Neutral Citation No: [2024] NICA 46 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **KEE12522** *ICOS No:* **19/39184/A01** *Delivered:* **31/05/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

BD

Mr Conor Maguire KC with Stuart Magee (instructed by Joseph F McCollum, Solicitors) for the Applicant
Mr Philip Mateer with Nicola Auret (instructed by the Public Prosecution Service, PPS) for the Respondent

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Before: Keegan LCJ, Horner LJ and Sir Donnell Deeny

KEEGAN LCJ (*delivering the judgment of the court*)

The complainants are entitled to automatic anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992 as amended. We have also used a cypher for the applicant to avoid identification of the complainants.

Introduction

[1] This is a renewed application for leave to appeal against conviction brought by the applicant, leave having been refused by the single judge, Scoffield J in a comprehensive ruling.

[2] The conviction concerns three complainants and relates to serious sexual offences. The applicant was convicted after a trial before His Honour Judge Kerr KC (the trial judge) of three counts of rape, contrary to common law; one count of attempted rape, contrary to section 9(b) of the Criminal Law Act (Northern Ireland) 1967 and common law; three counts of buggery, contrary to section 61 of the Offences against the Person Act 1861 (the 1861 Act); and 12 counts of indecent assault, contrary to section 52 of the 1861 Act.

Factual background

[3] The complainants are the daughter and two sisters of the applicant.

[4] There have been three trials in respect of these offences. In the first trial the jury was discharged because of the actions of the complainant NR while giving evidence. NR is the daughter of the applicant. In the second trial, following unanimous acquittals in respect of 13 counts on the indictment, the jury was unable to reach verdicts on the remaining 35 counts and was subsequently discharged. Thereafter, the prosecution proceeded to trial on a new indictment on 23 of the remaining counts. It is the conviction following this trial that we are concerned with.

[5] The trial began on 24 October 2022 and proceeded over six days until 1 November 2022. The applicant was found guilty on 19 counts by a mixture of unanimous verdicts on 11 counts and majority verdicts on eight counts. The applicant was sentenced on 16 January 2023 to a total of 18 years' imprisonment. This appeal relates to conviction only, an application for leave to appeal conviction having been lodged on 28 November 2022.

[6] At the date of this trial the applicant was 69 years of age. NR, his daughter, who is the first complainant is now aged 38. She made allegations of rape, buggery, and indecent assault against her father alleged to have taken place when she was aged between five and 13 years of age from late 1989 to 1997 in the applicant's family homes and in the applicant's car.

[7] The second complainant, who we will describe as J, is the applicant's sister and is now aged 59. She made allegations of indecent assault and gross indecency against the applicant. There were seven counts in total relating to her. These offences were alleged to have taken place in the family home when the complainant was aged between 8 and 12 years old in the mid-seventies.

[8] The third complainant, who we will call S, is the applicant's other sister now in her early sixties. She made two specific allegations of attempted rape, one of which was successfully challenged at the direction stage, and instead left to the jury as an indecent assault. These offences were alleged to have taken place in the family home and on the family farm when the complainant was 13 years old in the early 1970s.

Grounds of appeal

[9] The applicant has articulated several grounds of appeal in the notice, but these have helpfully been distilled at hearing into three main grounds as follows:

(i) That the trial judge erred in allowing bad character evidence to be admitted without any prosecution application to admit same.

(ii) That the trial judge wrongly refused to discharge the jury on foot of two defence applications arising out of the circumstances in which prejudicial and inadmissible bad character was referenced by the complainant NR before the jury.

(iii) That there was a material irregularity in respect of some of the verdicts in the case as a query was raised after the verdicts were given by one juror whether some verdicts were unanimous.

[10] This appeal has been effectively argued by way of combining appeal grounds (i) and (ii) to an overarching submission as to the fairness of the trial, given matters which led to the discharge applications. The second ground relates to alleged material irregularity in the jury verdict and raises the question whether the presumption of assent to verdicts should be rebutted on the facts of this case. We, therefore, deal with the case in this sequence.

Ground 1 – Failure to discharge the jury upon defence applications

[11] This ground relates only to the evidence of NR. Mr Maguire KC utilised the transcripts of evidence provided to us to highlight the following points which he maintained should have resulted in the jury being discharged given the prejudice occasioned to his client which he said could not be corrected by way of a warning to the jury.

