Neutral Citation No: [2024] NICA 86 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **TRE12614** *ICOS No:* **23/77923/A01** *Delivered:* **16/12/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

FD

Mr Devlin KC with Mr McKeever (instructed by LMK Law Solicitors) for the Appellant
Mr Farrell (instructed by the Public Prosecution Service) for the Respondent

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Before: Treacy LJ, Horner LJ and McFarland J

TREACY LJ

Introduction

We have anonymised the appellant's name to protect the identity of the complainants. They are entitled to automatic anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992. The appellant is a referred to as a cypher to avoid jigsaw identification of the complainants.

[1] The appellant appeals against conviction on four counts by unanimous verdict of the jury on 19 March 2024 following a trial at Antrim Crown Court before Her Honour Judge McCormick KC. He was sentenced on 1 July 2024 to a custody probation Order comprising 21 months' custody and two years' probation.

Background

[2] The counts faced by the appellant were dealt with as per the below table:

Count	Offence	Finding	Sentence
1	Indecent assault on H – 1/9/67 – 30/6/74 (specific)	Guilty	21 months' custody and 2 years' probation
2	Indecent assault on H – 1/9/74 – 31/9/77 (specific)	Not guilty	

3	Indecent assault on H – 1/9/74 – 31/9/77 (specimen)	Not guilty	
4	Indecent assault on H – 1/9/74 – 31/9/77 (specimen)	Not guilty	
5	Indecent assault on H – 1/9/74 – 31/12/75 (specific)	Not guilty	
6	Indecent assault on H – 1/9/74–31/12/75 (specimen)	Guilty	21 months' custody and 2 years' probation
7	Gross indecency with a child (H) – 1/9/74 – 31/12/75 (specimen)	Guilty	21 months' custody and 2 years' probation
8	Indecent assault on H – 1/9/74–31/12/75 (specimen)	Not guilty	
9	Gross indecency with a child (S) – 1/9/71–1/3/75 (specific)	Directed acquittal	
10	Assault occasioning actual bodily harm on (S) – 1/1/75 – 31/12/75	Guilty	21 months' custody and 2 years' probation
Total			21 months' custody and 2 years' probation

[3] He was thus convicted of the following four counts:

Count 1 Indecent assault on H, between 1 September 1967 and 30 June 1974 – a specific count

Count 6 Indecent assault on H, between 1 September 1974 and 31 December 1975, a specimen count

Count 7 Gross indecency with H, between 1 September 1974 and 31 December 1975, a specimen count

Count 10 Assault occasioning actual bodily harm on S, between 1 September 1975 and 31 December 1975, a specific count

[4] The appellant was born in 1954.

[5] The appellant was found not guilty by direction of the judge on the only sex offence he was charged with in relation to S, a specific count of gross indecency between 1 September 1971 and 1 March 1975. In addition, he was found not guilty by the jury of five sex offences in relation to H, three specimen counts and two specific counts.

Factual background

[6] There are two victims in respect of this case, H and S, both of whom are the half-sisters of the appellant. The appellant is older than S by six years and six months. He is older by almost eight years than H. In her sentencing remarks the judge stated as follows:

> "In respect of [H], now aged almost 62 years of age, she gave an account of living at […] the family home, and at a point while she was in primary school, therefore between 1967 and '74, the defendant came to the house, closed the blinds in the sitting room, pushed her down - when he was in the house, he closed the blinds in the sitting room, pushed her down onto a sofa, undid his zip, grabbed her hand and got her to touch his penis. An aunt knocked at the door and enquired why she wasn't at school. The victim's evidence is that she was at primary school at the relevant time, therefore aged between five and 11, so the defendant will have been aged between 13 and 19 at the time of that event.
>
> Counts 6 and 7 are specimen counts, in other words, counts to cover recurring conduct relating to her evidence about the defendant calling her into his bedroom, placing his penis into her mouth, masturbating in front of her and, on occasion, ejaculating into her mouth. This is the course of conduct which occurred recurringly between September '74 and December '75.
>
> The second victim, [S], now aged 63, gives an account of being 13 in her evidence. In January '75, there was a dispute at the home, the defendant dragged her from the living room out to the backyard, punched her, caused her injury round her face which she reported to her mother. Apparently her face was injured black and blue according to her and that was the incident which led to the defendant being put out of the family home."

