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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

R

v

LIAM McLAUGHLIN

Before: Morgan LCJ, Weatherup LJ & Treacy LJ

TREACY LJ *(delivering the Judgment of the Court)*

Introduction

[1] This case is an appeal against a refusal of leave by the single judge to appeal against the conviction of the Applicant on the charges described below. All convictions relate to so-called "historic" sexual abuse of the two complainants involved. In this case the alleged offending occurred between October 1991 and October 1995.

Reporting Restrictions

[2] Both complainants are entitled to lifetime anonymity in respect of these matters by virtue of the Sexual Offences (Amendment) Act 1992, as amended.

Factual Background

[3] The complainants are twin sisters who were aged 7-8 years at the time the abuse started. The Applicant was a friend of their older brother. The mothers of the girls and of their assailant were also friends. Because of these overlapping friendships the Applicant was regularly present in the girls' home where the majority of the offences took place. The majority of the offences in relation to complainant A were indecent assaults involving the Applicant touching the victim

on her vagina and digital penetration of her vagina. There was also an incident where the Applicant was found to have exposed himself to this girl, and there was one allegation of rape. The offences against complainant B were similar indecent assaults to those perpetrated on her sister, plus one count of gross indecency with a child which involved him exposing his penis and putting it into complainant B's mouth. The Applicant was aged 14-18 over the period of the relevant offending.

[4] The alleged offences were first reported to the police in 2012. When interviewed by police in September 2013 the Applicant denied all charges so the matter proceeded to trial. The Applicant, then aged 39, was arraigned on a total of 23 charges before His Honour Judge Kerr QC in Belfast Crown Court on 14 March 2016. He was tried before the same judge and a jury from 28 June to 5th July 2016. A direction of 'no case to answer' was given in relation to 14 of the indecent assault charges and in respect of the single count of rape. The remaining seven charges went before the jury. These consisted of two specific charges of indecent assault and one specimen charge of the same offence all perpetrated against complainant A, and the same combination of charges of indecent assault against complainant B. The final charge that went to the jury was one of gross indecency with a child which was also related to complainant B. The jury unanimously convicted the Applicant on six of these seven charges and he was acquitted on the remaining count.

[5] The Applicant applied for leave to appeal against the convictions but this application was refused by the Single Judge, Mr Justice Burgess.

[6] The application sets out the grounds of appeal in the order in which they arose during the trial.

Ground 1 - Failure to Discharge the Jury

[7] On the second morning of the trial the Learned Trial Judge ("LTJ") received a note from the foreman of the jury alleging that on his train journey home from court the previous evening he had been looked at in an intimidating way by "a member of the family". It was not clear which "family" he was referring to. The juror said he felt intimidated by this experience.

[8] In the absence of the jury, the judge shared this note with counsel and rose to allow both sides to make appropriate enquiries. Both sides made their own enquiries. Counsel for the Defendant, Mr Duffy QC, established that all family members connected with his client had travelled home by car. Counsel for the

prosecution, Ms Dinsmore QC, added that they too had made enquiries and had established that 'no one travelled home by train'.

[9] Mr Duffy raised concerns that pressure may have been brought to bear on the juror or that he may have felt that way. The LTJ commented: "I think it could be more accurately described as how they (sic) felt as opposed to any pressure being exerted."

[10] Defence counsel suggested that there was a risk that "other members of the jury will speculate as the reasons for" the discharge of their colleague. He concluded his submissions on this matter by saying: "I don't think the juror can remain on the jury and I think it is very early to lose a jury member." When invited to comment Ms Dinsmore said that she would "share Mr Duffy's concerns."

[11] Having heard all submissions on this matter the LTJ said:

> "I intend to deal with it by asking the person concerned if they have discussed this with anyone else on the jury. Have they not done so I will discharge them and then warn the jury that they are being discharged for a good reason which is nothing to do with the case or the evidence in the case."

