Case No: 200500805 B4

Neutral Citation Number: [2006] EWCA Crim 2625
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
His Honour Judge Scott
The Crown Court at Leeds
T20047187

Royal Courts of Justice
Strand, London, WC2A 2LL

31st October 2006

Before :

THE RIGHT HONOURABLE LORD JUSTICE HOOPER
THE HONOURABLE MR JUSTICE AIKENS
and
THE HONOURABLE MR JUSTICE LLOYD JONES

- -

Between :

ANVER DAUD SHEIKH	**Appellant**
- and -	
THE CROWN	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Ltd
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr P. Cosgrove QC and Mr M. Barlow for the Appellant
Mr J. Goose QC for the Respondent

- -

Judgment

LORD JUSTICE HOOPER:

1. At the conclusion of the oral hearing we announced our decision that the appeal against conviction succeeded. A retrial was not sought because, in particular, of the time which the appellant had spent in custody.

2. On 21st January 2005 in the Crown Court at Leeds before H.H.J. Scott and a jury the appellant Anver Daud Sheikh (now aged 56) was convicted, following a re-trial, of indecent assault upon a male (counts 1 and 3) and buggery (counts 2 and 4), all verdicts being by majority of 11 to 1. The offences had allegedly been committed in 1980 when the appellant was aged 30.

3. The appellant had previously been convicted of these offences in May 2002. Those convictions were quashed by the Full Court on 5th February 2004. He appeals against conviction with leave of the Full Court granted on 4th May 2006.

4. Between September 1979 and August 1980 the appellant, known then as Mr Anver, was employed as a housemaster of House A at the St Camillus Community Home (the "Home"). The appellant lived with his wife and child in staff accommodation within the House.

5. House B was attached to House A and the appellant, like other members of the staff, had a pass key enabling him to enter House B. There were two other houses, one of which was closed at the time. The dormitories in the houses had four beds but, according to a witness, Mr Agnew, the occupancy was not more than three at a time. It was established that there was a night watchman based in House B whose duty it was to patrol the houses at night. It was not the duty of house masters to supervise at night.

6. Counts 1 and 2 alleged one incident of indecent assault and buggery in August 1980, the victim being MG, born on 14 November 1966 and aged 13 at the time. The jury were told that their verdicts on these two counts had to be the same. MG arrived at the Home on 1 August 1980 and remained there until 15 January 1982. He joined House B. He was in the care of the local authority from February 1979 until January 1984. The appeal primarily concerns counts 1 and 2.

7. Counts 3 and 4 alleged one incident of indecent assault and buggery between 14 April and 1 September 1980, the victim being WG, born on 6 March 1966 and aged 14 at the time. WG was in House A. It is not necessary for us to set out the evidence given by WG.

8. The trial judge directed the jury that the only support which was capable of supporting the evidence of either complainant was in the evidence of the other. He gave a direction as to the alleged similarities between the accounts of the two complainants. He invited the jury to start with counts 3 and 4 but did not direct the jury to do so. It follows, as Mr Goose QC accepted, that if the verdicts on counts 1 and 2 were unsafe, then the verdicts on counts 3 and 4 were also unsafe. Mr Cosgrove QC submitted in one of his grounds of appeal that the judge had failed to direct the jury about the possibility of collusion. As Mr Cosgrove accepted there was no evidence of collusion and he had not invited the judge to

give such a direction or correct his direction when given, we see no merit in this ground.

9. At the time of the first trial in 2002, it was erroneously believed that the appellant had worked at St Camillus for two to three years, including a substantial part of 1981. The evidence of the complainant MG (at that time) was that the offences occurred in late 1980. At the first trial MG had also stated that the offences took place shortly after he was bullied by a black boy named Danny.

10. Following the first conviction, it was discovered that the appellant had in fact only worked at St Camillus for one year between 1st September 1979 and 31st August 1980. Accordingly the time period in which the abuse could have occurred was greatly reduced and a significant part of MG's evidence (relating to 1981) could not have been correct. It also transpired that the appellant was never at St Camillus at the same time as Danny so the offence could not have happened at a time after he was bullied by Danny. The appeal was unopposed by the Crown. Penry-Davey J giving the judgment of the Court said:

> "16. ... in his statement [MG] described the circumstances leading to the episode of sexual abuse. He spoke of conversations with the appellant when he, [MG], spoke about his problems and the appellant listened. He said that he had told the appellant that a boy called 'Danny', a black boy from Sheffield, had beaten him up and was going to do it again. He described the appellant's reaction to that. The fresh evidence also establishes the identity of the boy, Danny, and that he was admitted to the home on 13th August 1981 and thus was not there at the same time as the appellant. That material was not available to the defence at trial and the Crown concede that its absence renders unsafe the conviction ... ."