[7] The appellant was made aware of the allegations against him on 26 November 2020 but was not interviewed until 24 March 2021. He denied the allegations.

Previous convictions

[8] The appellant had no relevant convictions.

Grounds of appeal

[9] There are four grounds of appeal:

(i) The judge erred in not acceding to the defence direction application at the conclusion of the Crown case that the appellant had no case to answer;

(ii) The judge erred in law is refusing to give a direction in respect of count 7;

(iii) The judge erred in not acceding to an application to discharge the jury after the directed acquittal on count 9;

(iv) The jury's verdicts are inconsistent.

Judge's charge to the jury

[10] The judge gave her charge to the jury on 15 March 2024. She summed up the evidence to the jury, outlining the familial relationship between the appellant and the two victims. She referred to the long-standing mental health problems of "H", advising the jury to guard against sympathies which may arise as a result. The judge took the jury through H's ABE interview which formed the basis of her evidence.

[12] The judge outlined inconsistencies and contradictions contained within H's evidence, including the fact that she denied having made numerous sexual abuse allegations against other persons previously, which was shown to be incorrect under cross-examination. "H" denied her father having abused her, despite this being contained within her medical notes, and she remained adamant that she was certain the appellant had abused her and that she could remember the details of same.

[13] Numerous other contradictions were noted in the evidence given by "H", including her recollection of the appellant having a camera, which she admitted she could have imagined, her uncertainty over whether the offending took place during the day or at night, her uncertainty over the locus of the offending, her indecision over whether other persons were present in the house during the offending, her ambiguity over whether the appellant's bedroom door was locked or not, her doubt over the reason why she did not tell police earlier about the oral sex, and her uncertainty over when or if she had disclosed the abuse to her husband.

[14] In respect of the first count the judge summarised the evidence given at some length. She outlined the other evidence given in respect of the counts as they appeared on the bill of indictment before addressing counts 6 and 7 collectively. The judge also outlined the evidence in respect of the allegation made by S at count 10. As part of her summing up the judge addressed the bad character evidence which had been admitted in relation to count 9 which had then been the subject of the directed acquittal.

[15] The judge laid out the mental health difficulties experienced by the second victim, S:

> 'Now, about S's hallucinations. Under cross-examination, she confirmed that she had had one auditory hallucination. Later, she had to accept that she had had several. She also told you that she had never had a visual hallucination. She agreed that visual hallucinations occur when you see something that's impossible to see and further, that she never had any but when she was asked about the record of her concern in 2019 that she'd seen and heard two acquaintances fighting and believed they'd murdered each other, she told you, 'I never said I seen them murder each other.'"

[16] The judge further directed the jury as follows:

> "You are aware that each of them has struggled with mental health issues, including the sorry experience of having hallucinations about which they were questioned here in court. I am directing you to approach the evidence of each of the complainants with caution. However, you may rely on their evidence if, having taken account of the need for caution about their evidence respectively, if you are sure that they are telling the truth about the incidents and actions which are the subject of the nine counts on which you must return verdicts and what I have said applies to the evidence of each of the complainants."

[17] The judge outlined the evidence given by the appellant, including his reasoning for the animus displayed against him, on his case, by the victims. She noted the appellant's explanation for what he asserted were the fabricated allegations of both complainants namely that "there's a 40 year grudge arising from a failure to introduce his child promptly to his side of the family as opposed to his wife's and that there is no other explanation." When he was asked under oath was it not a farcical explanation his answer was "I couldn't answer that." It was a "conspiracy" in part revenge for not taking his children to see his mother and that was how he said the rift started. The judge concluded by providing the jury with various documents including one outlining the various contradictions contained in the evidence of the victims.