[12] When the jury was brought back the LTJ addressed the juror who sent the note and the audio records the following exchange:

> LTJ - "You've sent me a note which I've discussed with counsel. I just want to ask you one question. Have you discussed the contents of that note with any other member of the jury?'
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> Juror concerned: "No."
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> LTJ: - "Very well. I intend to discharge you. You are free to go. Now members of the jury I have discharged the juror on the basis of a note that was sent which both of the parties are aware of. It is not anything that will concern you nor does it affect your decision in any way in this case. ... I have the power to proceed with 11 jurors in

> a case where we have commenced the case and I intend to do that."

[13] In the current application defence counsel assert that the LTJ:

> - "Erred in law in not discharging the jury ... once it was discovered that the foreman was complaining of having been intimidated ...;
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> - Failed to allow the police or the defence solicitor to investigate 'this intimidation;
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> - Raised the issue with the juror in open court and in the presence of other jurors 'further increasing the risk of injustice ...."

[14] The record shows that upon receipt of the juror's note the LTJ brought it to the attention of both sets of counsel in the case and then rose to allow them to investigate the matter. When he resumed the case, still in the absence of the jury, he was informed that no member of the Complainants' family and no member of the Defendant's family had travelled home by train the preceding evening. At this point the LTJ seems to have reached the view that the perceived 'intimidation' on the train had no factual foundation and that he was in reality dealing with a misperception by the juror in question. Having reached that view he told the parties how he intended to deal with it and no party raised any objection to the proposed approach. He asked the juror affected if he had discussed the content of the note with the other jurors. The question posed was neutral and did not disclose any basis for spreading the affected juror's concern to anyone else present in court at that point. He was assured that the affected juror had not discussed the contents of the note with the remaining jurors and he then discharged the juror affected by the misperception. He immediately reassured the remaining jurors that the cause of his dismissal was not a concern for them and would not affect their decision in the case in any way. He then continued the trial with 11 jurors and the discharge of the original foreman was never mentioned again.

[15] Defence counsel submitted that the correct course for the LTJ to take "once it was discovered that the foreman was complaining of having been intimidated..." was to discharge the entire jury. This submission is made on the basis of two earlier cases in each of which the trial judge concerned had reached the view that actual jury tampering had taken place: R v Mackle and Ors [2007] NICA 37 which involved

a juror who was approached at his home by two men who offered him money for information about the case; R v Clarke and Others [2010] NICC 7 which involved a juror who received an intimidatory phone call in relation to that case. These cases are far removed from the present one which, at its height, involved a misinterpretation by a juror of a look from a fellow traveller on a train.

[16] We agree with the observation of the LTJ that it was open to him to proceed with a jury of 11 in the circumstances that had arisen. The overriding duty of the trial judge is to ensure that the trial is fair. We consider that the steps taken by the LTJ were sufficient to ensure that the defendant's interests were protected and that there was no actual risk to the fairness of the trial. However, judges in trials must also endeavour, insofar as is compatible with the Article 6 and common law right to a fair trial, to be fair to all other parties involved. In particular, trial judges must be mindful of the extra stress that undue delay can cause for such parties and of the risk that complainants, who having once steeled themselves to give evidence in a trial such as this one, may not be prepared to undertake the same exercise twice.

[17] In relation to the risk that 'other members of the jury will speculate as to the reasons for that jury member no longer being on the jury' which Mr Duffy raised, we consider that the judge’s remarks to the remaining jurors were sufficiently neutral to give no basis for such speculation, and sufficiently reassuring to obviate the risk of such speculation. We further concur with the views expressed by the single judge about this hypothesised risk. He notes at paragraph 15 of his ruling that 'the defendant was convicted on all but one of the counts left to them. However, the jury did acquit him on one count. There appears to be nothing to show that this jury was in any way contaminated or had speculated in any manner, let alone one adverse to the defendant...'