11. MG had some early convictions but had kept out of trouble since 1987. He worked in London where he lived with his wife and children.

12. In giving evidence in the second trial, MG said that he was bullied almost every other day, right from the time he arrived. The bullying included both teasing and physical beatings. The main perpetrators were boys called Smith, Kelly, Simon Ellis, McLaughlan and Flash. His evidence was that he told Mr Caine about the bullying but Mr Caine did not believe it and told him to stop telling lies. Mr Caine rejected this suggestion in his evidence and stated that MG was never bullied and that if he (Mr Craine) had made such a complaint, he would not have ignored it as alleged. There was some support for MG's account of being bullied in a contemporaneous unsigned typed note which recorded MG stating that he had been bullied in the early hours of 20th August 1980 and naming the bullies as Cutts, Hardy and McLaughlan.

13. MG also gave evidence at the second trial that he met the appellant in the office when he was being given his cigarette ration. He did not know how long this was after he arrived at the Home but it must have been between 1st August 1980 and 31st August 1980, because this was the limited period of overlap when they were

both at the home together. His evidence in this respect differed markedly from what he had said in the first trial.

14. MG's evidence was that he liked the appellant. On a weekend when the appellant was on duty, so he said in cross-examination, he told the appellant about the bullying and said that he was afraid he would be beaten up again that night. It was a weekend when he was going to be alone in his dormitory. Mr Cosgrove established that the only possible weekend was that which started on Friday 29 August and that the only possible dates were the Friday or the Saturday 30 August. In a police interview conducted after the appeal MG said that he was sure that it was the Friday night, however his evidence at the retrial was that he could not really say if it had been a Friday.

15. The appellant, so MG said, reassured him that everything would be all right and, just to be safe, locked his dormitory door at bed time. MG's evidence was that in the early hours, the appellant woke the complainant and said he would take him to another bedroom for greater safety. At the retrial MG expanded his evidence and for the first time claimed that the appellant had said that he had heard boys walking about. They went to a staff room in block B. It was on the same floor, just along the corridor from his dormitory. The appellant asked him to sit on the bed, took his own trousers down, grabbed hold of MG's head and told him to "suck it". He placed his penis into his mouth, so he bit it. The appellant then hit him and started to strangle him to the point of unconsciousness. MG's evidence was that when he came round, he was face down on the bed, being held down, and the appellant buggered him before masturbating to ejaculation over his legs. Although MG had previously stated that he had spoken during the event, at the retrial he claimed that he had said nothing. The complainant stated that he went into a toilet (across the corridor) and locked himself in. He was afraid the appellant would kill him. The appellant followed and asked if he was OK. After leaving the toilet MG claims that he returned to his room. At the first trial he alleged that the appellant followed him to his room and locked his door, but at the retrial he said that he did not remember the appellant following him to his room. At the second trial it was MG's evidence that on the same day, he went to Mr Caine to report the incident but Mr Caine accused him of lying again and was not interested. Mr Caine denied this in his evidence. MG's evidence was that, afterwards, he avoided all contact with the appellant.

16. He reported the matter to police after watching a "Crimewatch" programme. He had received £11,000 in compensation from the state. MG was also in the process of bringing a civil action against Catholic Care.

17. In cross-examination, various documents were put to him, inter alia to demonstrate that he could have complained about the sexual abuse to a number of people including the police who interviewed him about an unrelated matter on 31st August 1980, one or two days after the alleged offences, which, on MG's account, included strangulation (and which according to MG had left visible marks). The documents were also put to him to demonstrate that records suggested he was doing well at St Camillus and there were no concerns about him

18. He agreed that, on his account, he must have met the appellant on a number of occasions during August in order to build up the necessary trust to tell him about

the bullying. On some occasions, so MG said, this happened when the appellant was on duty in House B. Mr Cosgrove established that it was unusual for a staff member from one house to be on duty in another house. But there was also evidence that during the last two weeks of August those few residents remaining in the Home were all moved into one house and the appellant could have been on duty in House B if House B was used as the holiday house.