Appellant's argument

[18] Defence counsel set out the history of the trial including his provision of a document detailing the inconsistencies of the witnesses which was accepted by the judge and the prosecution.

[19] In respect of the first ground of appeal the appellant asserts that the trial judge erred in not acceding to the application that there was no case to answer. Counsel referred to *R v Galbraith* [1981] 73 Cr App R 124, *R v Shippey* [1988] Crim L.R. 767, *Archbold* at 4-365 and *Blackstone's* at D16.56, D16.57 and D26.26. The application was made under the second limb of *Galbraith*. Counsel acknowledged that the vast majority of cases should be left to the jury, even where inconsistencies are present, however, counsel submits that the instant case is exceptional given the number and nature of inconsistencies, stating that they "… are not confined to internal inconsistencies as between one witness's various accounts but also external inconsistencies between witnesses." He submits that the inconsistencies are central issues, rather than issues on the periphery of the evidence.

[20] Counsel asserts that both victims expressed their evidence "with virtually complete certainty", only expressing doubt once "diametrically opposed accounts" were put to them in cross-examination. He refers to the history of abuse allegations made by H to health professionals, and in some cases to police, which the appellant describes as false. It is submitted that this is indicative of this victim having a history of making false accusations of sexual abuse against close family members. He also refers to S's own admissions of doubting herself at times, and further that her own medical professional background led her to doubt her own memory.

[21] Counsel refers to the history of hallucinations suffered by S, which is raised as a cause of concern with regard to the safety of the conviction on count 10 as well as the inconsistencies raised in the evidence of H asserting that, "thus, this was a case where both complainants have a documented history of making false complaints and providing accounts which are demonstrably untrue." Counsel sets out the history of false allegations and hallucinations in a document referred to as "Appendix 4", which was produced for trial, and a list of the inconsistencies were set out in "Appendix 3", which was also produced to the judge during the trial. The skeleton argument also refers to an expanded list of inconsistencies at "Appendix 5."

[22] Counsel contended that the concerns engendered by the mental health issues experienced by both victims gave rise to evidence of issues which were demonstrably false, as well as the internal and external inconsistencies in the evidence such that a real sense of unease over the verdict exists, and that the judge erred in not acceding to the *Galbraith* application during the trial.

Ground 1 - The judge erred in not acceding to the defence application for a direction of "no case to answer" at the conclusion of the prosecution case

[23] This was a difficult and challenging case for the prosecution as both complainants had a significant mental health background and as is common in cases of historical sexual offence there was little by way of independent evidence to support the accounts of each complainant. The prosecution, however, called the husband of H to confirm that she had revealed abuse at the hands of her half-brother, the appellant, in and around 1985.

[24] The appellant gave evidence, and it is clear, as the prosecution contended, that the jury rejected his repeated assertions that all the allegations were fabricated and motivated to land him in serious trouble due to a perceived fall out in 1981. It is also clear that the jury took care in returning their verdicts considering each count individually, as directed by the judge. This is reflected in the not guilty verdicts which they returned on counts 2-5, and 8. It is also noteworthy that the grounds of appeal take no issue with the judge's summing up to the jury.

[25] The trial judge gave a split charge to the jury in oral and written form on 12 March 2024 dealing with the legal directions and then the main charge after counsel's speeches on 15 March. The written charge was then circulated to the jury following delivery of the main charge shortly before they retired to consider their verdicts.

[26] The judgment of Lord Lane CJ in *R v Galbraith* (1981) 73 Cr App R 124 sets out the extent of the jurisdiction vested in a judge when sitting with a jury:

> "How then should the judge approach a submission of 'no case?'
>
> (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.
>
> (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.
>
> (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters

> which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[27] The prosecution acknowledge that there were various inconsistencies in respect of the evidence of both complainants who had had significant mental health issues going back many years. All of the this was canvassed in detail before the jury. Both complainants were vulnerable individuals who were granted 'special measures' to deliver their evidence during cross-examination by live link. The prosecution contended that this was a classic case of mature adults giving evidence about adverse childhood experiences many decades previously.

