Neutral Citation Number: [2018] EWHC 1409 (Admin)

Case No: CO/2618/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/06/2018

Before :

LADY JUSTICE SHARP
MR JUSTICE SPENCER

- -

Between:

Howard Godfrey QC	**Appellant**
- and -	
Bar Standards Board	**Respondent**

- -
- -

Ian Stern QC and Timothy Kendall (instructed by **Weightmans LLP**) for the **Appellant**
James Counsell QC (instructed by **Bar Standards Board**) for the **Respondent**

Hearing date: 12 December 2017

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Approved Judgment

Lady Justice Sharp:

Introduction

1. This is the judgment of the Court.

2. The appellant, a practising barrister appeals against the finding of guilt made by the Disciplinary Tribunal of the Council of the Inns of Court (the Tribunal) on 12 May 2017 in respect of one charge of professional misconduct. There is no appeal against sanction. The Tribunal formally reprimanded the appellant and ordered that he took all reasonable steps to attend an 'Advocacy and The Vulnerable' training course for barristers.

3. For the reasons that follow we would dismiss the appeal.

Background

4. There were two charges of professional misconduct against the appellant.

5. The charges arose from a complaint about the appellant made to the Bar Standards Board (the BSB), by the mother (M) of a victim of sexual assault (B). The sexual assault took place in January 2013 when B was 16 years old. The perpetrator of the assault was the victim's step-father (the defendant) who was married to M at the time.

6. The appellant did not represent the defendant at his trial for that assault, but advised on appeal, and represented him before the Court of Appeal, Criminal Division (the CACD), at his renewed application for permission to appeal against conviction and sentence. The application for permission to appeal against conviction was refused. The court gave its reasons for this, and then heard the application for permission to appeal against sentence, which was also refused: see *R v SR* [2013] EWCA Crim. 1560. M's complaint concerned certain remarks made by the appellant during the course of the latter application, some of which were subsequently reported in the Press and picked up on social media.

7. Reporting restrictions were made by the CACD under section 1 of the Sexual Offences (Amendment) Act 1992; those restrictions continue to apply, including to any report of these proceedings. We have anonymised this judgment accordingly.

8. The defendant's trial took place at the Crown Court at Reading before HH Judge Cutts QC and a jury.

9. There were three counts on the indictment, each alleging sexual assault contrary to section 3(1) of the Sexual Offences Act 2003 (the 2003 Act). Count 1 alleged that on 24 December 2013, the defendant had sexually assaulted B by touching and kissing her without consent. Count 2 alleged that in January 2013, the defendant had sexually assaulted her by penetrating her vagina with his finger without consent. Count 3 alleged that in January 2013 he sexually assaulted her by touching her vagina with his finger without her consent. Count 3 was added to the indictment at the close of the evidence, by agreement, as an alternative to count 2, to cater for the possibility that the jury might be satisfied that the defendant touched B's vagina, but not satisfied that he penetrated her vagina.

10. It was the defence case that no such incidents as alleged by B had taken place; she was a troubled young girl, who would do anything to get rid of her step-father, whom she hated, including by making up these allegations. The defence applied for permission to cross examine B about certain matters pursuant to section 41 of the Youth Justice and Criminal Evidence Act 1999 (the section 41 Application). That application was refused. The defence was however permitted to cross-examine B about her consumption of alcohol (before and after the incident which led to the charges under Counts 2 and 3). This was said to be relevant to whether the defendant had assaulted B because if she was accustomed to alcohol, her tolerance of it may have made it less likely she was unable to resist an assault after drinking; and because, she would have been less likely to behave as she did on the day after the assault (allegedly laughing about being found asleep in the dog basket) if the defendant had assaulted her.

11. On 16 October 2014, the defendant was convicted on Count 3. The jury could not agree on counts 1 and 2 and were directed to enter verdicts of not guilty on those counts. On 11 December 2014 the defendant was sentenced to 2 years' imprisonment. He was placed on the Sex Offenders Register for 10 years. The judge also made a Sexual Offences Prevention Order (SOPO) for 5 years and imposed a restraining order preventing the defendant from contacting B.

12. The Sexual Offences Definitive Guideline (the Guideline) applied for the purpose of sentence. It was common ground that the offence fell into Category 2A of the Guideline for sexual assault. In relation to harm, this was a Category 2 offence, because there was touching of the naked genitalia. As for culpability, there were two factors which put it at the highest level of culpability, level A: use of alcohol on the victim to facilitate the offence, and abuse of trust. The commission of the offence by the defendant whilst under the influence of drink was an aggravating factor; it was a mitigating factor that he had no previous convictions. The custodial sentence imposed by the judge (2 years' imprisonment) represented the starting point for a Category 2A offence of sexual assault, where the category range for that offence is 1 to 4 years custody.

13. This was a serious offence of its kind for the reasons given by the judge in her sentencing remarks:

> "…when B, the complainant in this case, was about seven-years of age you formed a relationship with her mother and moved in with her. You subsequently married. It is clear on the evidence I heard during the course of the trial that virtually from the outset you and B did not get on.
>
> You and your wife went on to have another daughter and the decision was made that as your wife was the major wage earner she would continue to work whilst you took on the running of the house and the care of the children. It is undoubtedly true that M worked long hours in London and that meant you had the care of the children for much of the time. It seems to me that placed a particular responsibility upon your shoulders as the primary carer of each.
>
> I am satisfied, on the evidence that I heard, that as B grew older and began to physically mature you became sexually attracted to her. I heard in the course of the

trial how you would make inappropriate comments to her and take opportunities to be physically close to and rub yourself against her.

In the early part of 2013, when B was sixteen, when your wife had gone to bed, you stayed up drinking your home-made wine. You gave this also to B, albeit she was only sixteen, in sufficient quantity for her to become very drunk indeed. This was a school night. Given the difficult relationship between you and what happened next, I can think of no reason for you to have done that other than to enable you to sexually abuse, assault her in the way that you then did.

When she was overcome with drink and asleep on the sofa you touched her vagina under her knickers, saying to her: "You're teasing me now. You've got such a lovely body, why are you doing this to me?" She was aware of what you were doing but froze. You then stopped and she slept on the sofa.

