdicts and quash the convictions, or to do so and grant authority to bring a new prosecution under s 119. At one time fault on the part of the Crown was viewed as a reason for the court to decline to grant authority but the leading cases pre-date the development of the modern law on disclosure and the enacting of the current disclosure regime. We note that following the Supreme Court's decision that the appeal in *Fraser* v *HM Advocate* [2011] UKSC 24, 2011 SC (UKSC) 113 should be sustained on account of a serious failure of disclosure by the Crown, it remitted the case to the High Court of Justiciary to determine whether the conviction should be quashed (as was inevitable) and whether authority should be granted for a new prosecution. Having set aside the verdict, the High Court of Justiciary granted authority and there was a retrial.

[128] We wish to state that we find it profoundly concerning that there was such a substantial failure of disclosure in this case. It is hardly unusual that there were different police reports in a case being marked for prosecution in Crown Office. It is essential that the Crown ensures that there is a system in place whereby all relevant information that should be disclosed is disclosed.

[129] We reproduce what the Solicitor General stated about the Crown's failures in this case:

> 1. … the Crown accepts that this case involves considerable failures of revelation and disclosure. It is a matter of particular regret that these failings only came to light after the appellant was granted permission to appeal by the Supreme Cout and only then as a result of a routine disclosure request by then junior counsel for the appellant. The Crown repeats the apology for these failures which the Solicitor General made on behalf of the Crown at the procedural hearing on 6 March 2025. The scale of the failures, the episodic nature of their discovery, and the advanced stage at which they were identified are all matters of acute concern and significant regret.
>
> 2. The Crown has taken urgent action to investigate these failures, to understand why they took place and to ensure that they do not happen again. An urgent review of its disclosure practices and procedures has been ordered. This covers both the Crown's internal procedures and its procedures for working with Police Scotland to ensure that the police provide all relevant information in a case to the Crown, that the Crown properly assesses this information to determine whether it meets the disclosure test and, where it does, that it is promptly and properly disclosed.
>
> 3. An investigation into the reasons for the disclosure failures in this particular case has also been carried out. The following themes have emerged in that investigation:
>
> (i) Police Scotland did not record all relevant material on their case management systems. As Police Scotland and COPFS case-management systems are linked, this meant that any material not recorded by the police was not visible to COPFS in these linked systems.
>
> (ii) Police Scotland did not provide COPFS with details of all relevant information obtained or generated during the police investigation.
>
> (iii) Information was discussed informally by email between Police Scotland and COPFS rather than through formal report from the police to COPFS or by submitting the information through linked case-management systems. This meant the significance of the information was not appreciated or it was not considered for disclosure in the usual way. It also meant that discussions on disclosure were not followed up and documents that ought to have been requested from the police so that they could be disclosed to the defence were not requested.
>
> (iv) Disclosure schedules, which ought to have been submitted by Police Scotland to COPFS at regular intervals throughout the duration of the case, were not received. COPFS failed to query the absence of these disclosure schedules with Police Scotland.
>
> (v) Where material was visible to COPFS through the linked case-management systems, COPFS failed to request the material from Police Scotland.

(vi) Where information was not recorded by the police or was not sent to COPFS but was still referred to in other documents (for instance, a summary of evidence), COPFS failed to ask for the material to be sent.

(vii) The indictment contained charges which had been reported to COPFS by the police under four separate police reports. When that happens, one report is designated as the main report in COPFS case management systems. Sufficient steps were not taken on COPFS case management systems to formally tie the allegations contained within two of the reports to the main report against the appellant. Consequently, the material relating to these allegations was not automatically included within the case. This meant that some of the routine disclosure checks that COPFS carries out on its case management system in advance of trial did not take place.

(viii) Some material, particularly witness statements, were wrongly assessed as not meeting the test for disclosure and thus were not disclosed. The reasons for this assessment were not properly recorded.

(ix) In one case, it was decided to seek Crown Counsel's instruction on whether disclosure should take place but that instruction was never sought.

(x) When materials were identified as disclosable, disclosure was not then made, as a result of human error. Routine disclosure checks failed to spot that disclosure had not taken place.

(xi) Proper handover procedures were not followed when responsibility for preparation of the appellant's case passed between members of COPFS staff.

4. The Crown is committed to rectifying these mistakes, improving its systems and working with Police Scotland to ensure that these mistakes are not repeated.

[130] The Crown advised that they would not be seeking authority for a new prosecution if we sustained the appeal. We have done so only on a fraction of the numerous points on which the Crown conceded the appeal. The highpoint for the appellant is the police interview of the appellant in 2021. We note that both he and his solicitor knew about it albeit they did not have a recording or transcript. The Dean of Faculty acknowledged that, in principle, a finding that the trial was unfair because of non-disclosure would justify a re-trial after disclosure has been made.

[131] We note what was said by this court in *Wilson* v *HM Advocate* [2021] HCJAC 12, 2021 SCCR 141, a case involving domestic sexual and physical assaults in which the court was

focussed primarily on appropriate directions on hearsay. The Lord Justice General (Carloway) explained, at para 54, that:

> "…in ensuring that a fair trial takes place, the trial judge must have regard not only to the interests of the accused, but also to those of the public and the alleged victim in seeing that crime is properly and fairly prosecuted."

The court examined the ECtHR decision in *Schatschaschwili* v *Germany* (2016) 63 EHRR 14 where the ECtHR stated, at para 101, again in the context of the use of hearsay, that:

> "The Court's primary concern under art.6(1) is to evaluate the overall fairness of the criminal proceedings. In making this assessment the Court will look at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interest of the public and the victims in seeing crime properly prosecuted [31] and, where necessary, to the rights of witnesses."

Footnote 31 referred to *Gafgen* v *Germany* (2011) 52 EHRR 1, where the court confirmed, at para 175, that victims of crime, their families and the public have an interest in the prosecution and punishment of criminals.

[132] The jury accepted the evidence of each complainer in a trial that we have found to be unfair only because of the Crown's failures to disclose certain information. This failure was not the responsibility of the complainers or the public. It is not obvious to us that refraining from granting authority for a new prosecution would serve the public interest. Bearing in mind not only the interests of the appellant, but also the interests of the complainers and the public interest, we consider it appropriate to authorise a new trial under ss 118 and 119 of the 1995 Act. It will be for the Crown to decide whether to take up the authority we are granting. The Crown may have more information than we do. The court has no power to compel the Crown to take the steps necessary to renew proceedings. We note that under s 119, proceedings must be commenced within two months and if that period passes without a new prosecution being instigated, our order setting aside the verdicts shall have effect for

all purposes of an acquittal: s 119(9). In the meantime, we continue the appellant's bail on the conditions currently in place.