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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

GERALD O'HARA

Before: STEPHENS LJ, MAGUIRE J and SIR RICHARD McLAUGHLIN

STEPHENS LJ (delivering the judgment of the Court)

Introduction

[1] This is an application by Gerald O'Hara ("the applicant") for an extension of time in which to lodge an application for leave to appeal against his convictions on 28 February 2017 at Londonderry Crown Court before HHJ Babington sitting with a jury on eight counts of indecently assaulting a female. If the court accedes to that application it is an appeal against his convictions. The single Judge, Treacy LJ, refused the application for an extension of time which is now renewed before this court.

[2] The victim in relation to seven of the eight counts of indecent assault is the applicant's niece, Sinead McKenna ("Sinead") who has waived her anonymity. These offences occurred between 1980 and 1987 some 30 - 37 years prior to the trial. At the time of the offences she would have been between 10 and 17 years old. In relation to the seven counts involving this victim three were specimen counts. The verdict of the jury was by a majority of 10 to 2.

[3] The victim in relation to the remaining one of the eight counts of indecent assault is a sister of Sinead and another of the applicant's nieces, Brenda Moore ("Brenda"), who also has waived her anonymity. This offence occurred between 1985 and 1987 some 30 - 32 years prior to the trial. At the time of the offence she would have been 13 - 14 years old. The verdict of the jury was unanimous.

[4] The applicant was also tried on 15 other counts of indecent assault in relation to some of which the complainant was either Brenda or Sinead but in relation to 5 counts the complainant was their sister and another of the applicant's nieces, Denise Moore ("Denise"), who has also chosen to waive anonymity. All the complaints in relation to these other counts relate to the same periods in respect of Brenda and Sinead. The complaints in relation to Denise related to the period 1989 - 1994, some 23 - 28 years prior to the trial. The jury were unable to reach a verdict in relation to any of these other counts and all of them were left on the books not to proceed without the leave of the Crown Court or of this Court.

The period of delay in giving notice of appeal against conviction and the test to be applied in relation to the application to extend time

[5] Section 16(1) of the Criminal Appeal (Northern Ireland) Act 1980 provides that notice of an application for leave to appeal against conviction is required to be given within 28 days from the date of the conviction. On 1 June 2017 *a notice of appeal against sentence* was given but at that stage there was no *notice of appeal against conviction*. It was not until after the applicant had changed his legal representatives that on 12 January 2018 an application was made for an extension of time for leave to appeal against conviction. On that basis the notice in this case was given not 28 days, but rather some 11 months from the date of conviction. On behalf of the applicant it was correctly conceded that there were no substantial grounds to explain the entire period of delay (paragraph [8] (ii) of Brownlee) and so correctly accepted that in order to obtain an extension of time the merits of the appeal would have to be such that it would probably succeed (paragraph [8] (vi) of R v Brownlee [2015] NICA 39).

Grounds of appeal against conviction

[6] There were three grounds of appeal with which we will deal in the order that they were considered during the hearing of the appeal. First, the appellant contends that the judge ought to have, but failed to give appropriate directions to the jury in relation to evidence which was admitted at trial as to the demeanour of all three complainants. Secondly, the appellant contends that the judge ought to have but failed to give appropriate directions to the jury in relation to inconsistencies in the complainant's evidence and failed factually to set out in his charge the inconsistences which it was asserted had been established in evidence. Thirdly, the appellant contends that inadmissible opinion evidence was admitted before the jury and, having been admitted, the judge failed not only to direct them to ignore it but repeated it in his charge.

Appearances in this court

[7] In this court Mr Kelly QC and Mr Barlow appeared on behalf of the applicant and Mr McMahon QC and Mr Gary McCrudden appeared on behalf of the prosecution. Those were not the appearances at trial except for Mr McCrudden.

Factual background

[8] The applicant, Gerald O'Hara, is married to Rose O'Hara whose sister Mary Moore is the mother of the three sisters Sinead, Brenda and Denise. Robbie Moore is their father. There are a total of 10 siblings in the Moore family, six boys and four girls. Sinead is the eldest child, followed by Brenda. Denise is the youngest girl being some 10 years younger than Sinead. At the material times the various homes of the O'Hara family and the home of the Moore family were in walking distance of each other. There was a close relationship between the two families so that Sinead, Brenda and Denise as they were growing up were in the habit of visiting the home of their uncle and aunt, the applicant and Rose O'Hara. At trial Sinead described how she had a good relationship with Rose O'Hara and the applicant, describing Rose as being like a second mum. She also said that it was like a break to go to the O'Hara home as being the eldest child in her family she was always cooking at her own home and looking after the younger ones.