19. MG was referred to the transcript of the first trial and reminded of his evidence about the timings, in particular that the incident had occurred shortly before Christmas 1980 (about three or four months after he arrived at St Camillus). He agreed that he had stated at the first trial that it was Danny Bent who had bullied him immediately before this incident, but now stated that he did not have a clear recollection of that. He had attended the Court of Appeal hearing following the first conviction but did not hear it said that his account could not be true. He later discussed the matter with the police but that was not the reason he had changed his account. It was true that Danny Bent had assaulted him but he now accepted that that was not at the time of the assault by the appellant. Following the Court of Appeal hearing, he was video interviewed by the police (16 February 2004). In that interview, he stated he could not recall the date of the incident but was sure it was on a Friday night. MG claimed that at that time he was being beaten up by Ian McLaughlan and Mark Hurst. However Mark Hurst was not at St Camillus at the same time as the appellant.

20. He was asked about his evidence at the first trial that other members of staff at St Camillus, including Mr Buxton, had beaten him. He agreed he had said this and maintained that it was true.

21. In relation to events after the incident, he confirmed that he had crossed the public hall and locked himself in the toilet. The appellant, who had no trousers on when he left the room, had followed him.

22. James Agnew became the headmaster of St Camillus in about 1978. The appellant was a member of the care staff and his duties included night-time care work. He described the buildings. In cross-examination Mr Agnew stated that the appellant never gave a reason for leaving but that he recalled a conversation about his wife, in which he told the appellant to put his marriage first. At weekends many of the boys went home unless they could not afford it or were being punished. During 1980, about half the boys would go home at weekends leaving about 30 or 35 boys in the home. The staff kept records at the home including a day book and a log book. He stated that the appellant was not a night-watchman. He had eight weeks' calendar holiday including Bank holidays. The home had a matron and a doctor who conducted three monthly compulsory health checks as well as attending every Wednesday and being generally available.

23. The appellant was arrested in September 2001 and interviewed about the allegations, which he denied.

24. The appellant gave evidence, which was consistent with his account in interview. Conduct of this type was absolutely alien to him and he was not guilty. He was a man of good character who had served in the Duke of Wellington's regiment.

25. When he came to work at St Camillus, initially he slept in the staff village and later in the unit of House A.

26. In the summing-up the judge recorded the appellant as saying that he could remember occasions when he slept in the staff sleeping room in House B (the room in which MG said the offences had been committed). It is now accepted that, in fact the appellant had said that he could not remember ever using that bedroom.

27. Although he did not specifically explain his reason for leaving, the appellant did state that his wife was unhappy there and had decided to leave. He had explained this to the headmaster Mr Agnew who advised him that family should come first.

28. He never behaved improperly towards any of the boys, either sexually or violently. He had no attraction for young boys and no homosexual tendencies whatsoever. St Camillus was a good place for boys to be cared for with professional staff and he was not aware of any abuse against any of the boys by any of the staff.

29. If there were ever any complaints of bullying, the complaint would be recorded and the bullies spoken to. The only bullying he came across was against a boy named Bradshaw.

30. Since leaving St Camillus he had done voluntary work and helped as a carer at another school. He had re-married and had four children.

31. He had not locked MG in his room at any time and stated that he was making the allegations up.

32. The Defence read a number of character statements and called as witnesses members of staff from St Camillus. Bruce Clark was a housemaster. He said that there was a matron and a doctor at the home and social workers came regularly to visit the boys. All members of staff had an "open door" policy for the boys' health and welfare.

33. Mr Caine was a housemaster for 15 years gave evidence. He confirmed that the "day book" was an important document at the school. He had no recollection of MG. If he had complained about a sexual assault, he would have taken him immediately to the headmaster. But, there never was such a complaint during his 15 years. Anything of a physical nature, including bullying, would have been taken seriously and he would not have been dismissive.

34. Mr McHugh worked at the school for 21 years until it closed. He had a vague memory of MG who had visited him about three years earlier, although he could not remember anything about him from the school years. He asked after several members of staff and the impression he had given was that he had had a good time at St Camillus. Mr Buxton was a member of staff who lived in House C. He said the units were quite noisy and you could hear what was happening in the unit if you lived at the end. He remembered MG but denied that he had ever punched him in the stomach as he had alleged. Hazel Atkinson was the matron and confirmed that boys were told they could report any problems to her. There was also a doctor who could deal with any medical matters when required.