[18] We agree with the observation of the LTJ that it was open to him to proceed with a jury of 11 in the circumstances that had arisen and we consider that the fairness of the trial has not been prejudiced in any way as a result of his decision to take that sensible and proportionate approach to the unfortunate misperception that had arisen in this case. We entertain no doubt as to the safety of the conviction by reason of the course adopted by the LTJ.

[19] For all these reasons we are satisfied that this ground of appeal cannot succeed.

Ground 1B - Failure of Third Party Disclosure

[20] Counsel for the complainant stated that it had made application for various medical and counselling notes but that no disclosure had been provided by the LTJ. Counsel expressed the view that this outcome was 'somewhat surprising'. As a result of the concerns raised this court reviewed all the materials in question itself. It decided to make very limited disclosure of some material and, in the end, no submissions were made by the Applicant's counsel in relation to any of the materials disclosed to them.

[21] We are entirely satisfied that nothing in the disclosed materials could have affected the safety of the original convictions. Accordingly we find that this ground of appeal must fail.

Ground 1C - Allowing Count 1 to go to the Jury

[22] Count 1 was an allegation of indecent assault said to have been suffered by complainant A in the Applicant's home when she was playing there with the Applicant's younger sister. In her evidence in relation to this incident the complainant said this assault had happened at a specific address in which the Applicant had lived, and she described the house in question as a 4-bedroom house with a window on the side. Her memory was that this incident had occurred when she was around Communion age i.e. about 7 or 8 years old, which would mean it must have happened in 1991 -1992. Evidence was then produced which established that the Applicant did not move into the address given/ the house described by the complainant until May 1994. The defence apparently intended to make an application of no case to answer in relation to count 1 but Senior Counsel was not present in court to make this application at the allotted time. The LTJ then decided not to wait for any such application to be made and instead allowed count 1 to go before the jury for their consideration.

[23] Despite this clear inconsistency around the dates and/or the location of the alleged incident the LTJ refused to hear an application of no case to answer from Senior Counsel when he did arrive in court, and instead allowed Count 1 to go before the jury for their consideration. In his charge to the jury in relation to Count 1 the transcript indicates that he said as follows:

> "[Have] particular regard to the first count ... If you look at the dates on the indictment the indictment says that that occurred between ... 1991-1992. Her description of the Defendant's house at that time ... appears to relate to a different building than she described. If you feel that the

> evidence in relation to that ... is evidence upon which you cannot rely ... well then of course you would acquit the Defendant of that charge."

[24] In the event the Jury did convict on Count 1. Counsel for the Applicant now asserts that:

> "(i) the LTJ erred in refusing to hear the defence application;
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> (ii) no reasonable jury properly directed could have convicted on count 1; and
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> (iii) the fact that the jury convicted on count 1 'when there was cogent and uncontroverted evidence that the offence did not occur in the location described ... during the time frame put forward by the complainant demonstrates the unsafeness of the jury verdict as a whole."

[25] Dealing with these points in turn, we understand that at the time defence counsel wished to make an application of no case to answer in respect of count 1 the evidence in the case had already concluded. The court was scheduled to reconvene at 11am the following Monday in order to deal with the closing speeches in the case. The defence team had recorded that the time set for the resumed trial was 11.15am. Senior defence counsel was not present in court when the trial resumed and so was unavailable to make his application. Junior defence counsel did not make it in his absence. The court was reconvened and had no other business it could conveniently move on with. It moved onto the closing speeches which were the scheduled business of the court that morning.

[26] In view of the contents of counsels' skeleton argument in relation to the promised imminence of Senior Counsel's arrival, this was a step which we might not have taken ourselves. However, we have no material before us on the question of how far the tardiness of counsel was or was not impeding the efficient operation of the court below and the timely dispatch of its judicial business. It is not for this court to micro-manage the operation of the courts below and each trial judge will have his/her own style of dealing with the counsel who appear before them. This court will only intervene where there is clear evidence that something was done which

prejudiced the fairness of the trial overall, and there is no suggestion that that is the case here.