B was your step-daughter and it goes without saying that this was a significant and gross breach of trust.

I agree with both counsel in this case that this offence falls within Category 2A of the Sentencing Guidelines. You touched her naked genitalia; you used alcohol to facilitate the offence and this was a gross abuse of her trust.

The case is aggravated by the fact B felt that she had to leave the family home. This was in part because of your difficult relationship, I accept that, but this offence played a significant part in that decision.

I had an opportunity to read her victim personal statement. I am not going to repeat it here today. It is plain your action had a significant impact upon her; her state of mind and her ability to cope with day-to-day life.

I take into account all that I have heard about you. You are forty-six years of age and of previous good character. I accept that you are close to your youngest daughter who will, undoubtedly, be affected by any custodial sentence. Nonetheless, this offence, in my view, is so serious that only a custodial sentence can be justified.

I do not consider that suspending such a sentence would meet the justice of this case.

The sentence of the court is one of two-years' imprisonment. You will not serve all of that time in custody, you will be released after half, whereupon you will remain on licence. If you re-offend or otherwise misbehave, then you will be recalled to serve the rest of that time.

You will be on the sex offenders' register for a period of ten years.

The prosecution invite me to make a Sexual Offences Prevention Order in this case. That is opposed. It is right that the author of the pre-sentence report assesses you as posing a low risk of reconviction within two-years. However, in the view of the author of that report your risk of reconviction would rise were you to have unsupervised with female children. The author has assessed you as posing a medium risk of causing serious harm to children, based on the nature of this matter and that

would be lowered if you were to take responsibility for your behaviour and also not have unsupervised contact with female children.

It is on the basis of that that I am going to make a Sexual Offences Prevention Order in this case. The order is that you are not to have any unsupervised (and I underline that) unsupervised contact or communication of any kind with any female child under the age of sixteen years, other than inadvertent contact, which is unavoidable in the course of lawful daily life or contact, communication with the consent of the child's parent or guardian who has full knowledge of your conviction and with the approval of the local children's social care and police public protection unit for that area.

Also, from living in the same household as any female under the age of sixteen, unless with the express approval of social services for the area. To use your counsel's example, this would not prevent you attending the party of a friend of R's [the seven-year-old daughter of the defendant and M] provided there were other adults there because it would not be unsupervised contact.

The Sexual Offences Prevention Order is in place for a period of five-years. I also impose a restraining order upon you prohibiting you from contacting, directly or indirectly, B until further order…"

The defendant's appeal

14. The appellant, not trial counsel as we have said, advised there was merit in an appeal against both conviction and sentence. No criticism was made in the Advice on appeal (or at the subsequent hearing for that matter) of the judge's summing up, or the sentencing remarks, including the factual basis taken by the judge for the purposes of sentence.

15. The principal ground of appeal against conviction was that the jury were put under undue pressure to deliver a guilty verdict. A second ground, referred to in the judgment of the CACD as a technicality, was not pursued orally at the renewal hearing. There were two grounds of appeal against sentence. First, the sentence of 2 years' imprisonment was manifestly excessive because the judge was sentencing a man of otherwise good character, in whom the Court could, or ought to have been satisfied, there was no, or a low risk of reoffending. Secondly, the imposition of a SOPO was unwarranted because one was not necessary to protect the public from serious harm.

16. The single judge refused leave to appeal and the appellant was instructed to renew both applications. On 31 July 2015, the appellant appeared at the renewal hearing before the CACD (Davis LJ, Lang and Lewis JJ). As is usual, the Crown was not represented at the hearing. Members of the defendant's family were present in Court, sitting behind the appellant. Unknown to the appellant, the mother of the victim, M, was also present in Court.

17. The remarks by the appellant about which complaint is made, are highlighted below. We attach in an Appendix, a longer extract, to put these remarks into a fuller context.

> "MR GODFREY: The difficulty is that B, the complainant, had stated more than once an absolute hatred for her step-father. She had stated, and to be fair the reason there is no criticism of the learned judge's summing up is because it was all in there, that she would do anything to get him out of her life and so on, and this is not the case of a man taking advantage sexually of a child. This was a girl accustomed to taking alcohol, who previously, as I think the court will have read, made a rape allegation against two boys that was then withdrawn. This was not a young innocent girl, and I say it with all due respect. This was a very, very difficult family situation in which the mother was out because she was capable of earning more money. She was the breadwinner. She went off early in the morning, she came back late at night, and [the defendant] was looking after not merely his own child but the step-daughter as well. Now, I cannot go behind the jury's verdict; the court has upheld the conviction. I cannot go behind the verdict and I do not seek to. It would be wrong to do so.
>
> MR JUSTICE LEWIS: He was looking after a child and he gave her alcohol and then abused her.
>
> MR GODFREY: My Lord, I do not think it is a case of – this girl was not unaccustomed to drinking. The family –
>
> LORD JUSTICE DAVIS: I must say, Mr Godfrey, I think attacking the victim is not necessarily going to be a very profitable exercise for you. "

The complaint against the appellant

18. M's complaint to the BSB was that the appellant had implied the assault was her 16-year-old daughter's fault; and his remarks were then reported in the local press and on social media, causing B very considerable distress. For example, one local newspaper report of the hearing before the CACD recorded (accurately) the appellant's contention that "This was not a young and innocent girl" and she was "not unaccustomed to drinking."

19. The appellant's written response to the complaint was as follows:

> "I was instructed to advise and settle grounds of appeal against conviction and sentence by [the defendant] … convicted of the lesser of 2 counts of sexual assault (a touching) of his 16 year old step-daughter…
>
> The Court of Appeal first heard submissions about the safety of the conviction which, after retiring, they rejected. In the submissions as to sentence which followed it is correct (to the best of my recollection) that I referred to the hopeless state of the marriage, and to the fact that the daughter hated her step-father and had stated that she would do anything to destroy him. This had all been aired at length at the trial …and formed part of the trial judge's summing up. Similarly, evidence had been given about the daughter's consumption of alcohol, …The trial judge had also ruled upon the admissibility of a previous complaint of rape made by the daughter against a boy, that she subsequently withdrew.