[12] We summarise the impugned parts of the evidence upon which this appeal ground is based as follows.

[13] First, during evidence-in-chief NR made several unsolicited allegations that the applicant had taken indecent pictures and videos of her. Mr Maguire raises an issue as this allegation was not the subject of a specific charge and was unsolicited. The relevant part of the transcript of examination in chief reads as follows:

> "PM: Now when you moved to [address] what type of sexual behaviour do you say occurred there?
>
> NR: Playing with me, em, making me suck his cock, em, there was pictures taken, he would have taken pictures on the camera, em, there was (inaudible) trying to get me to suck his cock."

[14] Next, Mr Maguire took issue with another section of NR's examination in chief as follows:

"NR: Yes, he actually nicknamed it.

PM: What did he nickname it NR?

NR: Dipstick, do you want to suck my dipstick."

[15] Mr Maguire also maintains the argument that during cross examination the complainant strayed into making highly prejudicial comments, which were unsolicited which were not part of the indictment. The impugned comments are found within the following extract which we set out:

"CM: Did you see your mother after this alleged incident in the bedroom?

NR: Yes, she was beat up, she had blood in her nose, she had a black eye, she had bruises in her arms.

CM: So after this incident happened, was your mother let back into the house?

NR: She was yes, after begging quite a lot.

CM: So you are aware that your mother begged to get back into the house and your father let her back in and you describe her as being black and blue?

NR: Yes, she was.

CM: With blood in her nose?

NR: Yes, she had a black eye to go with it too, you could see the black eye coming out.

CM: How did that happen when she was outside the house NR?

NR: He had hit her before she went out of the house.

CM: Okay, so during the fighting and arguing you say he had hit her to the point where she was black and blue and had blood in her nose.

NR: Yes, she was beat more than once. He was a woman beater as well as a paedophile. And if yous can't say it, I'll certainly say it because I know what he is, I live with him, I know what kind of man he

is. I know what this man is capable of, and it is about time he served his time for what he has done because I am the one that has been left picking up the pieces, I'm damaged."

[16] After NR made these comments the trial judge gave the jury members a break. This pause in proceedings allowed Mr Maguire to formally complain as to what he described as NR's "outburst." He requested that the jury be discharged.

[17] There is a short ruling from the trial judge on this application which is truncated due to recording difficulties. In that ruling the trial judge did refer to "a rant on the part of the complainant" but he refused to discharge the jury.

[18] After this break and the first application to discharge, NR continued to be cross examined. There is a further complaint raised by Mr Maguire that after being questioned in relation to what happened involving Sunday School NR, made prejudicial comments which are summarised in the transcript in the following passage:

"CM: And you are aware that your father denied all of the references that you make there?

NR: My father will deny everything, he is a godly man, he doesn't want the church to look their nose down on him for what he really is and that's where he got his prey from too. He tried to prey on young, young Sunday School children. Nobody would let their father; nobody would let my father near their children in church."

[19] As a result of the evidence set out above Mr Maguire, again, made an application to have the jury discharged. There is a more substantial ruling by the trial judge in relation to this second application and a fuller transcript of the argument which we have considered and summarised as follows.

[20] It is fair to say that this second ruling covers the ground from the first application as well. We note that a comprehensive submission was made by Mr Maguire to the trial judge describing the basis upon which he says the jury should be discharged due to the prejudice occasioned to him. We can see Mr Mateer, on behalf of the prosecution, was invited to reply and did so. The argument was made by Mr Maguire that it was the cumulative effect of various utterances by the witness that would lead to discharge. During his submission to the trial judge, Mr Mateer pointed out that this witness was cross-examined over several days and suggested that the outbursts may have been provoked by the questions raised, not intentionally or improperly, but by virtue of the nature of the questioning.

[21] We set out the trial judge's ruling as follows.