[28] Their mental health difficulties were not interlinked with the childhood abuse they complained of but commenced many years later into adulthood. The prosecution highlighted the following matters in evidence before the jury which they said, objectively, were accurate and reliable recollections from both complainants:

The complainant "H"

- Stated in her evidence that the appellant worked for [a] Bakery during the offending period (this was confirmed by him in his police interview) and in cross-examination of H as correct.

- Was correct in her assertion that the appellant would ask her to go to the shop for him, (cross-exam of H).

- Was correct that the appellant had a lock on his bedroom door, confirmed by the appellant in his police interview and in cross-examination of H.

- Was correct when she stated that the appellant was present when she babysat for his sister A (judge's main charge).

- Her recollection of the layout of the downstairs of the family home was accurate including the fact that the sitting room (relevant to Count 1) was at the back of the house (see cross-exam of H).

- She was correct in her recollections regarding the number and layout of the bedrooms at the family home (cross-exam of H).

- She stated that the appellant had a property in Portstewart, which turned out to be correct again as per the appellant's police interview albeit after the offending period (judge's main charge).

[29] ***The complainant S*** was able to recollect the following important matter (Count 10 AOABH):

- She was correct and accurate to state that in 1975 there was an altercation involving the appellant and her at the family home. Although the appellant denied assaulting S the incident resulted in police calling and the appellant being asked to leave the house, all of which, bar the assault, the appellant accepted in his police interview. This complainant was therefore correct in recalling the initial incident and aftermath. The judge's main charge details that incident.

[30] We do not accept that the judge erred in refusing to accede to the direction application. The judge gave a very complete, thorough and fair charge pointing out all the weaknesses. She applied the well-known test as set out in *Galbraith*. The reliability, veracity and credibility of a witness is classic jury territory when the prosecution case involves evidence of one word against the other. The strength or weakness of the evidence of the complainants was a core issue in the case and one which the jury was best placed to assess. Their evidence was thoroughly tested, and the trial judge was particularly well-placed, having heard and seen the witnesses being examined and cross-examined, to form the view that there was evidence upon which a jury could properly come to the conclusion that the defendant was guilty and that the matter should be tried by the jury.

[31] The trial process is robust and sturdy enough to direct a jury as to how to factor in inconsistencies and the passage of time in deliberations in a way that ensures a fair process and that the appellant is not disadvantaged.

Ground 2 - The judge erred in refusing to give a direction of no case to answer in respect of Count 7

[32] Count 7 was a specimen count (in which the jury must be satisfied that the conduct occurred on at least one occasion) and the evidence was that the offence occurred when H was at primary school and shortly into secondary school. As stated in her ABE, "I can remember I was at primary school … I used to go to Girl Guides. We were in the Girls friendly society whenever I would have been at secondary school, I think it stopped then, whenever I was around that age, whenever I was at secondary school."

[33] We agree with the prosecution that given that the date range on the indictment placed the complainant at 12-13 it was perfectly reasonable for the judge to refuse the direction application on the basis that a jury could (as they did) conclude that the conduct alleged of occurred when she was 12 or 13 taking into account the age that children go to primary and secondary school in this jurisdiction. This was a matter of common sense and logic which the jury were best placed to consider.

[34] The judge is alleged to have made an error by refusing to give a direction in count 7 which related to H and to gross indecency between 1 September 1974 and 31 December 1975. H said that it happened when she was at primary school, the judge took judicial notice of the reality that children in Northern Ireland attend primary school from the ages of 4-11. Refusing leave on this ground the single judge, O'Hara J, stated, "that seems to me to be entirely reasonable and appropriate, and in my judgment, this ground of appeal is not arguable." We agree, and accordingly, dismiss that ground of appeal.