Anything that I said in the Court of Appeal was said upon express instructions, and had previously been said by counsel then representing [the defendant]. I had a set of the transcripts of the trial which I had carefully read.

I envisage my first duty to be to my client, to pursue fearlessly, properly judged submissions on his behalf in the hope that they may benefit his case. I am not in the habit of making recklessly inaccurate or gratuitously offensive, remarks in any court hearing, and did not do so here.

The very unfortunate situation, aired at length at trial, was of a broken marriage, with mother and step-father living rather separate lives, and a step-daughter who was no stranger to sexual activity, who behaved badly, and who bore malice and hatred towards her step-father, who was the only 'parent' who tried to discipline her. It was a very sad case and it was plain, at court, that the intense dislike of one side of the family for the other had not mellowed.

My recollection at the conclusion of my submissions, was that the presiding Lord Justice was kind enough to say that I had said everything that I could, but that the application was refused.

I have been in practice for 45 years, 25 of them as a QC. I have never before been the subject of a complaint. I sincerely regret the fact that my submissions caused offence to the complainant or her daughter. I intended no offence. I was (and remain) unaware that the press reported any of the language that I used at the hearing."

20. The Courts and Legal Services Act 1990 designated the Bar Council as the authorised body for the profession. The BSB was set up under the Legal Services Act 2007 to act as the specialist regulator of barristers in England and Wales. Its regulatory objectives derive from the Legal Services Act, section (1). The BSB publishes the Bar Standards Handbook (the Handbook) which contains amongst other things, the Code of Conduct, comprising the Core Duties and rules which supplement the Core Duties. "Outcomes" and "Guidance" on the Code of Conduct are also published. After an investigation of a complaint, the Professional Conduct Committee of the BSB decides whether to dismiss or administer an administrative sanction (a fine or warning); or to direct that it form the subject of a charge to be heard by a Disciplinary Tribunal. The proceedings of the Tribunal are governed by the Disciplinary Tribunals Regulations 2014 (including that by Regulation rE143, the Tribunal must apply the criminal standard of proof). Regulations rE183 to 185 confer a right of appeal against conviction or sentence. CPR Part 52 applies to such appeals.

21. Amongst the Core Duties identified in the Handbook (2nd edition) are these:

"CD2: "You must act in the best interests of each client [CD2].

CD3: "You must act with honesty and integrity [CD3]"…

CD5: "You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession [CD5]…

rC15: "Your duty to act in the best interests of each client (CD2) …includes the following obligations: .1 you must promote fearlessly and by all proper and lawful means the client's best interests….3 you must do so without regard to any other person (whether to your professional client, employer or any other person);…[CD15]

rC16 Your duty to act in the best interests of each client is subject to your duty to the court (CD1) and to your obligations to act with honesty, and integrity (CD3) and to maintain your independence (CD4)"

22. Charges 1 and 2 against the appellant were as follows:

Charge 1

Statement of Offence: Professional Misconduct contrary to Core Duty 3 of the Bar Standards Handbook (2nd Edition)

Particulars of Offence: On 31/07/2015, during Mr Godfrey QC's submissions to the Court of Appeal in support of the appeal of Mr Godfrey's client against sentence (in respect of a conviction for an offence of sexual assault against his step-daughter (the victim)), Mr Godfrey QC made remarks against the victim which:

(a) Implied that the victim bore responsibility for the assault, and/or
(b) Were offensive and unnecessary

In doing so Mr Godfrey QC failed to act with integrity.

Charge 2

Statement of Offence: Professional Misconduct contrary to Core Duty 5 of the Bar Standards Handbook (2nd Edition)

Particulars of the Offence: On 31/07/2015, during Mr Godfrey QC's submissions to the Court of Appeal in support of the appeal of Mr Godfrey's client against sentence (in respect of a conviction for an offence of sexual assault against his step-daughter (the victim)), Mr Godfrey QC made remarks against the victim which:

(a) Implied that the victim bore responsibility for the assault, and/or
(b) Were offensive and unnecessary

In doing so Mr Godfrey QC behaved in a way which was likely to diminish the trust and confidence which the public places in the profession.

23. The Tribunal had before it a witness statement from M. The appellant represented himself at the hearing; and was cross-examined by Ms Suzanne McKie QC on behalf of the BSB. His case was that his remarks would not have been made had he not been pressed by the CACD; and merely set out the background to support the submission that an immediate custodial sentence and a lengthy SOPO was excessive and unnecessary, given that the offending had arisen in particular family circumstances,

which were unlikely to be repeated. The Tribunal gave its findings in a short judgment on the day of the hearing. Sanction was dealt with at a later hearing, for the purpose of which, the appellant provided character references.

24. The Tribunal found Charge 1 not proved. In respect of Charge 2 the Tribunal was satisfied that the remarks made by the appellant implied that the victim bore some responsibility for the assault and that the remarks were offensive and unnecessary in relation to the application for leave to appeal against sentence.

25. The Tribunal considered the appellant's explanation that in making his remarks he was attempting to reduce the sentence by painting a picture of the background generally and the victim in particular. The Tribunal did not find his explanation acceptable. The Tribunal found that an attack on a victim in these circumstances was likely to diminish the trust and confidence which the public places in the profession. The Tribunal found, by a majority, that the appellant's conduct amounted to professional misconduct in all of the circumstances.

26. In relation to sanction, the Tribunal found that the conduct which formed the basis of both charges was not premeditated, but arose in the course of the hearing and that the words complained of were not pursued after judicial intervention. The Tribunal also took into account the previous unblemished record of the appellant. In the circumstances of the case, the Tribunal was not sure that the appellant could accurately be described as failing to act with integrity but that this isolated, albeit serious, lapse in his hitherto unblemished career was more properly seen to be a breach of CD 5.

