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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

ON APPEAL FROM DOWNPATRICK CROWN COURT

_____

THE QUEEN

-v-

CASEY MORGAN

_____

Before: Morgan LCJ, McCloskey LJ and O'Hara J

_____

Representation

Mr Conor O'Kane of counsel (instructed by Keown Nugent Solicitors) for the Appellant
Mr David McClean of counsel (instructed by the Public Prosecution Service) for the Respondent

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McCloskey LJ (delivering the judgment of the court)

Introduction

[1] The central theme of this judgment is that in cases where a victim (usually female) of violence (usually perpetrated by a male) initially makes material allegations against an identified perpetrator and later purports to retract same, to the extent of being declared a hostile witness at an ensuing trial, a perfectly safe conviction may ensue. The present case probably belongs towards the extreme end of the notional spectrum in this respect.

An Overview

[2] It is appropriate to emphasise at the outset the key features of the prosecution and trial giving rise to appeal. The events in question unfolded in a derelict house and the adjoining public area. Pursuant to emergency calls made by third parties the police and ambulance attended. The injured party alleged that she

had been assaulted by the Appellant, who was present. She was observed by the police to be in a highly distressed state and displaying several visible injuries which were photographed. Damage to her clothing was also observed. The injured party was conveyed to hospital where she repeated her allegation of assault. Certain injuries were noted and recorded. The following day she made a detailed written statement describing the assaults allegedly perpetrated against her by the Appellant: assorted punches, kicks, choking and trailing her, both inside and outside the derelict building, together with her resulting injuries. She further described the Appellant's alleged warning to her to tell the police that she had fallen.

[3] Three days later the injured party made a brief short second written statement whereby she withdrew her initial statement. Following committal the injured party attended the trial under subpoena. After some brief examination in chief by prosecuting counsel the judge acceded to an application to have her declared hostile. He later granted a separate application to admit as hearsay both her written statements. The thrust of her evidence to the jury was that her injuries and damage to clothing had been caused by falling through an upstairs floor. The other evidential components of the prosecution case and the course of the trial are both detailed *infra*. The Appellant gave evidence on his own account. By its verdict the jury convicted him of assaulting the injured party occasioning her actual bodily harm and criminal damage to her clothing. He was acquitted of certain other counts which are of no consequence in this appeal.

[4] On 04 October 2019 the Crown Court judge sentenced the Appellant to an extended custodial sentence of three years imprisonment, with an extension period of two years on licence, in respect of the first offence and an extended custodial period of two years imprisonment, with an extension period of two years on licence, in respect of the second. Leave to appeal against both conviction and sentence having been refused by the single judge, the Appellant renews his application to this court.

The Prosecution Case

[5] The prosecution case against the Appellant had four discernible components. It is convenient to consider these sequentially. First there was the evidence of what the police officers who attended the scene observed and what was said to them by the injured party. In summary:

(i) Constable Flood encountered the injured party at the side of the road, outside the derelict premises where the offences allegedly occurred. He described her as "*… lying on the ground curled up and clearly distressed*". She asked him to accompany her into the premises in order to retrieve some personal belongings. She then "*… became very upset and complained she was finding it difficult to breathe … was highly*

agitated and emotional stating she did not want to go back outside". She then "*made various allegations against*" the Appellant.

(ii) Constable Gilmore, who also attended the scene, observed the injured party "*lying on the ground and appeared visibly upset*". The injured party and Constable Flood then went inside the premises. Subsequently she observed that the injured party "*… was very upset stating she had a lot of pain in her ribs due to being assaulted by Casey Morgan tonight …*"

(iii) Constable Silcock, who also attended the scene, was informed by the injured party that "*… she had been assaulted in an incident by …… Casey Morgan …. While inside the building she told me that Casey had become aggressive, resulting in him assaulting her by kicking and punching her in various parts of her body including her ribs and head and had dragged her around on the dusty floor. This had resulted in damage to the clothing she had been wearing. She further disclosed that he had grabbed her by the throat using both hands, which had caused her to struggle for breath, but was unsure if she had been rendered unconscious at the time. She stated that this continued while her brother ran for help …. She became visibly upset while describing the events and was crying and was unable to continue speaking. She appeared to be having difficulty moving and complained of pain to her ribs* [and] *proceeded to show me the clothing that she had been wearing and confirmed that holes and dust on the garments were from Casey assaulting her … and proceeded to point out to me a number of cuts, grazes and swelling to her arms, legs, back and neck.*"

[6] Next there was photographic evidence, namely the photographs of the aforementioned injuries, taken by Constable Silcock at the scene. Third, there was medical evidence. This consisted of certain records provided by the Emergency Department of the Ulster Hospital Dundonald. The time and date are stated to be 01.49 hours and 15 December 2018 respectively. These recorded "*Patient states boyfriend assaulted her tonight – fists – kicked – dragged downstairs – pain right ribs … alleged prolonged assault … punched and kicked on floor … unsure if blacked out*". The injuries noted on examination were, in substance, consistent with the observations and photographs of Constable Silcock. They consisted of a mixture of visible marks and subjective complaints, namely bruising under the right eye; facial cuts and redness; marks on each side of her neck; a bruise on the upper right chest; a really sore bump on the back of the head and soreness and pain in the areas of her nose, ribs, legs and arms with associated difficulty in standing and walking normally.