35. We turn to the first and principal ground of appeal. At the conclusion of the prosecution's case Mr Cosgrove submitted that, in so far as counts 1 and 2 were concerned, the absence of certain documents made it impossible for the appellant to have a fair trial. The judge ruled against him. Mr Cosgrove criticises that ruling.

36. Before the trial judge Mr Cosgrove had submitted:

> "We do know that various documentation is missing. We do not know when that documentation went missing. It may have been in existence in 1992 or 1994. It certainly was not in existence in, I am not sure we have got the date but I suspect it was the year 2000 when the various documents were recovered from Catholic Care. Crucial among those documents is the day book. I needn't canvas with your Honour the contents of that or its importance, but what it would show inter alia is exactly who was on duty where, on any given day.
>
> The second set of records which have gone missing, which are crucial, are the personnel records. Your Honour may I link in with the day book the staff rotas which were mentioned, they are really the same thing but in a different way. They also have gone missing. Had one or the other existed the absence of the other would not of itself be harmful.
>
> The personnel records being missing means that we cannot tell when it was that Mr Sheikh, as he is now, took leave. We can deduce from Mr Agnew's evidence that his decision to leave, and therefore the posting of his notice, was very late, because it doesn't get reported at any monthly meeting, management meeting until September of 1980. Mr Agnew could not remember whether or not there would be August meetings. If they were it means he must have decided ...
>
> JUDGE SCOTT: He thought there probably wouldn't because it was the middle of the holiday period.
>
> MR COSGROVE: He thought they probably wouldn't but he couldn't say there would not be. If there was that August meeting, and if I may have recourse to the burden and standard on that basis, had there been an August meeting then the August meeting had not had reported to it this event and it means therefore that it was very, very late on indeed that Mr Sheikh submitted his resignation. Had there not been an August meeting it was not reported to the July meeting, which means it is still very late.
>
> Your Honour, the reason for that is this, that leave was permitted, eight weeks leave was permitted on a calendar

> year basis and any remaining leave open to Mr Sheikh therefore would be leave he would have to take at the end of his period of employment. That period of employment would be towards the end of August of 1980, and indeed if you think about the practicalities of it, if Mr Agnew's prompted recollection is correct that during the holiday periods all the boys were moved into the one house which enabled there to be less staff cover, the time when leave taken at short notice would be least harmful or damaging to the institution would be during those holiday periods, which would be the last two weeks in August. But of course we cannot know because of the absence of the record.
>
> [MG's] allegations are predicated upon there being an opportunity for the offence to be committed. If there was no opportunity there could be no offence, and the evidence which we have, the possibility of there being an opportunity is low. [MG] was in B house and said he never moved from B house. ...
>
> ...
>
> Now in those circumstances, the very existence of those documents would provide the means by which the Defendant could show beyond doubt what I think your Honour has called reverse alibi. He is denied that opportunity because of the absence of those records. We submit there cannot be a clearer example of there being prejudice to the Defendant because of a consequence of delay, the consequence of delay being the absence, either through destruction or mislaying, of those critical records."

37. Mr Goose made the point that the appellant did not have to be on duty to commit the offence and therefore the records would not necessarily assist. As to the personnel records, he submitted that they might not show whether he was still living at the home and therefore would not necessarily assist.

38. Mr Cosgrove replied in part:

> "... we submit it will not do to suggest that this offence could have been committed when Mr Sheikh was not on duty. That is not consistent in our submission with the evidence given by [MG] who spoke about him being working on house B on a number of occasions over a period of time as the trust built up, and indeed his evidence about what occurred on the night in question, namely the complaint and the locking in the room, making sure he was secure, are consistent only with that Mr Sheikh was on duty, and therefore it is not possible to try and - I mean this without complaint - wriggle out of the notion that whether or not he was on duty is a highly relevant consideration."

39. Unfortunately all concerned had overlooked the complainant's evidence that when he had spoken to the appellant about the bullying and the suggestion had been made to lock the dormitory door, the appellant was on duty. In any event, one might expect that if a door to a dormitory is to be locked from the outside, with the attendant dangers, it would be done by a member of staff who was on duty.

40. The judge in his ruling referred to the burden being on the appellant to establish (to a civil standard of proof) that he could not have a fair trial. That is no longer good law (see *S(P)* [2006] EWCA Crim 756; [2006] 2 Cr App R 23 at page 341). Mr Cosgrove does not take a point about that.