> "Yes, this is an application by the defence to discharge the jury and you have comments made by the principal witness in relation to these charges which go outwith the charges, and which are clearly matters which constitute potential criminal allegations against the defendant, her father. The court must exercise its discretion and the main part of that discretion is the court must form a view whether or not the potential damage and, of course, any such comments potentially can cause damage to a defendant's interests in a trial is something which can be redeemed by the normal trial process and if there is a high degree of necessity established for a jury to be discharged then it is the duty of the court to do so. It is not appropriate or proper for me to go through and analyse each individual matter which has been raised before me. In the context of this case, I consider that the court is well able to deal with the character allegations made and the evidence of this principal witness in giving proper directions to the jury as to credibility and reliability and in those circumstances, thereby, protecting the defendant's interests. I do not consider it is a case where it is necessary to discharge the jury and I decline the application."

[22] Following this ruling the trial continued. We note that the applicant gave evidence as did his wife and daughter in support of him.

[23] Significantly, the trial judge's charge to the jury is not impugned in any respect in this appeal. When this case is properly analysed that course is unsurprising given the robust manner in which the trial judge provided his charge. Two areas of the charge deserve particular mention as following.

[24] First, a good character direction was given in unambiguous terms. This is uncontroversial and so we need not recite the specifics of the direction save to say that the judge stressed that the applicant was a man of good character with no criminal record.

[25] Second, a clear warning as to the evidence of NR, the strength of which is encapsulated in the following extracts we take from the charge:

> "Now, I said in relation to supporting evidence there was no requirement for it except in the case of NR and the reason why I make a differentiation in her case is this, in

her case, depending on your view of it, there are features such as her inconsistency with previous accounts and a resurgence of bad character or bad behaviour of a gross kind by her father which are not connected to the charge before her. This makes her position different from that of her aunt's. Firstly, you must disregard those assertions that she has made which do not relate to the charges in this case and are not supported by any other evidence and not consider them part of the case against the defendant. Secondly, they showed a grave animosity to her father, so as to make her what could properly be described as a suspect witness about whom you would exercise considerable caution before acting on her evidence.

Now, the defence say sure there is a significant number of inconsistencies in this case. I do not intend to repeat all of them, but the main ones are as follows …

The allegation that photographs were being taken while she was being abused had never been made before. The allegation that the defendant referred to his penis as a dipstick was never mentioned before. The allegation that she had no bed and slept on cushions on the floor was never mentioned before. The allegation of buggery because she was on her period was not mentioned before. They also have referred you to the evidence about the removal of doors on [address], the incident with the doctors at [location], the incident at [location], the references to abuse in the car and allegations that she had made numerous statements to police in disclosure which is denied by police.

NR is a flawed witness, and you should not consider her as being supportive of the other two.

In view of my warning to you of the need for special caution in relation to NR's evidence, you should not use her evidence as supportive of either of her aunts, but you can consider whether their evidence is mutually supportive in support of either individually or collectively in support of NR. That is provided you have gone through the steps I have already identified …"

The arguments

[26] In his helpful submissions Mr Maguire essentially said that the accumulation of all of the prejudicial evidence that he referred to in this appeal meant that the gravity and prejudicial nature of the claims necessitated a discharge to the jury, and they could not be corrected by the trial judge's warnings.

[27] In advancing his argument Mr Maguire, however, realistically accepted that how a trial judge should act in a case such as this will depend on the facts of a particular case, that the issue of discharge of the jury is a matter of discretion for a trial judge and that the Court of Appeal will not lightly interfere with what the trial judge does. Of course, these sentiments have been expressed for decades, see *R v Weaver* [1968] 1 QB 358 *R v Blackford* [1989] 89 Cr App R 238, *R v Boyes* [1991] Crim LR 717, and *Arthurton v The Queen* [2005] 1 WLR 949.

[28] In reply to these arguments Mr Mateer contended that there was no substance in the argument that the prosecution should have made a bad character application and there was no abuse of process by way of prejudicial material being admitted that could not have been corrected by a charge. He pointed out that in this case the complainant gave evidence by live link as she was deemed to be vulnerable. He pointed out that some of the prejudicial material was extracted through cross-examination which the prosecution could not be faulted for. He also submitted that the trial judge rightly took the view that the threshold for discharge of the entire jury had not been met for valid reasons and he gave a strong warning to exercise care when considering NR's evidence to the jury.

Consideration

[29] We have considered the competing arguments and have reached the following conclusions.