[7] The following day (15 December 2018) the injured party made a written statement detailing the assaults allegedly perpetrated against her by the Appellant, the fourth strand of the prosecution case. This recounted a gathering of six males and females, including the Appellant and the injured party, in the derelict house, described as "*a local drinking den*". Alcohol consumption had begun prior to arrival and continued thereafter. The Appellant reacted to a reprimand from the injured party about his drinking:

> "*He started shouting and saying I was over reacting …*
>
> *He hit me a punch or slap to the face. I remember falling to the floor …*
>
> *After that I had stood up. It's all confusing but I recall Casey on top of me, punching me in the head. He repeatedly hit my face and head. He trailed me round the house …*
>
> *Casey kept hitting me. I was screaming for help. Casey was choking me to make me be quiet …*
>
> *He put both hands around my throat and was lying on the ground. … I couldn't breathe.*
>
> *He also kicked me repeatedly to the ribs and torso. He kicked me in the nose …*
>
> *I got out of the house. We got onto the road. I know that he began to punch and kick me again. I curled up in a ball on the road … that's when the police pulled up. Casey told me to say to the police I fell. Once the police came they came back into the house with me to get my phone. That's when I told them what happened.*"

[8] The injured party's withdrawal statement, made three days later and taken by Constable Meehan (see further *infra*), was in these terms:

> "*On Saturday 15 December 2018 I made a statement to police in relation to an assault on me by my boyfriend, Casey Morgan. I would like to withdraw the statement I made as I do not want to go to court and I do not want the hassle of a police investigation. I just want to drop it all. I do not want to ruin his life and I know we just don't get on and I feel it would just be best to end our relationship and move on. I make this statement of my own free will. I have not been put under pressure from anyone else to withdraw my statement.*"

As noted, both of the injured party's statements were admitted in evidence as hearsay at the trial.

[9] The prosecution evidence also included the transcript of the Appellant's police interview the following day. The various allegations of the injured party were put to the Appellant. All were denied. The Appellant claimed that he was alerted to screaming from the injured party in an adjoining upstairs room, he responded discovering that she had fallen through some cracked wood and he

lifted her up to the floor and helped her out of the house. He could not explain how she had ended up on the ground outside the house. He confirmed that she was on her knees when the police arrived. The injured party's injuries were put to the Appellant in detail. When asked whether he could explain how they had been caused he replied "*No, I didn't know she had any injuries.*" When shown the photographs of the linear bruising on the Appellant's neck his reply was that he did not know how this had occurred. His response to the photographic evidence of certain other injuries was either that they had been caused when the injured party fell through the floor or he could not explain them. He claimed that he had not seen any damage to her clothing. He described the injured party as "*steaming*".

[10] The evidence of the interview record was adduced via Constable Meehan, who also attested to a notebook entry made by him at the court building on the morning of the first day of trial. This was in the following terms:

> "*Spoke to* [the injured party] *with prosecutor* – [the injured party] *disclosed that on the night in question I was drunk and exaggerated things, I fell through the floorboards. Casey helped me up, my mental health was bad at the time. I was angry at Casey. I did not want all this to happen.*"

[11] Pausing, the evidence adduced by the prosecution consisted of everything outlined at [6] – [10] above, a mixture of oral and documentary evidence.

The Contentious Trial Issues

The hostile witness ruling

[12] The Appellant's trial had certain noteworthy features. First, there was an application to treat the injured party as a hostile witness which the judge granted. The relevant transcript forms part of the materials before this court. At the beginning of her examination in chief by prosecuting counsel, the witness stated:

> "*I have withdrew my statement months ago and I really can't, I really don't want to go through with this …*"

Some few questions later the injured party continued:

> "*… I was really, really drunk and me and Casey had an argument … sparked off* [by me] *… I just started arguing with him, I was in the wrong … I had actually hit Casey … with my fist around the back of the head …*"

Next the witness professed that she could not recall either how many blows she had struck or whether the Appellant responded.

[13] This simulated a hostile witness application in the absence of the jury. The judge was directed to relevant legal principles and text book sources and was reminded of the initial statement made by the injured party. In response to the judge defence counsel stated that he had no submissions to make. The judge then ruled in favour of the application.

[14] The jury was recalled, as was the injured party and prosecuting counsel began to cross examine her, putting her initial statement to her. She replied *inter alia*:

> *" … my mental health was really, really bad and I was really angry at Casey so I did make a few things up and I had told the police that whenever I retracted my statement … I did make some things up and …."*

She continued:

> "*I had assaulted Casey first and he had pushed me back and I landed on the floor.*"

She repeated that she had "*told some lies*". She illustrated this by reference to the allegation in her initial statement that the Appellant had threatened to kill her younger brother (aged 15 years) at the scene. She claimed for the first time that her younger brother had run for help because she had fallen through an upstairs floor. The Appellant, she claimed, "*… actually grabbed me to help me*". She attributed the damage to her clothes to the fall. She explained the marks on her neck by asserting that the Appellant "*… had grabbed me whenever I had assaulted him and …. whenever I fell through the floor*". When other parts of her initial statement detailing specific assaults and injuries were put to her, her answers ranged from "*No comment*" to "*I don't know*" and "*I can't remember*". Later she testified:

> "*I attacked him and if anything it was self-defence whenever he has hit me back.*"

[15] The injured party was then cross examined by defence counsel. In response to his questions she testified *inter alia* that she had been extremely drunk; they had been in the upstairs of the relevant building; this was an unlit derelict building with large holes in the floor; substantial physical effort had been required of the Appellant to rescue her from her fall; she had been taking medication for her mental health and had combined this with alcohol; she had told lies in her initial statement because she was angry at the Appellant and wanted to hurt him. Her "*withdrawal*" statement was put to her. While she initially agreed with the suggestion that at this time she had informed the police of having "*made some things up*", she then retracted this concession. Finally she testified that earlier that morning she had spoken to the officer to whom she made her withdrawal statement (Detective Constable Meehan), stating that she had been "*drunk and exaggerating things*".

[16] In re-examination (in effect an extension of the earlier cross examination by prosecuting counsel), the injured party confirmed that upon making her withdrawal statement she had not suggested that there was anything untrue about her initial statement. In response to the judge she testified that she could not recall when (or in what circumstances) she had first informed the police that her initial statement contained lies. She referred vaguely to some unspecified contact between her solicitor and the police about one month previously.