[27] Defence counsel submit that a trial judge can properly hear an application of no case to answer after the close of the defence case. It is clear from Blackstone 2019 at paragraph D16.73 and the authorities cited therein that a trial judge has such a discretion:

> "In *Boakye* (12 March 1992 unreported), Steyn LJ pointed out that, as a matter of principle, the judge was entitled to hold that there was no case to answer even at the end of the defence case:
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> > '[Counsel for the Crown] has made a submission to us that it was not appropriate to make a submission of no case to answer at the end of the defence case. In our judgment a judge is entitled, even at that late stage, if no evidence is available on a count or if there is no evidence of that count upon which a reasonable jury could convict, to rule that there is no case to go before the jury. The contrary proposition would be a startling one. It would contemplate that the judge might be powerless to prevent a real miscarriage of justice in a case where there was a sudden change in the strength of the prosecution case as a result of cogent evidence emerging in the defence case. We rule without any doubt that it was within the power of the judge to make the ruling that was requested of him.'"

The same paragraph of Blackstone records if, at the conclusion of the evidence, the trial judge is of the opinion that no reasonable jury properly directed could safely convict, he should raise the matter for discussion with counsel even if no submission of no case to answer is made. If, having heard submissions, he is of the same opinion he should withdraw the matter from the jury.

[28] In the present case the LTJ proceeded to closing speeches in the circumstances outlined at para [25] above. The ground of appeal indicates that the basis of the application would have been the fact that the events described by the complainant

could not have happened in the location she described, at least not within the time scale she had indicated. However, these inconsistencies in the complainant's evidence were covered by counsel in his closing speech. They were also covered by the judge in his direction to the jury. In his direction he took very careful steps to highlight the inconsistencies in the evidence around this charge. He expressly reminded them that if, in light of those inconsistencies they considered the complainant's evidence to be unreliable 'then of course you would acquit the Defendant of that charge.' In view of all these factors we consider that there was nothing unfair in the approach taken by the trial judge. We concur with the view of Prosecution counsel that 'if there was any mischief' in refusing to hear the late submission it 'was remedied by the robust charge of the Trial judge...' We agree and therefore we dismiss this limb of this ground of appeal. We would also add that it is clear that, inferentially at least, the LTJ must have considered that there was evidence upon which a reasonable jury properly directed could safely convict otherwise he would have been expected to take the steps outlined in Blackstone set out above. And as it transpires the jury did convict the Applicant on this count and we are satisfied that the safety of this conviction is not in doubt.

[29] The remaining limbs of this ground of appeal overlap significantly with Ground 2 and they will be dealt with below in the context of that ground.

Ground 1D – Unfairly restricting evidence in cross-examination

[30] This ground of appeal centres around the treatment of the evidence of MG, the older brother of the complainants. This witness was originally introduced as a prosecution witness to give evidence about the opportunity for the defendant to commit the alleged offences. The defence then introduced further evidence in cross-examination to the effect that MG had made a statement to police which, they said, contained a false allegation about the defendant. MG denied that he had made a false allegation and the defence then applied to introduce a new witness to challenge this denial. The LTJ refused to allow them to lead the new evidence because he considered it to be a collateral matter, not relevant to the main issues in the case. The defence complains that this course of events placed the Applicant in 'the worst of both worlds - having opened up this material and its prejudicial impact in front of the jury without then being permitted to demonstrate its untruthfulness.'

[31] Blackstone deals with the rule of finality of answers to questions on collateral matters at paragraphs F7.45 *et seq*. The general rule is stated as follows:

> "The general rule, based on the desirability of avoiding a multiplicity of essentially irrelevant issues, is that evidence is not admissible to contradict answers given by a witness to questions put in cross-examination which concern collateral matters, ie matters which go merely to credit but which are otherwise irrelevant to the issues in the case. ... Whether questions should be asked or evidence adduced, concerning a witness' bad character is now governed by the CJA 2003 ss101 (see F15.8 and F13.15) ..."