41. In the principal part of his ruling the judge said:

> "What Mr Cosgrove complains about now is the non-availability of documentation from the school which he regards as being crucial, so crucial as to be putting the Defence at a distinct disadvantage so that there could properly be described as being prejudice, and prejudice so that there could not be a fair trial of this Defendant. The documentation is a day book, we have the day book from 2002, a few random dates picked out by Mr ...
>
> MR COSGROVE: 1982 your Honour.
>
> JUDGE SCOTT: 1982, sorry, picked out by Mr Cosgrove and a staff rota, the staff rota would have been able to show who was actually on duty at the time, and personnel records which would have helped, or may have helped if they were properly kept, to see whether the Defendant was on his holiday.
>
> Obviously in the course of the case I have seen the witness, [MG], who got a little upset on occasions, but he was properly cross-examined in two basic ways, one about the documents which were disclosed and secondly about the inconsistencies between what he was saying today and on a previous occasion at the trial, and in his statement.
>
> The course of this case has been determined by the Court of Appeal's decision to quash the original conviction. I do not know exactly what happened at the Court of Appeal, although I have a transcript. But basically it appears to be a matter of dates as to whether a man called Danny Bent was available to be at the school at the time and place where the witness said he was in the first trial.
>
> But this trial is wholly different. I know that it is wholly different because of the amount of disclosure there has been by my hand through to the Defence of Social Services records. Simply put, there is a great deal more being disclosed for this trial than ever was at the original trial.

> Obviously behind the scenes there has been proper disclosure of everything the Crown have in their possession, and these books, personnel records, rotas, clearly are not here and they are clearly capable of being quite useful either to the Crown or to the Defence. I say quite useful, I think Mr Cosgrove would say that is an understatement, he would probably say they would have been very, very useful and crucial.
>
> But looking at this submission now, and the case of *Smolinski*, as I understand it I have to look at whether on the balance of probabilities the Defence have shown that they are so prejudiced that there cannot be a fair trial because of the documents not being here, and because I was warned of this submission I have been thinking about it all the way through, and all I need to say is that my considered judgment is that from the moment that it has been brought to my attention this would be the submission I have been thinking, "Is this a fair trial? Is this a fair matter to be put before the Jury at the conclusion of the evidence?", and at no stage after the evidence of [MG] have I said to myself, "This is not a fair trial, if there is a conviction it is unsafe, unsatisfactory". At no stage can I say to myself, or have I said to myself, "This trial is unfair and a fair trial is impossible because of the absence of these documents".
>
> Mr Cosgrove I am afraid has been the author of his own misfortune in many respects for his cross-examination was consummate, detailed, very compelling and understandable to a Jury and he has brought all these matters to the Jury's attention, and no doubt will do so in a speech to the Jury, which will be a little longer than that which he has delivered to me, but it will be basically the same, and all I can say is that this in my view is not an abuse of process application that can possibly succeed and in those circumstances I rule against the short, succinct submission by Mr Cosgrove and I will wait upon his speech to the Jury with interest."

42. Mr Goose rightly accepted that the judge in his ruling did not address the point being made by Mr Cosgrove. In substance the judge was saying no more than that Mr Cosgrove was the author of his own misfortune in having made considerable progress with the material that was available to the defence and the trial would therefore be fair. The judge's failure to deal with what were difficult issues and his reliance on the considerable progress made by Mr Cosgrove as a determinative factor fatally undermines the ruling. Mr Goose submitted, however, that the ruling was saved by what was to happen subsequently when the judge during the deliberations of the jury, the judge invited by Mr Cosgrove to revisit the matter in the light of the just published decision of this Court in *Burke* [2005] EWCA Crim