[17] The evidence of the injured party was followed by that of Detective Constable Meehan. This witness was the vehicle whereby the record of the Appellant's police interview was adduced in evidence. He agreed in cross examination that the Appellant had answered all questions, had been fully co-operative and had not been rude, cheeky or aggressive. He confirmed that he was the officer who took the written withdrawal statement from the injured party. He testified that he was unaware of any record of the injured party having informed police that there were untruths in her initial statement. He further confirmed that he was the author of the notebook entry made by him at court the previous day (see [10] *supra*). The substance of this was read to the jury. The officer then attested to a further notebook entry recording a telephone call the previous day from a named solicitor who claimed *inter alia* that the injured party had informed him that she had "*… made up and/or exaggerated some of the information she told police in relation to the incident …*" (double hearsay).

The hearsay application and ruling

[18] The next main event at the trial consisted of a formal application on behalf of the prosecution to adduce hearsay evidence. The application was stated to be made under Article 18(1)(a) and Article 23 of the Criminal Justice (Evidence) (NI) Order 2004 (the "*2004 Order*"). The grounds were framed as follows:

> "*The application is made under Article 23 to admit the statement of* [the injured party] *as a previous inconsistent statement. The witness has been declared a hostile witness and the application is made to adduce her statement to police as evidence.*"

An extension of time was also formally requested on the ground that the stimulus for the application was the hostile witness determination of the court the previous day. In moving the application prosecuting counsel first indicated that, by amendment, the prosecution would seek to encompass within it the second of the injured party's written statements. It was acknowledged that certain of the contents would have to be edited on the essential ground of fairness to the Appellant.

[19] The relevant provisions of the 2004 Order are these:

> "***Admissibility of hearsay evidence***

18.—(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—

(a) any provision of this Part or any other statutory provision makes it admissible,

(b) any rule of law preserved by Article 22 makes it admissible,

(c) all parties to the proceedings agree to it being admissible, or

(d) the court is satisfied that it is in the interests of justice for it to be admissible.

(2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)(d), the court must have regard to the following factors (and to any others it considers relevant)—

(a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;

(b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);

(c) how important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;

(d) the circumstances in which the statement was made;

(e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it.

(3) Nothing in this Part affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings.

Statements and matters stated

19.—(1) In this Part references to a statement or to a matter stated are to be read as follows.

(2) A statement is any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form.

(3) A matter stated is one to which this Part applies if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been—

(a) to cause another person to believe the matter, or

(b) to cause another person to act or a machine to operate on the basis that the matter is as stated.

[Article 22]

<u>Res gestae</u>

4 Any rule of law under which in criminal proceedings a statement is admissible as evidence of any matter stated if—

(a) the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded,

(b) the statement accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement, or

(c) the statement relates to a physical sensation or a mental state (such as intention or emotion).

Inconsistent statements

23.—(1) If in criminal proceedings a person gives oral evidence and—

(a) he admits making a previous inconsistent statement, or

(b) a previous inconsistent statement made by him is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865 (c. 18),

the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible.

(2) If in criminal proceedings evidence of an inconsistent statement by any person is given under Article 28(2)(c), the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible.

Court's general discretion to exclude evidence

30.—(1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if—

(a) the statement was made otherwise than in oral evidence in the proceedings, and

(b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.

(2) Nothing in this Part prejudices—

(a) any power of a court to exclude evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (NI 12) (exclusion of unfair evidence), or

(b) any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise)."

[20] The further element of the statutory matrix in this context is Article 76 of PACE. This provides:

> "*…. The court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court, having regard to all the circumstances, including the circumstances in which the evidence was obtained, that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*"

In passing, it is unnecessary to decide whether the exclusion power under Article 30 of the 2004 Order, which may be considered the *lex specialis*, adds anything material to Article 76 PACE or any residual common law judicial discretion.

[21] In exchanges with defence counsel the judge mooted that the case was "*a textbook example*" of one to which Article 23 applies, observing:

> "*You have a statement which is recorded… well within 24 hours of the alleged events, it's a detailed statement and it is an unequivocal statement of accusation against your client and then it is withdrawn three days later. But at no stage in the statement of withdrawal is it asserted that this was ... an exaggeration,… a lie, or anything of that nature.*"

The formal ruling of the judge was that the case fell squarely within Article 23(1)(a), the evidence in question was admissible and the court would therefore accede to the prosecution application.

[22] The trial then continued in the presence of the jury. The two written statements of the injured party were read to the court. Prosecuting counsel then formally closed the Crown case.

No case to answer ruling

[23] The next discrete phase of the trial was occupied by an application by defence counsel for a direction of no case to answer. The judge pointed out that the prosecution case was not confined to the first of the injured party's statements but embraced also the other aspects of the evidence already noted: the observations of the injured party by police officers, her verbal statements to them, photographs of her injuries and medical records.

[24] In rejecting the application the judge applied the test of whether there was evidence upon which a jury, properly directed, could safely convict the Appellant. He further posed the question of whether the prosecution case rested on evidence that was so wholly inconsistent that a properly directed jury could not safely convict. Highlighting the various strands of evidence noted in the immediately preceding paragraph the judge refused the application in respect of the two counts which are the subject of the appeal to this court.

The Appellant's Evidence

[25] The Appellant gave evidence at the trial. He adopted the replies he had made to the police in interview. He then provided his account of events on the occasion under scrutiny. His account, in substance, was that he was alerted by the screams of the injured party and another female person present, upon reacting he ascertained that she had fallen through a floor and, following a couple of failed attempts, he pulled her out of her predicament. The injured party said she was sore around the

belly and she appeared somewhat shaken but was otherwise alright. The marks on her neck might have been caused by his grabbing. The injured party continued to drink thereafter. She had been really drunk for a few hours. In cross examination he claimed that he "*never laid a hand on her*". He added "*… she never hit me*". Neither the injured party's missing boot nor her missing mobile phone had been caused by him trailing her around. *Ditto* the damage to her clothing. He had helped her out of the derelict house. The rescue was effected by him putting his arms under those of the injured party and pulling her up and out. He was adamant that he had not grabbed her around the neck.