27. There are three Grounds of Appeal.

    i) Ground 1: the Tribunal was wrong to find CD 5 proved. The remarks complained of and which were the subject of the finding were arguably relevant to the application for leave to appeal against sentence and/or the imposition of the SOPO and therefore could not be unnecessary,

    ii) Ground 2: the Tribunal failed to give any or any adequate reasons for the finding of a breach of CD5 that the comments were unnecessary. They did not explain why:

        a) The explanation provided by the Appellant was "unacceptable" and/or;

        b) The comments were not arguably relevant to the appeal against sentence and/or the imposition of the SOPO.

    iii) Ground 3: Even if the Tribunal was right to have found a breach of CD5, in the circumstances of this case, the Tribunal was wrong to find that it amounted to professional misconduct given the circumstances in which the submissions were made and the Tribunal's conclusion that the breach was unintentional.

Discussion

28. In our view, the Tribunal was entitled to conclude that there had been a breach of CD5 in this case, for the reasons it gave and that it amounted to professional misconduct.

29. The bald and unvarnished facts were that this was a case of sexual assault in gross breach of trust by a step-father who touched his 16-year-old step-daughter's naked genitalia after plying her, deliberately, with home-made alcohol, until she was drunk and unable to resist, so he could molest her. This was the acknowledged position, at the time of sentence and post sentence, including at the application for permission to appeal. Moreover, on the factual findings made by the judge for the purposes of sentence, the assault did not come "out of the blue". It was preceded by the defendant's growing sexual attraction to his step-daughter as she matured physically, which had manifested itself in the unpleasant conduct described by the judge in her sentencing remarks (inappropriate comments to her, taking opportunities to be physically close to and rubbing himself against her) examples of which were given in B's evidence and outlined in the summing up.

30. Against that background, our view of the remarks made by the appellant is the same as that of the members of the CACD considering the defendant's application for permission to appeal against sentence. The remarks amounted to an attack on the victim, which were irrelevant, offensive and ought not to have been made.

"Not unaccustomed to alcohol" "not a young, innocent girl" "...made a rape allegation against two boys that was then withdrawn"

31. We take the issue of alcohol first. The defence were permitted to cross examine the victim about her consumption of alcohol on the ground that this it related to her credibility as a complainant, and whether or not the act of sexual assault had actually occurred. However, the fact that this issue may have had some (marginal) relevance at trial, did not mean it was relevant after verdict, or had any bearing on sentence.

32. Various arguments are advanced of arguable relevance on the appellant's behalf, but none are remotely convincing. It is suggested for example, by Mr Stern QC for the appellant, that it is more culpable to provide alcohol to someone who is a stranger to it because of what this could reveal about the perpetrator's intention; and that providing alcohol to someone who is accustomed to it might demonstrate an offence was more opportunistic than planned. This was not the purport of what was said to the CACD however. Further, where the defendant had deliberately got his 16-year-old step-daughter drunk so he could molest her (an acknowledged factor placing this offending at level A) the suggestion that B may have been accustomed to alcohol when drinking with her friends for example, or even with her step-father, could hardly reduce the defendant's culpability (Step 1 within the Guideline) or mitigate the seriousness of the offending (Step 3 within the Guideline). Still less could it ameliorate the harm the sexual assault caused to the victim. It was, in short, irrelevant.

33. In this connection, the transcript of the appellant's cross-examination before the Tribunal is very revealing, as Mr Counsell QC for the BSB says, since the appellant was unable, despite being pressed (and ultimately asked by the Chairman) to provide any justification for mentioning B's use of alcohol in relation to sentence, other than

that it was part of "the background" and had been in evidence at the trial. He was eventually reduced to suggesting that the fact that the step-daughter drank alcohol made it less likely that this defendant would commit further offences with anyone else, a point it is not easy to comprehend.

34. The appellant had even more difficulty in explaining to the Tribunal why he said B was *"Not a young innocent girl"* Mr Counsell QC asks rhetorically, if she was not innocent, of what was she guilty? When pressed about this matter, before the Tribunal the appellant said he meant: "she was not a girl who was not outgoing. She was not a girl who was immature for her age or anything of that kind." It was put to him that this was completely different from the word "innocent". The appellant accepted this, and that the word "innocent" was the wrong word to have used. Mr Counsell QC submits, and we agree, that this was not only the wrong word, it was gratuitously offensive when juxtaposed with the reference to a false rape allegation, and put forward as part of an explanation as to why the defendant was not a man "taking advantage sexually of a child". We do not accept the submission made by Mr Stern QC that what was said merely meant B was "not naïve", or that her innocence or otherwise was material to a reduction in the defendant's sentence. As Mr Counsell QC says, if all the appellant meant was she was outgoing and acted her age, then this is what he should have said, albeit it would be hard to see why this should have featured in the submissions made on sentence to the CACD.

35. We turn next to the false rape allegation. In the section 41 Application the defence applied (in private) for permission to introduce evidence, based on the defendant's belief that his step-daughter had made an allegation of rape that was then withdrawn. That application was refused, as we have said. The defendant's allegation about B was not therefore adduced in evidence at the trial. We have been provided with a transcript of the section 41 Application. It is important to note that in his evidence to the Tribunal the appellant said he had not seen the section 41 Application when he made the remark to the Court. Further, he accepted there had been no evidence that the step-daughter had made such an allegation or withdrawn it. He said that with the benefit of hindsight, he would rather he had not said what he did, but went on to say that it is not unusual to wish one had said something differently, or not at all, and his intention was (merely) to seek to reduce his client's sentence and overturn the SOPO.

36. Mr Stern QC submits the issue of harm was central to the sentencing exercise, and to the considerations of the CACD; and the appellant's submission was arguably relevant to that issue ("the appellant was entitled to draw the court's attention to such material as, could in his view, indicate where the level of harm could be fixed."). Further, the fact that the matter had not been dealt with in evidence, did not preclude reference being made to it for the purposes of sentence ("The fact that the evidence was not admitted at trial, did not mean it could not be arguably relevant for the purposes of sentence." "It was not the defendant's fault that the matter had not been put to the victim and that would not deprive him from using the material." "The application for admissibility was put on a different basis than its use before the Court of Appeal.").