29. The judge said that *Burke* did not alter his view "in the slightest" and then ruled:

> "JUDGE SCOTT: Mr. Cosgrove submits in this case that the counts involving [MG], Counts 1 and 2, are similar in virtually every respect, I think, to the Count 3 on the original Indictment against Mr. - Burt, is it?
>
> MR. COSGROVE: Mr. Burke, your Honour.
>
> JUDGE SCOTT: Burke. The Court of Appeal Criminal Division this week quashed this conviction - essentially as I understand it, at Paragraph 40 they quashed it because he was prevented from having a fair trial in the absence of crucial documents, and bearing in mind Mr. Kenneth's evidence about the Court hearing.
>
> This case is factually in fact different from this one. There is an awful lot of evidence here which supports the Defence. They have been able to put forward an extremely good case before the Jury with the aid of the documents. There are a great deal more documents available in this case. It has already been to the Court of Appeal, the conviction quashed and been brought back because of some of the documents coming to light. All those documents are now available, such as they are, and I am still firmly of the view that if this Defendant is convicted, he will have received a fair trial.
>
> And although documents are missing, a lot of documents are there, and I do not think that the Defence have been so prejudiced in this case that they cannot get a fair trial.
>
> Mr. Cosgrove, in relation to MG, has been able to show, from the documentation, that the offence, if it occurred, must have occurred on the last Friday, or possibly the Saturday of August 1981. <u>And even if the Defendant was off duty or on duty, it is a matter of agreement between the Defendant and the Crown that he had the keys available to him on or off duty, and he would have been able to visit the scene of this alleged crime at any time he wished to do.</u>
>
> And so I am quite satisfied about the case as it is at the moment, halfway through the Jury's consideration. I am obliged to Mr. Cosgrove for bringing it to my attention, but it has not changed my view of the case one iota, quite frankly. And factually, this case is a lot stronger than the case involving this Defendant who we have just considered, Mr. Burke. There is a great deal more evidence available to the Defence. And I say again, Mr. Cosgrove has made extremely good use of it in cross-examination, as will be

> noted in the way the case has been summed up - I hope noted, by the way I have summed it up to the Jury. This Defendant, in my view, has received a fair trial, whatever the verdict." (Underlining added)

43. Mr Goose points to the sentence which we have underlined. That, he submits, is sufficient to cure the failure on the part of the judge to give proper reasons at the close of the prosecution's case. Mr Goose submits that the judge is there accepting his argument that the missing documents would not necessarily have assisted.

44. The one sentence is not, in our view, an adequate way of dealing with a difficult issue. Furthermore the balance of the ruling is in very similar terms to the earlier ruling (and we summarise) "Mr Cosgrove has made extremely good progress, there is a great deal more evidence available to the defence and therefore the trial is fair". In the circumstances of this case the use of this route to the conclusion that the trial was therefore fair constitutes a serious error.

45. In our view the missing documents, in particular the staff rota and the personnel records, were likely to be highly relevant to two issues in this case, First, whether the appellant would have come into contact with MG so as to have the opportunity to win his trust as MG alleged that he had; secondly, whether the appellant had the opportunity to commit these offences against MG.

46. The likely relevance is intensified by the following considerations:

i) The Appellant and MG were both present at the Home only during a specific and limited period, 1st-31st August 1980.

ii) The offences were shown to have been committed within a very narrow time frame on 29th or 30th August 1980.

iii) On the evidence of M.G the Appellant was on duty during the evening preceding the alleged offences.

iv) The particular circumstances of the termination of the Appellant's employment gave rise to a real possibility that he was on leave at the time of the offences.

v) It had been demonstrated by reference to other documents which survived (day books etc.) that the missing documents would have been likely to include information directly bearing on opportunity or the lack of it.

47. In these circumstances we have grave doubts whether a judge who properly analysed the consequences of the missing documents would conclude that the trial was fair. If we are wrong, we have no doubt that a judge who carried out such an analysis would not necessarily reach the conclusion that the trial was fair.

48. We add that Mr Goose submitted that MG may have been wrong when he said that when he spoke to the appellant, the appellant was on duty. The substance of

his argument was that, if the records had shown the appellant to be off duty, that would merely be one more inconsistency and given the number of inconsistencies in MG's evidence, the jury would have attached no weight to one more. This is an unattractive argument.