[26] No other witness was called on behalf of the Appellant. Sequentially the parties' counsel then addressed the judge on the issue of his directions to the jury. An issue of amending the indictment – of no consequence in this appeal – also arose and was determined by the addition of a further count to the indictment.

[27] The main issue canvassed on behalf of the Appellant at this stage was that the judge should give a so-called "*Makanjuola*" to the jury (see further [50] – [53] *infra*). The judge ruled against this in the following terms:

> "*The jury will receive the standard and accepted warning with regard to a hostile witness and the jury will be advised that it is for them to determine what, if anything, they can take from the evidence of* [the injured party] *and will be reminded, of course, that it is for the prosecution to prove the case and that if they are left in a state of any uncertainty or unless they can be absolutely sure that the account that she gave* [in her first statement] *was correct, then they must acquit the Defendant …*
>
> *In terms of '**Makanjuola**' it is discretionary – it is within the discretion of the court as to whether the court deems it to be appropriate to give such a direction. Bearing in mind the direction I will give – and which I am enjoined to give – in respect of the quality of the evidence of* [the injured party] *given the fact that I will be alluding to matters which may be considered relevant to issues of corroboration, then I do not see the necessity or indeed the appropriateness of a '**Makanjuola**' direction …. Anything that I would say by way of a '**Makanjuola**' direction would be superfluous.*"

The Command and Control Log Issue

[28] At the stage when both counsel had addressed the jury and prior to the judge commencing his charge there were exchanges in the jury's absence relating to a "Command and Control Log" ("CCL") documenting two phone calls (see further [54] – [60] *infra*). This had been disclosed by prosecuting counsel to defence counsel at a very late stage of the trial, around the time when counsels' closing addresses to

the jury were either being, or had been, made. Two logs, or entries, were disclosed in this way.

[29] While the contentious issue which materialised related to the second entry only, it is appropriate to note also the first in the context of this appeal. This is dated 14 December 2018 and bears the time 22.43 hours. The caller was clearly the mother of the injured party. The source of the information which the mother relayed in this way was her son who was one of the other young people present in the derelict house. According to the entry, her son –

> "*… has just returned home to report that her daughter* [name] *is at a derelict house with a Casey Morgan* [at address] *and that he is beating her … Morgan is reported as being drunk and had made threats towards her son* [who] *had managed to escape.*"

Neither prosecution nor defence was proposing that this documentary evidence should be adduced in evidence and it does not feature in the transcripts before this court.

[30] As the transcripts show, the sole focus of both counsel and the trial judge was the second of the CCL entries. This bears the time 22.57 hours. It records:

> "*Ambulance have a call from a male requesting an ambulance for a female (25 years) that has fallen. He cannot/will not tell the ambulance operator what her injuries are. He then went on to say 'they were starting to fight amongst each other'.*"

The remainder of the entry is of no particular moment. Further communications from the police personnel deployed recorded their presence at the scene at 23.13 hours and their interaction with the injured party and the Appellant. The latter was described as "*… known to police …. a Category 2 violent offender*" and a warning was given to "*… be prepared to back off if confronted with a weapon …*" Other elements of this second entry included the transporting of the injured party to hospital by ambulance and a description of her injuries.

[31] The transcript confirms that what excited the interest of the Appellant's legal representatives was the discrete entry in the second CCL that the female person mentioned had "*fallen*". To complete the context, PC Flood had testified, in response to a judicial question, that there was no suggestion from any quarter that night that the injured party had fallen through a floor. Defence counsel addressed the following request to the judge:

> "*I'm now formally asking for the jury to hear the fact simply that at 22.57 a male requested an ambulance for a female who had fallen. I'm formally asking that that be put before the jury*".

This was summarily refused by the judge.

Directions to the Jury

[32] The judge's charge to the jury contained a series of material directions, warnings and exhortations, including the following in particular:

(a) The jury is the sole arbiter of all matters of fact.

(b) The conventional standard and onus of proof direction.

(c) The standard bodily harm direction.

(d) To focus on the question of whether the Appellant had assaulted the injured party as alleged in her first statement.

(e) To consider whether the damage to the injured party's clothing had been caused in the course of the assault alleged by her.

(f) The evidence grounding the AOABH count was based "*to a very large measure*" on the injured party's first statement.

(g) Further and separately there was the evidence of the police officers about their observations of the Appellant having come upon the scene.

(h) Next there was the photographic evidence of the injured party's injuries and the damage to her clothing.

(i) The last two mentioned strands of evidence were capable of amounting to "*corroborative (or supportive) evidence of the allegations made in her original statement*".

(j) On the other side of the coin the jury must consider the oral evidence of the injured party which was, in substance, that the account in her initial statement was a fabricated one.

(k) The jury would take into account the absence of any assertion by the injured party in her withdrawal statement that her previous statement was untrue.

(l) "*Now because* [the injured party] *has given two different versions, you must look at all that she said with caution. If you are sure that one of the versions she gave is true, you can act on it. But if you are not sure which – if either – version is true, you should not take account of anything that she has said either originally or in court*".

(m) The standard self-defence direction, arising out of one aspect of the injured party's oral testimony (see [13] above).

(n) The Appellant's insistence in his evidence that he had not laid a finger on the injured party.

(o) If the jury considered that as "*a real possibility*" the injured party's injuries were sustained in the manner described by the Appellant, this would be "*powerful evidence to contradict the prosecution case ….*"

(p) If the jury entertained a reasonable doubt as to whether the injured party's initial statement was true, then "*… your duty would be to acquit the Defendant of ….*" counts 1 and 2.