[30] A helpful summary of the law as to the test to be applied when a trial judge is considering discharge of the jury is found in *Blackstone's Criminal Practice* section D13.62 as follows:

> "How the judge should act will depend on the facts of the particular case, and the court will not lightly interfere with what the judge does (see Sachs LJ's judgment in *Weaver* [1968] 1 QB 258 at page 359G.
>
> In *Weaver*, D's previous convictions were revealed during incautious cross-examination of the police officer who had interviewed him. Sachs LJ said that every decision turned on its own facts and depended especially on the nature of what has been admitted into evidence, the circumstances in which it has been admitted and what, in

> the light of the circumstances of the case as a whole, is the correct course (at page 360B). The factors which particularly weighed against discharge were:
>
> (a) That defence counsel had himself been responsible for inviting the answers which he then complained of; and
>
> (b) The degree of prejudice had been minimised by the judge's wise summing up."

[31] The wisdom of Sachs LJ outlined above has been applied in criminal cases since. The principles have also been applied in this jurisdiction in *R v Ghadghidi* [2016] NICA 43 paras [26]-[28].

[32] The other authorities that have been mentioned in support by Mr Maguire in support of his argument are fact sensitive and do not automatically result in a read-across. The case of *Arthurton* illustrates the importance of the context, the specific issues in the trial and the significance of the prejudicial material to those issues, in particular to the nature of the defence advanced by the defendant.

[33] Applying the law to the facts of this case we are quite clear that the trial judge has not strayed beyond the boundaries that are open to him. We bear in mind that he had conduct of this trial and heard the evidence. He also did stop the evidence at certain stages when matters could have boiled over.

[34] We have also examined what potentially prejudicial material is in issue. First, we note NR's evidence of the applicant allegedly taking pictures of her. We accept that this behaviour is not comprised within a charge on the indictment. However, the impact of this omission is not as stark in the context of the allegation of oral sex which was the evidence in this section of the trial. In addition, we do not believe that this is bad character evidence within the definition of the Criminal Justice (Evidence) (Northern Ireland) 2004 Order. In any event, the prosecution was not sighted on this and so could not have made a formal application. Overall, we are satisfied that this evidence of itself, as Mr Maguire himself realistically accepted, could not result in discharge of the jury.

[35] The next point concerns what Mr Maguire describes as a general opinion given by NR as to the applicant's character in the round rather than specifically against her. We understand the point that it is intemperate language, and that NR was clearly highly emotional when she made her comments. However, we cannot see past the fact that NR was giving evidence on her own behalf in a trial where she had alleged serious sexual abuse against her father. Hence it could be reasonably predicted that she might articulate her own assessment of the applicant as a paedophile.

[36] The other allegation in relation to woman beating is somewhat more concerning because this was not part of the indictment at all and strays into different territory. However, on close analysis this engages the behaviour between the applicant and his wife in their household. We questioned both counsel in relation to this issue and have ascertained that the applicant's wife was called to give evidence and that she dealt with the issue of domestic abuse in her evidence. And as such, even if there was a prejudice to the applicant at the time that NR made this assertion within her evidence, it was capable of being rebutted and, indeed, was rebutted within the trial and, therefore, the trial process cannot be said to be unfair.

[37] The third area of concern follows a lengthy passage of cross-examination which deals with specific allegations, some of which touched on what happened at Sunday School. It must be borne in mind that defence counsel quite properly undertaking his duties cross-examined closely on this issue. However, the consequences of such questioning are that answers from a complainant may not suit a defendant in a particular case. We think that is what has happened in this case. The evidence was solicited through questioning by counsel. However, NR has strayed very close to the permissible boundary by referring to the applicant as a predator. This is the part of the evidence which is of most concern to us.

[38] Following from the above assessment, the core question arises whether any prejudice has been remedied. In this regard, we have closely examined the trial judge's charge. In the charge the trial judge expresses himself in very clear and unequivocal terms raising concerns about the evidence of NR which he repeats on several occasions. To our mind, this charge is a model of how a charge should be framed to preserve fair trial rights for an applicant.