[9] The offending occurred when Sinead and Brenda were at the applicant's home either in the kitchen, outside in the driveway or in a bedroom. In her evidence Denise also stated that she had been indecently assaulted at the applicant's home.

[10] As we have indicated the allegations which founded all the counts against the applicant related to events between 1980 and 1994. The first report to the police occurred in April 2013 some 26 years after the last incident involving Sinead and Brenda and some 19 years after the last allegation involving Denise. Explanations for that delay were given at the trial and some of those explanations involved evidence as to changes in the demeanour of all three complainants. However, it appears that evidence as to changes in demeanour was introduced at the trial for reasons other than explaining the delay in reporting the indecent assaults. We will not set out all the evidence of demeanour or distress in relation to all of the complainants but rather refer to the evidence in relation to Brenda and Denise. In relation to all of the evidence as to changes in demeanour or distress there was no objection to its admission on behalf of the applicant.

[11] Brenda's explanation for the delay in reporting the indecent assaults was that she never wanted to bring out the allegations of sexual abuse because of her feelings for her aunt, Rose O'Hara. Her explanation as to what prompted her to report the matter was that Denise was drinking quite a bit, she could not cope and Brenda was frightened that Denise would end her life. Brenda gave evidence that Denise was in a psychiatric hospital at the time and that in order to help her to get better it had to be reported. Brenda stated that she reported the matter "to save Denise." Graphically she gave evidence as follows: "The last time she took her overdose I, on the ward that day I said to myself, I have to do something about this now because if I don't, there is no point to stand at her grave and saying I should have done something, and that is why we brought it out, told." It can be seen that in her evidence Brenda was attributing the cause of Denise's inability to cope and her drinking to childhood sexual abuse, that she considered that the impact of that abuse

was so serious as to lead to a real risk of Denise losing her life and that there was a need to reveal that abuse in order to allow Denise to recover. All of this was evidence given to explain delay but it was also evidence as to a change in the demeanour of one of the complainants, Denise, attributed to the sexual assaults perpetrated by the applicant. There was no medical evidence establishing any link between the problems faced by Denise and childhood sexual abuse.

[12] A change in the demeanour of another complainant, Brenda, was also introduced in evidence. Brenda gave evidence as to a discussion between her and Rose O'Hara after the allegations had been made during which Rose O'Hara enquired as to what was going on. Brenda gave evidence that she replied saying she could not discuss anything but that she did tell Rose that "here is your answer" to Rose's earlier and repeated enquiries as to why Brenda was depressed. Brenda also gave evidence that she thought that after this remark the applicant would be thrown out of the house by Rose O'Hara and that she was very upset when she found out that Rose and the applicant were staying together. As a consequence she cried a lot into herself, suffered from depression and shut herself off in her room at times. It is apparent that Brenda was giving evidence that she suffered from depression as a result of childhood sexual abuse and was also giving evidence as to her distress when her aunt did not react in a way she considered appropriate when she implicitly revealed to her the link between her depression and that abuse. Again there was no medical evidence establishing any link between the problems faced by Brenda and childhood sexual abuse.

[13] Another way in which evidence was admitted at trial in relation to a change in demeanour was that Brenda gave evidence that when she was in a developing relationship with her partner and he for the first time touched her in a sexually intimate manner she squealed. She gave evidence that she ran home. She also gave evidence that she took an overdose. A summary of this part of her evidence is that this was an entirely appropriate sexual advance made by a person with whom she was forming an emotional attachment which brought back memories of the sexual assaults perpetrated by the applicant with potentially devastating effects for her developing relationship and also involving a threat to her own life. Again it is apparent that this was evidence of the distress being suffered by Brenda and of her fragility a number of years after the sexual assaults all caused by those assaults.

[14] The prosecution in closing the case to the jury also relied on the changes in the complainants' demeanour. Part of the prosecution speech was as follows:

> "Brenda, and you heard that Brenda suffered with *bad depression*, and she wasn't the only one, so did Denise subsequently also, and in fact Denise made *several attempts*, certainly two if not three attempts, *on her own life* over the ensuing years *since this happened*." (our emphasis)

We consider that in that passage the prosecution through a subsequent association in time was making a link between the *bad depression* suffered by Brenda and Denise and the suicide attempts by Denise with the complaints of childhood sexual abuse perpetrated on both of them by the applicant.

[15] Another part of the prosecution closing speech to the jury was that Brenda had given evidence that "she saw a considerable change in Denise after the matter was reported to the police, it was like a weight lifted off and Denise was much better." Again this was the prosecution relying on evidence as to a change in the demeanour of Denise.