(q) To disregard the Appellant's previous assault conviction unless sure that it demonstrated a tendency to behave in the manner alleged.

(r) Otherwise to treat the previous conviction only as providing some support for the prosecution case and not to convict wholly or mainly because of it.

Grounds of Appeal

[33] The completed pro-formae filed on behalf of the Appellant detailing the grounds of appeal was provided belatedly to the court (on the day of hearing). Its omission from the book of appeal was one of multiple defects. The materials lodged at the appropriate time included other pro-formae, amongst them the Form 3 grounds of appeal against sentence, supplemented by separate skeleton arguments totalling almost 70 pages addressing appeals against both conviction and sentence. Insofar as necessary the court grants leave to file the second Form 3 belatedly.

[34] It is appropriate to add that skeleton arguments should not be deployed as a substitute for clearly and concisely formulated grounds of appeal. Every skeleton argument provided at the initial stage should be confined to elaborating briefly on the grounds and drawing attention to the main statutory provisions engaged, the governing legal principles and the leading authorities. Furthermore, references to first instance judicial decisions will very rarely be appropriate as these do not have the status of authorities under the doctrine of precedent. Scrupulous adherence to Practice Direction 06/11 is required.

[35] In his careful and detailed decision refusing leave to appeal against both conviction and sentence the single judge, Maguire J, identified the following central grounds of appeal:

(i) The exclusion of the jury from the prosecution application to declare the injured party a hostile witness.

(ii) The trial judge's ruling that the injured party's two written statements should not be excluded under Article 76 PACE.

(iii) The judge's ruling whereby the application for a direction of no case to answer was refused.

(iv) The absence of a "*Makanjuola*" warning to the jury in the judge's charge.

(v) The guilty verdict was against the weight of the evidence.

(vi) The judge's ruling refusing to admit in evidence any part of the second "CCL" noted in above.

[36] In presenting the Appellant's case to this court Mr Conor O'Kane of counsel made the following submissions, in summary: in essence the convictions are unsafe as they are based almost entirely on the written statement of evidence later withdrawn by the injured party; the injured party's injuries and distressed state are at least equally consistent with the Appellant's account in both interview and evidence and the injured party's evidence to the jury; the judge erred in not excluding the injured party's initial statement under Article 76 PACE, in refusing the direction application and in failing to adequately direct the jury on the consideration that the prosecution case was in very large measure based on a written statement of evidence made by a witness who, on the Crown case, had lied under oath; the judge erred in not alerting the jury to that part of the CCL highlighted above; and the jury should not have been excluded from the hostile witness application.

[37] Mr O'Kane informed the court that he was not proposing to develop the first of the seven grounds of appeal contained in Form 3, namely the contention that the trial judge, having been alerted to the injured party's wish to obtain legal advice, erred (in some unspecified way) in not permitting "*time and facilities*" for this, insisting rather that the trial begin without delay. It is appropriate to observe that this was a truly hopeless ground of appeal. As the transcripts disclose, the injured party testified that she had, in terms, sought and obtained legal advice some considerable time previously. Furthermore there was the evidence of Detective Constable Meehan about the telephone call from the injured party's solicitor just before the trial began. The trial judge's handling of this issue was irreproachable.

The Unsafety Test

[38] As the appellate jurisdiction of this court in criminal cases is purely statutory, it is necessary to consider the governing statutory provisions. These are contained in sections 1 and 2 of the Criminal Appeals (NI) Act 1980, which provide:

> *"1. A person convicted on indictment may appeal to the Court of Appeal against his conviction –*
>
> *(a) with the leave of the Court; or*
>
> ***(b)** if, within 28 days from the date of the conviction, the judge of the court of trial grants a certificate that the case is fit for appeal.*
>
> ***Grounds for allowing appeal against conviction.***
>
> *2. Subject to the provisions of this Act, the Court of Appeal –*
>
> *(a) shall allow an appeal against conviction if it thinks that the conviction is unsafe; and*
>
> *(b) shall dismiss such an appeal in any other case.*
>
> *(2) If the Court allows an appeal against conviction it shall quash the conviction.*
>
> *(3) An order of the Court quashing a conviction shall, except when under section 6 of this Act the appellant is ordered to be retried, operate as a direction to the chief clerk acting for the court of trial to enter, instead of the record of conviction, a judgment and verdict of acquittal."*

In short, as confirmed by *R v Pollock* [2007] NICA 34, the sole question for this court is whether it considers the conviction under challenge to be unsafe. It is well established that this entails the application of the test of whether this court, on appeal, has a sense of unease, or a lurking doubt, about the safety of the conviction under challenge. See [32], per Kerr LCJ:

> *"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.*

> *3. The court should eschew speculation as to what may have influenced the jury to its verdict.*
>
> *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."*

[39] Properly analysed, the Appellant's case must be that his convictions in respect of the AOABH and criminal damage offences are unsafe on the basis of the grounds of appeal either individually or taken together in any combination. The statutory test, as expounded in *Pollock,* is to be applied by this court in this way. We shall examine each ground in turn.

The Hostile Witness Ground

[40] The suggestion that the Crown application for a declaration that the injured party be treated a hostile witness should have been made in the presence of the jury is frankly startling. Properly exposed, it entails the contention that the jury, whose exclusive domain is issues of fact and who had no role whatsoever to play in determining the application, should have been permitted to become embroiled in arguments relating to purely legal issues in spectator mode. Mr O'Kane's contention that *R v Darby* [1989] Crim LR 817 is supportive of this ground is unsustainable. In that case the Court of Appeal held that the trial judge should not have questioned the witness who was later declared hostile in the absence of the jury. This, however, was considered to have caused no prejudice.