[39] Accordingly, we have no hesitation in finding that any prejudice that has been caused to the applicant by virtue of NR's unfortunate outbursts at times in this trial have been remedied by the charge to the jury, which clearly highlighted that NR may be viewed as a flawed and suspect witness. In truth, as the single judge states in his ruling NR's outbursts could have backfired on her given that the jury may have viewed her as an unbelievable witness because of the animosity shown towards her father. The charge was also balanced by the good character direction in favour of the applicant.

[40] Overall, the approach adopted by the trial judge was within his discretion and is not one we will interfere with. The trial judge was best placed to assess any potential prejudice to the applicant and guard against it. We consider that he did so in his charge. Hence, we dismiss this ground of appeal.

Ground 2 – Material irregularity

[41] This rather unusual ground of appeal arises as after the verdicts were recorded and the jury was discharged a juror suggested to a member of court staff that none of the verdicts announced by the foreperson of the jury were unanimous.

There were 11 unanimous verdicts and eight majority verdicts recorded. It is therefore submitted that the verdicts are non-verdicts.

[42] We have read the trial judge's ruling in relation to this issue. In that ruling we note the following approach which bears upon our decision:

(i) Upon being informed of this issue by the court clerk, the trial judge enquired as to the whereabouts of the jurors and confirmed that they had all (including the unidentified juror who had raised this point) left the building.

(ii) The trial judge directed the clerk to contact the foreperson to enquire if he had any papers or documents relating to the verdicts and, if so, to ask that he keep them.

(iii) The trial judge also directed that any papers in the jury room be retained in case further enquiry was necessary.

(iv) The trial judge considered whether the information might require him to reconsider his decision to remand the applicant into custody (and has given reasons as to why this was not required).

(v) He further contacted senior counsel by way of email to inform them of what had occurred and asked for their submissions as to whether the court should take any action as a result (and, if so, what action).

(vi) The trial judge requested that senior counsel agree an early date for hearing on the issue and directed the applicant to appear via Sightlink. 9 October 2022 was agreed, and written submissions were also received prior to judgment.

[43] The jury foreperson could not be contacted despite all efforts. It is also clear that there was limited paperwork in relation to the jury analysis. The trial judge records all of this in his judgment and sighted counsel on this. In his ruling he ultimately decided that this was not a material irregularity on the basis of how the verdicts were returned.

[44] Crucially, in the ruling the trial judge explains that 11 of the verdicts were declared unanimous by the foreperson and on each occasion, he was asked in the presence of the other 11 jurors, including the juror who raised the issue, if this was the verdict of all and he said, "yes." As the trial judge records no issue was expressed by any juror on any of the 11 occasions on which this question was asked and answered in this way. The trial judge's core conclusion, therefore, reads as follows:

> "Further, on my view, significantly, there were eight majority verdicts, where the foreperson stated in open

> court that it was not the verdict of all, but that 10 agreed and two disagreed. I find it incredible that if the juror who later demurred is correct, that not one of the 11, including himself or herself, raised this during the extended period the verdicts were being recorded. I do not accept as a reasonable possibility that all 11 failed to understand and draw to the court's unanimous attention that no verdicts are unanimous."

[45] The trial judge was clearly aware of the relevant law in this area, in particular, the case of *R v Charnley* [2007] EWCA Crim 1354. This well-established authority is to the effect that there is a presumption in favour of assent of a jury to a verdict and that it is only in "extreme circumstances" that exceptions are permitted. In *Charnley* no majority direction had been given; and the evidence was that the requisite number of 10 jurors had clearly not agreed to the guilty verdict in the jury room communicated though the bailiff. These are stark circumstances which do not translate into the circumstances of this case.

[46] Thus, having considered the law and applied it to the facts of this case we entirely agree with the trial judge that this was not an exceptional case where he was required to go behind the verdicts described by the foreperson in open court in the presence of the other jurors and to which they presumptively assented. We consider that the trial judge took all reasonable steps to deal with this issue by engaging counsel, considering the law, and providing a reasoned ruling. There is no valid reason why we would interfere with this approach of the trial judge. As such, we dismiss this ground of appeal.

Conclusion

[47] For the reasons given we refuse leave on all grounds and dismiss this appeal. In doing so, we have applied the overarching test in this jurisdiction which is found in *R v Pollock* [2004] NICA 34. We are entirely satisfied as to the safety of the convictions.