Legal principles in relation to evidence of the demeanour or the distress of the complainant

[16] This court has considered the question of the complainant's demeanour or distress in R v Paul Hughes [2008] NICA 17 and in R v BZ [2017] NICA 2. In those two cases consideration was given to a number of decisions of the Court of Appeal in England and Wales, namely R v Keast [1998] Crim LR 748; R v Redpath (1962) 46 Cr App Rep 319; R v Chauhan (1981) 73 Cr App Rep 232; R v Venn [2002] EWCA Crim 236; R v Romeo [2003] EWCA Crim 2844; R v AH [2005] EWCA Crim 3341; and R v Zala [2014] EWCA Crim 2181. The facts of all of those cases, almost all of which were summarised in BZ, together with the facts of Hughes and BZ are instructive. All of those cases demonstrate a considerable variation in the circumstances relating to the evidence of demeanour and distress and the consequential distinctions that can be made as to the evidential value of changes in the demeanour or distress of the complainant. This in turn bears on the questions as to whether the evidence of demeanour or distress is admissible and if so whether a direction is needed and, if it is needed, then in what terms.

[17] For the purposes of this appeal it is only necessary to refer to a brief summary of the facts of R v Venn and R v Hughes.

[18] In R v Venn the complainant, a girl, at the time of the offences aged between 9 and 12 years old, alleged that she had been indecently assaulted by the appellant. There was no contemporaneous report. The appellant's mother gave evidence that at or about the time of the alleged assaults the complainant had become withdrawn and given up various pursuits, such as riding, choir practice and going to school discos, but that immediately after the complainant's video interview, she appeared to dramatically change back to her previous light-hearted demeanour and activities. We note that the evidence was being given by the mother of the complainant who was not independent and that the evidence related to two changes in the demeanour of the complainant. The first change was the deterioration in the complainant's demeanour after the assaults and the second change was the complainant's improved demeanour after the video interview. The Court of Appeal held that in view of the uncertainties involved in establishing a link between the complainant's demeanour and the earlier abuse that, rather than leaving it to the jury to decide

whether on the basis of the mother's evidence any significance could be attached to the complainant's behaviour over the relevant period, the judge should have excluded it from their consideration. However, given that the judge gave the jury a careful direction which ended with a clear indication that they should attach little importance to such evidence the appeal was dismissed.

[19] In R v Hughes the complainants were sisters anonymised as "A" and "B." The offences against "A" were said to have occurred on various occasions between 1990 and 1995. "A" was born on 2 June 1984 so that she was about six at the start of the period over which the offences were alleged to have taken place and about 11 at the end of that period. The mother of "A" and "B", who gave evidence at the trial, was asked if she noticed anything about "A" when she was about ten years of age. She said that "A" started to wet the bed when she was around six which she had not done when they had lived in Belfast and around the age of ten she stopped going to the appellant's house. She told her mother, when she queried why she was not going there, "I don't want to go back again." As "A" got older her mother said her personality and whole outlook became completely different. Having been a good child and always laughing she had a different expression on her face and a haunted look about her. Under cross-examination the witness accepted that children do change as they get older. The evidence from the mother of "A" about her daughter's bedwetting and the change in her countenance was admitted without objection from the defence. In his summing up the trial judge repeated the evidence without comment. This court held in that case that "before this evidence could be admitted it was necessary for the prosecution to establish a link between the symptoms that the mother said "A" exhibited and the abuse that was alleged. In the absence of such a link the evidence ought not to have been admitted. Once it was before the jury a clear direction was required from the judge that the evidence did not confirm what "A" alleged had happened to her. The absence of such a clear direction was identified by this court as a shortcoming in the trial judge's charge to the jury.

[20] In BZ this court gave the following guidance:

> "[43] Given that the weight of evidence as to distress will vary according to the circumstances of the case we consider that whether the evidence is admissible and if so whether a direction is needed and, if it is needed, then in what terms, depends much on the particular circumstances in any given case. In giving consideration to those questions a distinction can be drawn between the complainant's own evidence of distress and evidence from a witness, who may be independent, as to the distress of the complainant. A distinction can also be drawn between evidence of distress at the time or shortly after the alleged offence and distress displayed years later when making a complaint. If the jury is sure that distress at the time is not feigned then the complainant's