[41] The correct procedure for a hostile witness application is described in *R v Hopes* [2011] EWCA Crim 1869 at [19]:

> *"But it is important that the procedures are undertaken with proper formality. No application was made to treat the witness as hostile. It should have been. The jury should have been sent out. If necessary, the witness should have been sent out and prosecuting counsel should have made the application in the conventional way."*

We endorse this approach.

[42] This court finds it virtually impossible to conceive of any case in which a hostile witness application should be made in the jury's presence. It is in the highest degree unlikely that this will ever be appropriate. The same high level of improbability applies to the prospect of this court ever holding that a conviction is rendered unsafe by excluding the jury from an application of this kind. Insofar as the *R v Darby* commentary in the Criminal Law Review provides any sustenance for any contrary contention this court disagrees profoundly.

Admitting the injured party's first written statement

[43] The effect of Article 23 and Article 28 of the 2004 Order is that where it is demonstrated that a person's oral evidence is, by that person's admission, inconsistent with a previous statement the latter is "*admissible as evidence of any matter stated of which oral evidence by him would be admissible*" – unless it falls to be excluded pursuant to any of the following mechanisms: the general discretion of the court under Article 30; the court's power under Article 76 PACE; or the court's common law discretion.

[44] We consider it important to neither overstate nor underestimate the importance of the first written statement of the injured party. It falls to be evaluated with detached objectivity. Fundamentally, it must be considered in the setting of all of the evidential components of the prosecution case. We have rehearsed these at a little length at [5]-[10] above. We consider that the injured party's initial statement was not the lynchpin of the prosecution case. It was, of course, a self-evidently important piece of evidence, fortifying the prosecution case. But, as demonstrated, it did not exist in isolation. Standing back, we consider that the Appellant could have been safely convicted on the basis of all of the other evidence which, notably, was in essence both uncontentious and incontestable.

[45] There is another factor of some importance. Mr David McLean, prosecuting counsel, correctly highlighted that at the stage when the judge ruled the contentious statement admissible the injured party had already been cross-examined *in extenso* about its contents. This evidence included her claims that she was very angry at the Appellant and had made some things up and told some lies in her written statement. It also included her multiple "*can't remember*" and "*don't know*" responses to questions. In addition substantial swathes of her withdrawal statement were read and/or put to her. Thus, by virtue of the way in which the trial unfolded, at the stage when the judge made the impugned hearsay ruling key parts of the first of the injured party's statements had been relayed in evidence to the jury. Furthermore the judge's ruling had the positive merit that the jury would not be left with an incomplete grasp and understanding of these important pieces of documentary evidence.

[46] In the foregoing circumstances the Appellant can assert no infringement of any of his constituent fair trial rights to the contrary and no ensuing unsafety in consequence. This evidence had the sole effect of fortifying the prosecution case. In the abstract, evidence which has this impact, without more, cannot be condemned as unfairly prejudicial to any accused person. This court must take into account also that the contentious evidence was admitted at a stage of the trial when the Appellant had every opportunity to respond to it and proceeded to do so. Finally, in the language of Article 76, we consider that the contentious evidence was of obvious probative weight. It was not prejudicial to the Appellant in the sense of dealing with something extraneous or peripheral to the prosecution case depicting the Appellant

in an unfavourable and unfairly prejudicial light. Giving effect to this analysis this ground of appeal is rejected accordingly.

The no case to answer ground

[47] It fell to the trial judge to apply the test of whether taking the Crown's evidence at its highest a jury properly directed could safely convict the Appellant. The application of this test entailed a judicial evaluation of whether the strengths and/or weaknesses of the prosecution case hinged on the assessment of a witness's reliability or any other matter lying within the province of the jury and whether on one possible view of the facts there was sufficient evidence to justify a jury verdict of guilty. The statutory incarnation of this, the *Galbraith,* test, is found in Article 29 of the 2004 Order which, translated to the context of the present case, required the judge to determine whether the initial written statement of the injured party was "*… so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe*".

[48] In determining an application for a direction it is incumbent on the trial judge to evaluate the prosecution evidence as a whole, particularly in cases with a circumstantial evidence dimension. Applying this global approach the judge will test the overall strength of the prosecution case and the inter-dependence of its various constituent elements: see *R v Courtney* [2007] NICA 6.

[49] On appeal it is for this court to stand back and review the totality of the prosecution evidence at the midpoint of the trial. The submission that there was insufficient evidence to permit the trial to continue is in our view manifestly unsustainable. We refer to, but do not repeat, the elements of the prosecution evidence highlighted above. In common with many prosecutions this evidence contained both strengths and weaknesses. These were matters for the jury to evaluate and determine. Fundamentally, the evidence was sufficient to enable the prosecution to safely continue. This ground of appeal fails accordingly.

The Makanjuola direction ground

[50] In *R v Makanjuola* [1995] 2 Cr App R 469 Lord Taylor LCJ, stated at p 472:

> *"The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which the judges may take into account in measuring where a witness stands in the*

scale of reliability and what response they should make at that level in their directions to the jury"

As this passage, and others, make clear the hurdle to be overcome in establishing this ground of appeal is a substantial one in every case. In this jurisdiction the decision in *Makanjuola* has been applied without qualification: see for example *R v Meneice* [2018] NICA 30 and, more recently, *R v BJ* [2020] NICA 5, where this court highlighted the discretion of the trial judge and held that even if a warning ought to have been given, this did not render the verdicts unsafe "*… as the alleged inconsistencies and/or lies were extensively explored in cross-examination, put before the jury in the defence closing speech, and referred to by the judge in his charge to the jury*". Furthermore, "*… it was open to the jury to form the view that the inconsistencies did not undermine the prosecution case*": see [48].