As Blackstone notes at paragraph F7.46 it has been held that the issue of sufficient relevance is one for the trial judge and that the Court of Appeal will only interfere with a decision to exclude evidence as being insufficiently irrelevant if it is either wrong in principle or plainly wrong as being outside that wide ambit.

[32] We consider that there can be no legitimate complaint of the approach adopted by the LTJ. This was a case where the prosecution case rested overwhelmingly on the evidence of the two complainants. No other witness gave evidence on behalf of the prosecution about the alleged abuses that the jury had to consider. The Applicant gave evidence. MG had no direct evidence to offer in relation to the central allegations in the case. In his charge to the jury the LTJ addressed the evidence of the complainants comprehensively. He did not address the evidence of any other witness including that of MG. His charge carefully addressed the issue of passage of time. It dealt thoroughly with the inconsistencies within the complainants' evidence and the need for the jury to approach that evidence with care. No requisition was raised by the defence in relation to the charge to the jury. In all the circumstances we are satisfied that the refusal to admit the evidence challenging the veracity of a peripheral witness does not undermine the safety of the convictions in this case. Having regard to the general rule of finality of answers to questions on collateral matters, defence counsel, in the circumstances of this case, ought to have asked to address the LTJ in the absence of the witness about the matters upon which they wished to cross-examine. They were not entitled to assume that leave was not required or would necessarily be granted.

Ground 2

[33] This ground asserts that the jury verdict was against the weight of the evidence. The main bases for this complaint may be summarised as follows:

- there was no other witness to the abuse even though all but one of the offences on which the jury convicted had happened when there was another person present - that being the other complainant who was usually present in the same bed;

- there was no medical evidence, either at the time or since, supporting the allegations;

- the jury convicted on count 1 despite the unchallenged evidence that the offence alleged could not have happened in the location described by the complainant within the time frame she had identified.

[34] The jury heard and saw both complainants' being examined and cross-examined in detail. They also heard and saw the applicant giving evidence and being cross-examined. This court does not enjoy the well-recognised advantage which a jury has in seeing and hearing the witnesses accompanied by an impeccable summing up. In relation to points 1 and 2 the absence of corroboration is a common feature of cases of this kind. The jury were well aware that most of the offences happened whilst the double bed was shared by the two complainant sisters and who were usually present in the same bed. The jury were ideally placed to evaluate the complainants' evidence and that of the applicant in assessing its truthfulness, reliability and weight. This assessment also takes place in the context of the comprehensive closings of counsel and the detailed directions of the trial judge. Similarly, the absence of contemporaneous medical evidence is not unusual in cases involving young children who may not, at the relevant time, perceive themselves to have suffered an injury.

[35] As Widgery LJ in R v Cooper [1969] 1 QB 267 said:

> "It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing up was impeccable, this Court should not lightly interfere ..."

This was a case where the prosecution case rested overwhelmingly on the evidence of the two complainants. No other witness gave evidence about the alleged abuses that the jury had to consider. MG had no direct evidence to offer in relation to the central allegations in the case. In his charge to the jury the LTJ addressed the evidence of the complainants comprehensively. He did not address the evidence of

any other witness including that of MG. His charge carefully addressed the issue of passage of time. It dealt thoroughly with the inconsistencies within the complainants' evidence and the need for the jury to approach that evidence with care. No requisition was raised by the defence in relation to the charge to the jury.

Conclusion

[36] In R v Pollock [2004] NICA 34 Kerr LCJ at para [32] said:

> "[32] The following principles may be distilled from these materials: -
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> 1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.
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> 2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
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> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
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> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[37] We reject all the grounds upon which leave to appeal was sought. We do not think that any of the convictions are unsafe and we share no sense of unease about the correctness of the verdicts. Accordingly, we dismiss this appeal.