49. In our view this principal ground of appeal succeeds.

50. We shall deal with the other grounds shortly. Mr Cosgrove complains of a passage in the summing up when the judge reminded the jury that Mr Agnew, the headmaster at the time, had said during his evidence in chief that he had given evidence in seven or eight trials. Mr Agnew had said this in answer to a question from the judge. Mr Cosgrove had not heard the answer. Alarmed by the judge reminding the jury of the answer Mr Cosgrove submitted that the jury should be told the true position which (as we understand) was that that there had been no convictions for abuse arising out of events during the period that the appellant was at the Home. He feared that the evidence which he had called and elicited about the caring atmosphere of the Home and the evidence of those witnesses who had denied allegations made by MG would be fatally undermined. The judge refused to do. Mr Goose submits that the judge was right. Allowing the jury to hear what Mr Cosgrove wanted would only encourage speculation. He submitted that the absence of a question from the jury about this shows that it was of no interest to them- another unattractive argument, with all respect to Mr Goose. It was unfortunate that the judge mentioned the evidence at all and having mentioned it did not allow the addition which Mr Cosgrove sought. He was to say in his ruling that he thought the evidence was of no importance. Mr Cosgrove relied before the judge and before us on *Williams-Rigby and Lawson* [2003] EWCA Crim 693. In that case the Court held that a document seen by the jury which set out the names of those investigated but which did not state that hardly anyone had been convicted, must have left the jury with the impression that if so many had been arrested abuse must have been widespread. In our view what happened in the present case, whilst unfortunate, does not render the conviction unsafe. The likelihood of the jury going down the impermissible route seems to us to be too remote.

51. We turn to a new ground on which leave is sought. We grant that leave. During the course of his evidence MG was asked about a number of contemporaneous documents which showed, it was said, that he was much happier at the Home than he was suggesting. The judge summarised this in the course of the summing up:

> "What he [MG] was saying in general to a lot of these documents that were produced to him, and the details of which you have, is that they all speak actually of a gap where he is behaving himself and being all right, and then after - about a year or so, then he starts to be bullied. Which is a curious feature, says Mr. Cosgrove. But the other feature of these reports is that he does not agree at any time that he was enjoying his stay in St. Camilla's. He enjoyed aspects of it, like Mr. - I forget his name now, Mr. Peat and the welding course, and that sort of thing, and Mr. McHugh, the Irishman with a Scottish name. And what it actually means is this. That he was agreeing that

> "Whatever they say about me there, I can't dispute that it's there, but it wasn't actually accurate. I loathed it". So what it means presumably is that he was putting on a show for the staff in order to get good reports. At least that is an interpretation of it.
>
> And going back to Mr. Martin, Mr. Martin being the person he felt betrayed by on his entry into St. Camilla's. But that did not last, and he agreed with one of the documents that were put to him that Mr. Martin took the view that he realised that it was good for him, and they were basically back being friends. He described Mr. Martin as "A very nice man", and he did not complain to him. He also put into the betrayal class with Mr. Martin, Mr. Caine for not taking his complaint seriously.
>
> He said to Mr. Cosgrove - well, Mr. Cosgrove was putting this proposition. "Look, here you've got Mr. Martin, a man you say is a nice man, a man you could trust. Why not tell him about this terrible deed?" And basically what he said was this. "If I had told Mr. Martin the truth about what happened to me, it would have got back to the boys. And I was frightened to tell him, just in case he didn't believe me. Who would have believed me, a 14-year-old? I didn't want to try telling Mr. Martin. I wanted it out of my head in order to get out of St. Camilla's. I wish they had forensic now, and it would prove the case against the Defendant".
>
> And he complained about the reports about which he was being asked, saying <u>"Oh, it doesn't put in there that I tried to commit suicide five times, one of those times when I was at St. Camilla's".</u>" <u>(Underlining added)</u>

52. MG was to say that on one occasion when he was on leave from St Camillus he took an overdose and was taken by ambulance to Rotherham District General. MG said that the last time he had attempted to commit suicide was in 1988.

53. Mr Cosgrove told us that this answer was very striking and likely to have had an impact on the jury. There was no mention of any such suicide attempts in the social services records. If the jury accepted what he was saying about attempting suicide then that cast doubt on the records and on the appellant's case that the Home was run in a caring way. Those representing the appellant have now discovered that the prosecution were in possession of the appellant's general practitioner records. Mr Cosgrove submits that those records if not otherwise discloseable became so at this point. Those records appear to start in August 1980 and show the Home as MG's address at the time. They do not contain any mention of suicide. One might expect them to do so if the account given by MG were true. Mr Goose submitted to us that there appears to be or may have been a gap in the records. That would not preclude disclosure- on one interpretation of the copy records, there was no such gap. Further, the GP records for the whole of 1988 were certainly available and they did not contain any reference to the alleged

final suicide attempt that year. We take the view that the records became discloseable at this point. Mr Cosgrove would have been entitled to argue that MG was making up the suicides and doing so to discredit the contemporaneous documents and the appellant's case that the Home was run in a caring way. Given our conclusion on the principal ground we do not need to resolve this issue. It is sufficient to say that this ground gives us cause for concern.