[51] The substance of this ground of appeal, per Mr O'Kane's submission, is that this was one of those "*more extreme cases*" in which the judge should have given a "*stronger warning*" to the jury which may have exhorted the wisdom of "*looking for some supporting evidence before acting on the evidence of the injured party*". The correct analysis in our view is that the reach of the *Makanjuola* principles has certain intrinsic limitations. They are couched in open textured language with a heavy emphasis on the discretion of the trial judge. This is doubtless based upon the truism that in matters of this kind the members of an appellate court occupy a position and operate from a perspective unavoidably distinct from those of the trial judge. While there may be some scope for debate as to whether the elevated *Wednesbury* threshold is the correct one, we consider, as already emphasised, that the critical prism to be applied by this court is that of the safety of the impugned conviction.

[52] In [32] above we have drawn attention to the salient features of the trial judge's charge to the jury. We would emphasise that his charge must be considered in its totality. The judge, in substance, opted for an "intermediate" *Makanjuola* direction to the jury. As the governing principles establish, this is an issue on which the review carried out by this appellate court is habitually of the less intensive kind. This is based on the rationale that as regards issues of this type the trial judge is considerably better placed and equipped to make the evaluative judgement required in the arena of the trial.

[53] There is a related issue. While the judge did not direct the jury precisely in the terms of the specimen hostile witness direction, we consider that there was in substance no disharmony. There can be no quibble with the options which the judge formulated for the jury. Fundamentally, the jury was urged to consider with caution everything which the injured party had said. Taking all aspects of this discrete direction together, this court has no reservations about it. Giving effect to the applicable principles we are satisfied that its terms were appropriate in the circumstances and give rise to no legitimate reservations about the safety of the Appellant's convictions. This ground of appeal is rejected accordingly.

Non-admission of the Command and Control entry

[54] We have outlined the factual framework of this ground of appeal at [28] – [31] above. A careful perusal of the relevant transcript exposes the reality of this ground. What emerges clearly is that defence counsel made no application to the judge to have either the second CCL or any part thereof admitted in evidence. Counsel further stated that he was not making a hearsay application. We observe, in passing, that any such application would have had to comply with the procedural requirements of Crown Court Rules. The defence proposal, in short, was that the judge should, by some unspecified mechanism, inform the jury of an emergency phone call requesting an ambulance "*for a female (25 years) that has fallen*". The transcript reveals that this request was advanced in an unsatisfactory way. The judge rejected this request in brusque, but unreasoned, terms.

[55] As our analysis demonstrates there was no application to admit this evidence. Notwithstanding, the question for this court is whether the incontestable fact that the jury was not made aware of this evidence, whether singly or in combination with other grounds of appeal, renders the Appellant's convictions unsafe.

[56] We would emphasise that the lateness of the request advanced did not *per se* provide a complete basis for dismissing it. It is well established that evidence can be placed before a jury at any stage before their verdict is delivered. Nor did the absence of any properly formulated adduction mechanism justify the refusal. Evidence can be – and is in practice – presented to juries in a variety of ways and, without elaborating, it is evident that a suitable mechanism could have been devised. However, from our stand point *qua* appellate court, it is clear that there were compelling reasons for refusing the request made. These are, in summary: the evidence was double hearsay; the jury would have received no evidence from either the source of what was recorded or the person who recorded it; thus there would have been no opportunity for the probing of the obviously important issues of veracity and reliability; the evidence was a mere fragment of a considerably greater segment and sequence of evidence belonging to the discrete context, with both previous and subsequent entries; and the word "*fallen*", the key word, without more, was a manifestly equivocal and incomplete description.

[57] We consider that to have adduced this evidence in the manner canvassed on behalf of the Appellant would have created the real risk of the jury indulging in speculation. It would have given the jury a misleading and incomplete picture, a mere snapshot of a much broader evidential canvass. Furthermore, the record said nothing about *falling through a floor:* and this in a trial context where the jury had already received evidence, which the Appellant had not challenged, that the injured party had indeed fallen on two occasions, first inside the building and second outside it. As this analysis demonstrates, this isolated fragment of a considerably larger record was of highly dubious probative weight. It is not possible to identify any tangible unfairness to the Appellant flowing from its exclusion. For this combination of reasons we are satisfied that this discrete ruling of the judge

generates no concerns about the safety of the jury's verdict and reject this ground in consequence.

[58] In this context we would add the following. It is documented in the relevant transcript – and was confirmed to this court – that there was no defence statement in this case. This was the main reason proffered for the unhappily belated disclosure of the two CCLs. We consider that in a prosecution of this nature a PPS/PSNI check for the existence of records of this kind should have been made as a matter of course. The prosecutor's sacred duty of disclosure is not constrained by what is requested in a defence statement: *R v H and C* [2004] 2 AC 134. Furthermore, this court must express concern about the admitted delay between receipt of these records by prosecuting counsel and their disclosure to defence counsel.

[59] This court was also informed that the time lapse between the Appellant's committal for trial and the commencement of the trial was very short indeed, being less than four weeks. The police, prosecuting and court authorities, including the presiding judge, are to be commended. This alacrity caused no unfairness to the Appellant. It cannot serve to excuse his lawyers' failure to serve a defence statement. This was not an optional matter. There being no suggestion that the prosecution had failed in its statutory duty to make preliminary disclosure and the Appellant having been committed for trial, the two pre-requisites to the service of a defence statement were satisfied. This was required as a matter of statutory obligation, by virtue of s 5 of the Criminal Procedure and Investigations Act 1996. The failure to serve a defence statement in the present case had no justification. It was compounded by the absence of any application to extend time. This court commends to practitioners the following passage in Valentine, Criminal Procedure in Northern Ireland (2nd Edition) at 7.76:

> "*Clearly it behoves the defence lawyers to start preparing a draft defence statement as soon as committal papers are received and to draft its final version as soon as initial prosecution disclosure is received, or draft the notice for extension of time within a few days.*"

[60] We further take this opportunity to draw attention to the contents of every defence statement which are obligatory by statute: (a) the nature of the defence, including any particular defences on which the accused intends to rely, (b) the matters of fact on which the accused takes issue with the prosecution, (c) in respect of each such matter the basis thereof and the matters of fact on which the accused intends to rely for the purposes of his defence and (d) any point of law (including as to the admissibility of evidence or abuse of process) and any authority on which he intends to rely.