37. In our judgment, these submissions are misconceived. The defendant's (contentious) allegation that B had made false allegations of rape formed no part of the evidence at trial. The fact that the section 41 Application (heard in private) may have been dismissed in open court is nothing to the point. The allegation was not mentioned in

the grounds of appeal against sentence, still less was it made the subject of an application to admit fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968, something that would have been necessary had the defendant wished to put it before the CACD as evidence material to sentence, notwithstanding the judge's exclusionary ruling. See *R v Rogers* [2016] EWCA Crim. 801, 2 Cr. App R (S) 36 (Lord Chief Justice, Lord Thomas of Cwmgiedd, Hallett LJ and Andrews J) where it was held that section 23 of the Criminal Appeal Act 1968 is of general application to all sentencing appeals, except for information updating that placed before the sentencing judge, to which section 23 does not apply.

38. There was therefore no evidence before the CACD that B had made a false allegation of rape, merely assertion. In his response to M's complaint, and in his evidence before the Tribunal, the appellant relied on the fact that what he said to the Court of Appeal was said upon his client's express instructions. However, an advocate appearing before the CACD is in no different or better position in this respect to that of an advocate appearing at trial. An advocate cannot give evidence or make assertions about facts that have not been adduced in evidence, nor is the advocate the client's mouthpiece. That is inconsistent with the proper function of an advocate: see *R v Farooqi* [2013] EWCA Crim. 1649 at paras 108 and 111.

39. Further, it is no more appropriate to make derogatory and irrelevant assertions about third parties in the appellate process, than it would be at the time of sentence (where there is a well-established procedure of notification, and then challenge by the Crown to any assertion in mitigation which is derogatory to a person's character, and which is either false or irrelevant to proper sentencing considerations: see Attorney General's Guidelines on Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise [revised 2009] at paras E1 - E3 and the Bar Council's Code of Conduct at para 11.2 and "Written Standards for the Conduct of Professional Work - Standards Applicable to Criminal Work" at paragraph 10.8 (e)). See also section 58 to 61 of the Criminal Procedure and Investigations Act 1996.

40. Advocates who simply make irrelevant submissions to the CACD by reference to marginal matters which are not in evidence, might be subject to a reproof from the court before whom they appear, but, we apprehend, they are unlikely to find themselves charged with professional misconduct. However, what occurred in this case clearly crossed the line between what was proper and what was not. The appellant made a particularly grave and derogatory allegation about a 16-year-old girl who had been sexually assaulted by a family member. He did so, as he accepted before the Tribunal, when he did not have the facts available to him that would have enabled him to form a view on whether there was any substance to the allegation or not, and when the court below, after a hearing in private, had directed the particular allegation could not be introduced into evidence. The allegation, mere assertion therefore, by the perpetrator of the assault, was, nonetheless presented in open court as though it was an established fact, at a point in the proceedings when the victim of the sexual assault had no means to defend herself against it.

41. Taken together, as they were made together, as the Tribunal found, the appellant's submissions to the CACD conveyed the unfortunate impression that B bore some responsibility for what had occurred (Davis LJ's intervention at the time was that he could not go behind the jury's verdict) and that the defendant was entitled to a more lenient sentence than the norm, because B was a girl of a "certain sort" which

diminished the harm such an assault would otherwise have caused her. The latter suggestion was not the result of a clumsy use of language.

42. In the course of his cross-examination before the Tribunal, the appellant said this:

"Mr Godfrey: What I am saying is that in relation to this girl, with this lifestyle, and this degree of consumption of alcohol with her friends and all the rest of it, the harm that would normally flow from a sexual assault is less. And

Q: That is really your evidence Mr Godfrey is it?

A: That is my evidence.

Q: That a 16-year-old girl who consumes alcohol cannot be at the same level of victim as someone who does not?

A: No, no, everyone is a victim. This was the most minor of sexual assaults, right. It was the least offence in the book. It was a touching.

Q. But touching on the genitalia Mr Godfrey." …

"Mr Godfrey: No. My intention was to show that this victim had not suffered from that assault in the way that other victims might have. It was in that sense calling for a less serious disposal than that which the judge had decided to impose. This is the basis on which, in many cases, you advance grounds of appeal against sentence. I took the view, rightly or wrongly, that I was entitled to say this because of the sort of girl I was told she was.

Ms McKie: You appear to be saying that she was a girl of a certain sort, is that right?

A: Yes.

Q: A prejudiced view about the impact of sexual assault on certain sorts of girls.

A: No, no, no no, that is –

Q: You are saying that the impact was less on her than it would have been on others.

A: I am saying that she, bearing in mind all of the background circumstances, her personality, her temper, her alcohol consumption and all the rest of it, was not in the same category as someone who was a truly innocent young girl."

43. Vulnerability of the victim is certainly a factor which can *aggravate* the seriousness of any offence; and the particular vulnerability of the victim of a sexual assault due to their personal circumstances is a factor specified in the Guideline as one which places the offending into Category 2 when assessing harm. However, particular vulnerability was not a factor putting this offence into Category 2, and the appellant's remarks were not directed to rebutting a case that it was. Absence of aggravation is not the same as mitigation. Whatever the defendant's own views may have been, the particular aspersions he wished to cast on B's conduct and character could hardly lessen the

seriousness of his offending, by reference to his conduct or the harm he had caused B by sexually assaulting her. See further *Attorney General's Reference No 85 of 2014; R v Ackland* [2014] EWCA Crim. 2088; [2015] 1 Cr. App. R (S) 14 at para 28.

44. In our view, the Tribunal's reasoning in support of its conclusion that there was a breach of CD 5 was perfectly adequate. The Tribunal followed the arguments made at the hearing very carefully. In its decision, the Tribunal made it plain that it did not accept the appellant's explanation for the language he had used, explaining why it rejected that explanation, and why it found the charge proved. Mr Counsell QC submits, correctly in our view, that the appellant can have no complaint about how the Tribunal reached the decision or about the reasons given: the word "unacceptable" was used because the appellant's remarks were offensive, unnecessary and implied responsibility on the part of B for the reasons given in its decision. It is true that the Tribunal made no reference to the Guideline. Nor for that matter did the appellant or the BSB at any stage of the disciplinary hearing. There was no need to do so. The Guideline formed the accepted backdrop to the hearing. It was referred to extensively in the transcripts of the hearing before the CACD, in the judge's sentencing remarks and in the appellant's advice on appeal, all of which were before the Tribunal. The Tribunal obviously had well in mind the potential relevance of the appellant's remarks to the issue of the degree of harm suffered by the victim and rightly concluded that there was no relevance; this was an issue that turned essentially on the facts, rather than on any discrete point on the Guideline.