Ground 3 - The judge erred in not acceding to an application to discharge the jury after the directed acquittal of the appellant on Count 9, ie gross indecency with S

[35] Count 9 was properly removed from the jury at the direction stage as it was not reliably established that S was a child under 14 at the relevant time (a necessary ingredient of the offence). The judge then refused the defence application to discharge the jury. Furthermore, she explained why she was withdrawing Count 9. The trial judge, carefully and with the agreement of counsel, directed the jury on the disputed bad character evidence as follows:

> "I have already explained why you will not be required to return a verdict on Count 9. To recap on what I told you yesterday, even if the prosecution made you sure that the incident had occurred in the manner described by S, you could not have been sure that it occurred when she was under 14 years of age.
>
> You may recall that when Mr Farrell made his opening statement to you about the charges or counts on the indictment he told you that you would hear evidence about other conduct which he called "bad character." I am speaking of the allegation that on a number of occasions, D deliberately dropped his towel in S's presence after D came out of the bathroom. I remind you that D denies all of the allegations in this case and he denies that the towel-dropping ever occurred.
>
> The towel-dropping evidence was evidence which you were permitted to hear and assess because of its relevance, **potentially**, to the issues you were going to have to decide in Count 9. Now that you are no longer required to make any decisions in respect of the alleged gross indecency Count 9, **the disputed evidence about what is alleged to have occurred on a number of occasions when D came out of the bathroom is no longer relevant to the trial. Therefore, you do not have to make any assessments or decisions about the disputed towel-**

dropping events. <u>The evidence which you heard in that regard will not assist you in your deliberations about the alleged assault on S at Count 10 nor will it assist you in your deliberations about the 8 counts in respect of H</u>. The towel-dropping evidence is not relevant to the nine counts about which you have taken an oath or affirmation to return a verdict according to the evidence. Therefore, you should put evidence in respect of Count 9 together with the evidence about what may or may not have occurred outside the bathroom out of your minds and return your verdicts only on the basis of the evidence relating to the 9 counts which remain in the BOI."

[36] In *R v BD* [2024] NICA 46 the complainant made repeated comments which the defence argued were highly prejudicial, but the trial judge refused to discharge the jury upon application. Para [25] of the judgment states:

> "Now, as 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 inconsistencies 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 … 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 …"

[37] As put in *BD* at para [30] citing *Blackstone*:

> "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:
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> (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."

[38] In this case although the evidence of bad character was already before the jury the trial judge gave a detailed direction to the jury regarding how they should deal with it which we set out at para [35] above. We consider that on the facts of this particular case, the judge's direction was sufficient to remedy any potential for prejudice. The trial judge did not err in law in refusing to discharge the jury having carefully warned them in oral and written form.

Ground 4: The jury's verdicts are inconsistent

[39] To the extent that this ground was maintained the proposition here is that the verdicts are inconsistent, the gist of this being that there were so many difficulties with the evidence of the complainants that it simply makes no sense for the jury to return guilty verdicts on some counts (both specimen and specific) while returning not guilty verdicts on other counts (both specimen and specific). For the reasons given by the prosecution and in agreement with the single judge who refused leave on this ground we do not consider that this ground is arguable.

Overall Conclusion

[40] The test for this court is set out in *R v Pollock* [2004] NICA 34:

> "[32] The following principles may be distilled from these materials:
>
> 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 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."

[41] The judge's charge to the jury was fair and balanced and was not criticised by the defence. In particular she highlighted the following important matters:

- She provided the jury with a list of agreed inconsistencies and implausibility's arising from the evidence they had heard;

- She directed the jury on the impact of delay to which the jury could apply in the appellant's favour in terms of loss of evidence, erosion of memory etc - see Legal Directions;

- A direction was given regarding the limited weight to be given to the evidence of complaint;

- A direction was given to treat the evidence of the complainants' "with caution" given the mental health issues both suffered from, inconsistencies and indeed the passage of time;

- She directed the jury regarding how to deal with the "bad character evidence";

- A direction was given to consider each count separately and not as a "job lot";

- She fairly represented and presented the defence case through the main Charge.

[42] We are not persuaded that the verdicts are unsafe applying the principles in *Pollock*. Accordingly, we dismiss the appeal.