> appearance or state of mind could be considered by the jury to be consistent with the incident. Evidence as to the demeanour at the time of making the complaint may in law be capable of amounting to corroboration but "quite clearly the jury should be told that they should attach little, if any, weight, to that evidence because it is all part and parcel of the complaint" (R v Redpath) and "should be assessed with the complainant and not given any separate weight" (R v AH). In relation to evidence of a change in demeanour over a significant period of time, as in the mother's evidence in R v Venn, such evidence, although technically admissible or relevant, is likely to be of such tenuous relevance that it would not be right to admit it. We consider that the uncertainties are such that the evidence should either not be admitted or it should be excluded from the jury's consideration. Complainants may exhibit such changes in demeanour for many reasons and generally it is dangerous to infer that it should be regarded as indicative that sexual abuse has occurred. It is clear that in relation to the complainant's own evidence of distress and the evidence of a witness as to the distress of the complainant, the jury should be directed that they must be sure that there is no question of it having been feigned before they can rely on it (R v Romeo). In that way the jury is reminded that a person fabricating an allegation may support it by an equally false show of distress at the time of making a complaint.
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> [44] We consider that it is for the judge to look at the circumstances of each case and tailor the direction to the facts of the particular case emphasising to the jury the need, before they act on evidence of distress, to make sure that the distress is not feigned and drawing to their attention factors that may affect the weight to be given to the evidence."

[21] We emphasise here, as was emphasised in BZ, that the directions, if required, should be tailored to the facts of the particular case. For instance if evidence as to an individual's perception of a change in demeanour or distress is introduced in order to explain a delay in reporting to the police then consideration should be given to directing the jury that the evidence whilst of potential value for that purpose has little or no value for the purpose of deciding whether sexual abuse has occurred as complainants may exhibit such changes in demeanour for many reasons so that the jury is directed that generally it is dangerous to infer from a change in demeanour or distress that sexual abuse has occurred. Furthermore, in some cases consideration

should be given to directing the jury to factors such as the lack of any medical evidence establishing any link between the complainant's demeanour or distress and the sexual abuse.

Discussion in relation to the first ground of appeal

[22] There was no objection to the admission of any of the evidence of demeanour or distress and this appeal was directed to the questions as to whether the judge ought to have, but failed to give appropriate directions to the jury in relation to that evidence. In those circumstances we will confine our consideration to those questions rather than to the admissibility of the evidence.

[23] Counsel has an obligation to bring to the attention of the judge the authorities in relation to directions as to the evidence of a complainant's change in demeanour or a complainant's distress. Unfortunately the judge was not referred to any of the authorities. He should have been. It is clear from the rest of the judge's directions to the jury, including his careful written directions in relation to cross admissibility that if he had been referred to the authorities then, in discussion with counsel prior to speeches, directions would have been crafted in relation to the evidence of demeanour and distress. Mr McMahon, who appeared in this court but not at trial, accepted that a direction as to demeanour ought to have been given. We consider that he was correct to make that concession given the nature of the evidence which we have set out and the contrast with the facts of R v Venn and R v Hughes. The question then becomes one as to whether the verdicts are unsafe. In BZ the evidence of distress did not assume unusual importance or particular prominence. That is not our assessment of this case. We consider that the depression of Brenda and Denise was a central feature of the case and had considerable impact given that it threatened their lives, interfered with Brenda's own developing sexual relationship with her partner and caused Denise not to cope to the extent that her life had to be saved. We consider this all to be powerful and central evidence at this trial.

[24] In the circumstances of this case, we take the view that the prosecution in its closing speech and the judge in his charge were wrong to draw attention to the evidence as to changes in each of the complainant's demeanour and the distress of each of the complainants and then to give no guidance to the jury on how to deal with it.

[25] The task to be performed by this court when determining an appeal has been clearly and authoritatively expounded by Kerr LCJ in R v Pollock [2004] NICA 34 after a review of the relevant authorities. At paragraph [32] of his judgment the Lord Chief Justice set out the following principles to be distilled from the authorities:

> "1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.

> 2. This exercise does not involve trying the case again. Rather it requires the court, where a 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."

[26] Applying those principles and also relying on what this court stated at paragraph [10] of its judgment in R v Gerard Judge [2017] NICA 22 we consider that the first ground of appeal does give rise to concerns about the safety of all of the convictions.

The second and third grounds of appeal

[27] It is not necessary to determine the other two grounds of appeal which in our view Mr Kelly properly conceded would not on their own have given rise to any concern as to the safety of the convictions.

Conclusion

[28] We extend time in which to lodge an application for leave to appeal against conviction, grant leave to appeal, treat the application for leave as the appeal against the convictions, allow the appeal and quash all the convictions.

[29] We will allow time so that consideration can be given to the questions of a retrial and of giving leave to proceed with the 15 other counts which have been ordered to be left on the books.