45. We turn finally to whether this particular breach of CD 5 was so serious as to amount to professional misconduct. Professional misconduct is defined by the Handbook as "a breach of this Handbook…which is not appropriate for disposal by way of the imposition of administrative sanctions, pursuant to Section 5.A".

46. On behalf of the appellant it is submitted that even if a breach of CD 5 was properly found, the Tribunal was wrong to find (as it did by a majority) that the breach amounted to professional misconduct given the circumstances in which the submissions were made to the CACD and the appellant's lengthy and otherwise unblemished legal career. At the time of the Tribunal proceedings, in April 2017, the appellant had been in practice for 45 years and a Queen's Counsel for 25 years, and was of impeccable character with no previous findings or complaints made against him. Further, to quote the Tribunal's findings in relation to his sentence, it was a single breach, which was not premeditated, it arose in the heat of the moment and was not pursued after judicial intervention. The comments were made only when pressed by the court. It was a single and momentary error. Mr Stern QC submits in those circumstances, *Walker v Bar Standards Board* (19th September 2013) provides an example of the proper approach on appeal in circumstances such as these.

47. *Walker* was an appeal to the Visitors to the Inns of Court from the Disciplinary Tribunal. Mr Walker, the appellant in that case, was a senior junior, prosecuting at a criminal trial. In the course of his cross-examination of a defence DNA expert, the expert said he had left his previous employers for competitive reasons. Mr Walker then suggested he had been stealing information. There was no basis for that suggestion (Mr Walker had been told informally by his own expert that the defence expert had left his employment under something of a cloud). Defence counsel intervened. In the absence of the jury, Mr Walker immediately accepted he had overstepped the mark. When the jury returned, he withdrew the allegation and

apologised to the witness. After court, he repeated the apology to the witness in private. It was an isolated incident in an otherwise unblemished career of some length. The Tribunal considered that the case was "very close to the line" but found that what happened should not have occurred with someone of the barrister's seniority and experience, and that professional misconduct was made out.

48. The issue for the Visitors was whether Mr Walker's single and momentary error was sufficiently serious to be characterised as professional misconduct (under para 901.7 of the Code of Conduct (8th edition) then in force). The Visitors said that the concept of professional misconduct carries resounding overtones of seriousness, reprehensible conduct, which cannot extend to the trivial: see para 16. *Mens rea* was not an exclusive test of whether there was professional misconduct: the essential question, was, whether the misconduct was particularly grave: see paras 30-32.

49. Allowing the appeal, Sir Anthony May said, at paragraph 37:

"We are unanimously of the view that Mr Walker's lapse - though a clear breach of paragraphs 708 (j), was not so serious as to require the characterisation of professional misconduct… We do not consider that the lapse was trivial; far from it, not least because of its effect on [the witness]. But we do consider it was a momentary and uncharacteristic lapse which did not cross the line of seriousness which in the end is a matter of judgement. The Tribunal thought it was a border line case but we are in fact, each of us, of the view that in the end it really is not…there was no forethought in this essentially inadvertent question which looks as if it came out of a general, but as it turned out, erroneous idea of Mr Walker that the abrupt evidence of dismissal chimed with whatever he made of his general instructions"

50. Mr Counsell QC submits that *Walker* was a very different case. The barrister promptly agreed that he had overstepped the mark and immediately and publicly withdrew the suggestion of dishonesty. It was a classic example of something inappropriate being said in the heat of the moment and, on reflection, being withdrawn. By contrast, the appellant had the opportunity to plan his submissions and should have anticipated questioning from the Court. He should have been aware that the remarks were wholly inappropriate and the likely effect on a listener or reader if his comments were reported in the press or on the Internet. The remarks could not be rebutted. In relation to the rape allegation the remarks were not even based on reliable information. The remarks were not retracted, swiftly or at all. The remark about alcohol was repeated in an attempt to justify it. The hearing was in public and it was likely that the remarks would find their way back to the victim and her family. Anyone reading the remarks would be likely to suppose the victim bore some responsibility for what had happened to her. Before the Tribunal, the appellant sought to justify the remarks, to the extent that the Tribunal expressed concern about the appellant's lack of insight. It is submitted, in short, that although barristers must not feel constrained in what they say in representing their lay clients' interests, there are boundaries beyond which advocates should not go, even if instructed to do so. This case clearly went well beyond the limits of propriety and regrettably amounted to professional misconduct.

51. We have considered these submissions carefully.

52. The issue of sexual offending and the vulnerability of complainants during the criminal process is an extremely sensitive one; so much so, that Parliament has legislated by section 41 of the Youth Justice and Criminal Evidence Act 1999 to place special restrictions on evidence or questions that may be asked about a complainant's sexual history. This legislation ensures amongst other things, that in such cases, no question may be asked in cross-examination on behalf of an accused about any sexual behaviour of the complainant except with the leave of the court (section 41(1)); and that no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness (section 41(4)). These provisions do not only apply to proceedings at trial, they apply to any hearing held between conviction and sentencing for the purpose of determining matters relevant to the court's decision as to how the accused is to be dealt with, and to the hearing of an appeal (section 42(3)(d) and (e)). Further by section 43(1), applications to introduce such evidence are heard in private.

53. Such sensitivities were precisely engaged in this case with the added feature that this was a sexual assault within a family. The victim (as she indubitably was by the time of the hearing before the CACD) was only 16-years-old, and had been sexually assaulted in the manner described by her step-father who had been in *loco parentis* from when B was about seven years old. Having regard to these features and to those identified in the judge's sentencing remarks to which we have already drawn attention, great care was required – in particular, if we may so, by an advocate who had not appeared at the trial – as to what it was, or was not, appropriate to say about the victim. This was not a case of clumsy use of language, or a submission made and immediately regretted. It is true that the appellant's remarks were made in response to questioning from the court; but such questioning was to be expected in the light of what the appellant had by then said, or hinted at. Nothing that took place during the hearing excused the appellant's remarks, nor did his apparent failure to appreciate the limits of what he was permitted to do.