The weight of the evidence ground

[61] Mr O'Kane properly acknowledged that this omnibus ground overlaps and merges with others. It is well established that in cases where this court concludes, following its review of all the evidence and the trial process, that a guilty verdict was against the weight of the evidence the statutory test of unsafety will be established. Having regard to everything preceding this penultimate paragraph of our judgment, we have no reservations about the safety of the Appellant's conviction on this free standing ground. In short, there was ample admissible evidence to support the jury's verdicts of guilty. Furthermore, this court has held that in cases where an application for a direction of no case to answer was properly refused the contention that the ensuing verdict was against the weight of the evidence must fail: *R v X* [2006] NICA1.

[62] In thus concluding we take this opportunity to emphasise that, in the abstract, there is absolutely no reason why a prosecution for any offence which has the ingredient of a purported withdrawal by a witness of material evidence against the accused should not in principle succeed. The fact of retraction should be presented to the jury in a measured, balanced way, avoiding both overstatement and distortion. Every case will be unavoidably fact sensitive. This reflection further serves to highlight the intrinsic undesirability of exercises involving comparing the factual matrix of one case with that of another.

Appeal Against Conviction: Conclusion

[63] We have considered the grounds of appeal both individually and collectively. This exercise gives rise to no concerns on the part of this court about the safety of the two convictions for the reasons given. We dismiss the Appellant's appeal against conviction accordingly.

Appeal Against Sentence

[64] The grounds of appeal against sentence, reduced to their essentials, are that the dominant sentence of three years imprisonment with an extension period of two years licence was manifestly excessive and wrong in principle; the Appellant should not have been assessed as "*dangerous*"; the sentence was out of harmony with Northern Ireland "*sentencing precedents and authorities*"; the guidelines of the English Sentencing Guidelines Council should have carried greater weight; and, finally, the court erred in concluding beyond reasonable doubt that the Appellant had forced the injured party to alter her account.

[65] The answer to the first two grounds of appeal is readily provided by two factors. The first is the evidence – which the jury by reasonable inference must have accepted – of the prolonged and violent attack on the injured party, a defenceless and intoxicated female, which entailed punches, kicks, choking and dragging. This attack was of such ferocity that at least one of the other persons present ran from the scene in order to alert the emergency services. Furthermore, the choking, or strangulation, dimension was plainly a terrifying experience for the injured party

and, as emphasised in this court's recent decision in *R v Allen* [2020] NICA, at [47] – [52], a substantial aggravating factor.

[66] The second is the Appellant's criminal record. The Appellant was aged 24 years on the date of the index offences. In brief compass, his offending began when aged 13; he first received a custodial disposal when aged 14; the offences which he accumulated in his early teens included one of wounding with intent when aged 14; he has eight previous convictions for assault offences; when aged 15 he was convicted of threats to kill, attempted robbery and possessing an offensive weapon in a public place giving rise to an extended custodial sentence of 3 years imprisonment and 5 years licence; this court was informed that upon expiry of the relevant custodial period the Appellant's release was not ordered by the Parole Commissioners; and following his release on licence he committed several further summary offences. His criminal record consists of a total of 68 offences. He was assessed as a "Category 3" offender when released on licence in March 2018. He has been managed by the Probation Board as a "SROSH" offender since March 2013. According to the pre-sentence report, he is –

> "*…assessed as high likelihood for further reoffending* [sic]. *This identifies significant pro-offending attitudes, significant victim empathy deficits, emotional instability and critically the influence of substance misuse upon his decision making and lack of consequential thinking.*"

[67] It is clear that the Appellant had a highly troubled and severely deprived upbringing. One can but sympathise with this. On the other hand the realities of his criminal record, the index offending and the PBNI assessment are inescapable. Taking all of the foregoing facts and factors into consideration the conclusion that the first two grounds of appeal are devoid of merit readily follows.

[68] The third ground ("*sentencing precedents and authorities*") is based on the misconception that sentencing should be by rote, involving an exercise of comparing the facts and features of the present case with those of others. The fourth ground is equally unsustainable having regard to the differing sentencing regime for AOABH in England and Wales and what this court has repeatedly stated about the correct approach in this jurisdiction to the SGC Guidelines.

[69] As regards the next ground of appeal of substance, it is clear that the judge was influenced by the urgings of prosecuting counsel that the Appellant had engaged in "*placing the victim under duress to lie to the police and to the court*". This was not an agreed fact. Nor is there any basis upon which it can be said to have been established beyond reasonable doubt. This element of the judge's sentencing approach is, therefore, erroneous. However, the essential question for this court is whether, standing back and having regard particularly to what we have rehearsed in [65] – [66] above, this discrete error has given rise to a sentence which is manifestly excessive. For the reasons given we consider that the answer must be "no".

[70[The final two grounds of appeal in substance resolve to the single complaint that the court should have given greater weight to the possibility that some of the injured party's injuries may not have been perpetrated by the Appellant. As already observed it is evident that the jury accepted the substance of the injured party's initial statement of complaint. We have addressed above the description contained therein of the attack to which the injured party was subjected, two features whereof were separate beatings by the Appellant inside the building and then outside and two separate falls – inside and outside - occasioned by the blows. There was no direct evidence of any other cause of her injuries nor any primary evidence from which some other cause could reasonably be inferred. This ground of appeal has no merit in consequence.

Omnibus Conclusion

[71] Having called on the prosecution to deal with a discrete issue, leave to appeal against conviction is granted and the appeal is dismissed. Leave to appeal against sentence is refused.