54. The case of *Walker* bears only a superficial resemblance to the present case. In *Walker* the credibility of an expert witness was being explored legitimately but clumsily, with an unjustified allegation of dishonesty made in the heat of the moment. In the present case the appellant made an attack on the character of the victim of a serious sexual offence in a way which could not possibly advance the prospects of a successful appeal against sentence. In *Walker* the Tribunal itself considered that the case was very close to the line. Here, albeit it by a majority, the Tribunal reached the clear conclusion that the breach passed the threshold of seriousness required to establish professional misconduct. The Tribunal concluded that an attack on a victim in these circumstances was likely to diminish the trust and confidence which the public places in the profession. Like the Tribunal, we are conscious of the appellant's lengthy and otherwise unblemished legal career. However, regrettably, we are satisfied that the Tribunal was entitled, indeed right to reach the conclusions that it did.

55. Accordingly, this appeal must be dismissed.

Appendix

LORD JUSTICE DAVIS: Can we turn to sentence?

MR GODFREY: My Lord, please. [The defendant] had served now a sentence of almost eight months' imprisonment. In other words, the equivalent of 16 months. He, as your Lordship and the court knows, is a man of previous good character, not alleged by the Crown to have been a paedophile, not alleged by the Crown to have particular sexual interest in children or anything of that kind, and the court knows – I need not recite it in open court – the history, which was unfortunate. In that situation, in my respectful submission, although, and there is no dispute that this was a category 2 offence in relation to section 3, where the category range in terms of sentence was one to four years' custody with a starting point of two years, the learned judge in all the circumstances imposed a sentence of two years which was manifestly excessive. The questions that the guidelines require the judge to ask are, has the custody threshold been passed? The answer to that, I would submit, is probably yes. If so, is it unavoidable that a custodial sentence be imposed? My submission is that it was not unavoidable. It was perfectly possible and proper for the court to avoid the custodial sentence or, if minded to give a custodial sentence, to suspend it. There was no risk here of any on-going problem. The girl's mother and [the defendant] were in the process of getting divorced and have got divorced, and it is not as if [the defendant] was anything other than a man of hitherto good character, a man who had excellent character references that were placed before the court, and in my submission when it is not alleged that this is a case who is sexually deviant in any way or has any kind of paedophile tendencies, the necessities for an immediate sentence of two years' imprisonment is not [made] out.

LORD JUSTICE DAVIS: Why should there be any significant departure from the starting point which the guidelines had indicated? Because not only was this, on the jury's verdict, a bad case of its kind, it was accompanied by the use of alcohol.

MR GODFREY: My Lord, it is correct that –

LORD JUSTICE DAVIS: And there was mitigation, particularly he had no previous convictions of any kind, but as against that alcohol had been used, so why was the judge disentitled from taking the starting point which the sentencing guidelines had indicated as appropriate for cases of its kind?

MR GODFREY: My Lord, it is a starting point, and what is submitted is this. It is a starting point for the entire category of cases of this kind, which frequently involves people who, for one reason for another, are sexually attracted to children. The girl in this case was over 16 at the time. The circumstances, the home life, the matrimonial history the court is aware of. This man does not pose any kind of threat to society in any normal sense whatsoever and therefore the matter has to be, in my submission, effectively purely punitive. It is not a case of rehabilitation or anything of that sort. The circumstances were such that there was no risk whatsoever in reality of this or anything like it ever happening again. [The defendant] has a daughter of his own with his ex-wife, [M]; he has two I think by now teenage children by a former or his first wife, all of whom get on perfectly well and there has never been the slightest hint of any difficulty.

LORD JUSTICE DAVIS: That does not seem to have been – I understand the point, but it does not seem to have been the view of the pre-sentence report which wanted conditions, if there were to be a suspended sentence, to be imposed, and indeed that supported the making of a Sex Offenders Prevention Order, and that is an experienced probation officer.

MR GODFREY: Yes, but your Lordship knows that they go through set procedures in cases of this kind.

LORD JUSTICE DAVIS: Indeed they do.

MR GODFREY: It is very difficult, I suspect, for a probation officer in these cases to say "we do not require anything" because they would be criticised something happened and they had not sought these requirements in their report.

LORD JUSTICE DAVIS: I do not think one can just so swiftly disregard the professional assessment of a probation service, and it is quite striking that not only they support the making of the Sexual Offences Prevention Order, but in the alternative, if there were to be a suspended sentence, they wanted a prohibited activity requirement limiting his contact to female children under the age of 16, and I think it is unjust of the probation service simply to say simply to protect themselves from any future criticism.

MR GODFREY: But, my Lord, in a situation where the Crown do not allege any kind of paedophilia, where there has never been any suggestion of any abnormal -

LORD JUSTICE DAVIS: But your point is that this was a one-off matter in a very particular dynamic, a very unfortunate between step-parent and child.

MR GODFREY: A very, very sad dynamic. Where there had been not the slightest indication of him being anything other than an excellent father to his other children and that this step-child relationship, for reasons that it does not help to get into or try to analyse, was very unfortunate.

MRS JUSTICE LANG: I just do not understand the logic of your submission really, because obviously many people have difficult family relationships and the step-child one is a classic example where difficulties can arise and I am sympathetic to both parties in that situation, but the vast majority of people do not then commit criminal sexual offence against the child. You know, you are almost sort of discounting that when you say he is not committing paedophilia or anything. You are putting labels on – he has been convicted of conduct which was sexual assault on a 16-year-old girl.

MR GODFREY: My Lady, I of course accept that, as I must, but what I am saying is, in circumstances where an offence occurs and the cause of the offence is indicated to be the particular very sad, very pressurised circumstances of the home life, as opposed to a tendency towards sexual depravity or paedophilia generally, this man –

MRS JUSTICE LANG: But the judge said in her sentencing remarks, she referred, did she not, to the fact that as the victim became more physically mature and older that was inappropriate remarks and getting too close to her, so whilst clearly there was real tension between them the evidence also indicated a sexual interest in her.

MR GODFREY: The difficulty is that B, the complainant, had stated more than once an absolute hatred for her step-father. She had stated, and to be fair the reason there is no criticism of the learned judge's summing up is because it was all in there, that she would do anything to get him out of her life and so on, and this is not the case of a man taking advantage sexually of a child. This was a girl accustomed to taking alcohol, who previously, as I think the court will have read, made a rape allegation against two boys that was then withdrawn. This was not a young innocent girl, and I say it with all due respect. This way a very, very difficult family situation in which the mother was out because she was capable of earning more money. She was the breadwinner. She went off early in the morning, she came back late at night, and [the defendant] was looking after not merely his own child but the step-daughter as well. Now, I cannot go behind the jury's verdict; the court has upheld the conviction. I cannot go behind the verdict and I do not seek to. It would be wrong to do so.

MR JUSTICE LEWIS: He was looking after a child and he gave her alcohol and then abused her.

MR GODFREY: My Lord, I do not think it is a case of – this girl was not unaccustomed to drinking. The family –

LORD JUSTICE DAVIS: I must say, Mr Godfrey, I think attacking the victim is not necessarily going to be a very profitable exercise for you.

MR GODFREY: My Lord, I do not seek to. I am simply saying that there was alcohol made at home.

LORD JUSTICE DAVIS: And he supplied it.

MR GODFREY: He supplied it.

MRS JUSTICE LANG: To excess.

LORD JUSTICE DAVIS: I am a little surprised you are going down this particular route. I can understand you are submitting maybe treating it as a one-off incident –

MR GODFREY: Indeed.

LORD JUSTICE DAVIS: But going down this particular road, I do not know to what extent you are advantaging your client's case. It may reflect strongly held views of people, but I am afraid cannot, will not go behind the jury verdict.

MR GODFREY: I entirely respect that, my Lord, and I am sorry think that I have tended towards a bad point.

LORD JUSTICE DAVIS: No, Mr Godfrey, we are not unappreciative of what we suspect your background –

MR GODFREY: My Lord, what I am saying is this. Where there is no indication of a likelihood of reoffending, the matter in terms of sentencing should be realistically purely punitive. Other sentencing requirements are not indicated. Two years' immediate

imprisonment for a man of good character in the particular circumstances of this case, in my submission, is manifestly excessive.

LORD JUSTICE DAVIS: So does it come to this, you say that two years as a custodial term is too long; further the sentence should have been suspended if it was to be custody; and, further, the sentence should have been suspended if it was to be custody; and, further or alternatively, again, there should have been no Sexual Offences Prevention Order?

MR GODFREY: My Lord, I do.

LORD JUSTICE DAVIS: So you take those three strands?

MR GODFREY: I do. The Sexual Offences Prevention Order was unnecessary, given that he would automatically be on the Sex Offenders Register and the other provisions in relation to these matters would apply.

LORD JUSTICE DAVIS: The statutory language being that the court must be satisfied that it is necessary.

MR GODFREY: Exactly so, and all the indications here is that this was a one-off out of character conviction, that there was no reason to believe that anything like it would ever happen again.

MRS JUSTICE LANG: Those are not all the indications, because the PSR is expressing on more than one occasion the concern about on-going unsupervised conduct with young females, which is (over speaking).

MR GODFREY: My Lady, what I tried to say before, obviously rather inadequately, was that of course the probation service have to make provision for possible things that may happen, and they have to warn against what might happen.

MRS JUSTICE LANG: Yes, they are dealing in risk, not certainty.

MR GODFREY: Indeed.

MRS JUSTICE LANG: But how can you submit that it is a certainty, that it is a one-off, which will never repeat itself?

MRS JUSTICE LANG: You cannot.

LORD JUSTICE DAVIS: Of course not.

MR GODFREY: I would be foolish to try to do so. What I can say is that all the indications are that this was an isolated incident. He is a man of good character. There has never been the slightest problem with his own children or with the daughters of anybody else in the world. The fact is it therefore gives the impression of being a one-off and, if it is, a two-year –

LORD JUSTICE DAVIS: If it is, then there is no other circumstance, like the finding of child pornography or things like that, which so often happens in these cases, apart from previous convictions it is not going to happen?

MR GODFREY: Absolutely.

LORD JUSTICE DAVIS: Right, well, I think we understand the points. Really you are saying the judge should not have accepted what the pre-sentence report – because the judge really based herself on what the pre-sentence report had said – and you are saying she was wrong to do so.

MR GODFREY: I say that a two-year immediate sentence is excessive.

LORD JUSTICE DAVIS: We understand that. You also say it should have been suspended.

MR GODFREY: Even in relationship to the Sexual Offences Prevention Order I submit that there was not sufficient basis –

LORD JUSTICE DAVIS: For concluding it is necessary to make such an order.

MRS JUSTICE LANG: I think another point that was raised, although you have not mentioned it today, is that B was 16 at the time and therefore an order targeted at under 16s is irrelevant because this is not an under 16 case.

MR GODFREY: That is so. I thought I had mentioned it, that the young lady was over 16, but really the category that the Sexual Offences Protection Order is aimed at protecting is not the category that was indicated as in any way at risk.

MRS JUSTICE LANG: Against that, the judge in his sentencing remarks obviously based on the evidence that does describe the sort of pre-section 16 history, as I have just related to you. B was living with him from about age seven and the applicant had appeared to become sexually physically attracted to her as she grew older and so there was a history leading up to the commission of the offence which did occur when she was 16 but undoubtedly, from what the judge is saying, that process of him becoming sexually attracted to her and making inappropriate comments and so on had occurred before she was 16.

MR GODFREY: But there was never any sexual assault of any kind.

MRS JUSTICE LANG: Before the January 2013.

LORD JUSTICE DAVIS: I think we understand the points you have made, Mr Godfrey. Is there anything else?

MR GODFREY: I think it would be better if I (inaudible).

LORD JUSTICE DAVIS: Thank you. We will rise again.

(Court rise)