Neutral Citation No: [2025] NICA 9 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **KEE12694** *ICOS No:* **23/060898** *Delivered:* **30/01/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

CH

_____

Mr McCartney KC with Mr Michael Halleron (instructed by Terence McCourt Solicitors) for the Applicant
Mr Connor KC with Mr Farrell (instructed by the Public Prosecution Service) for the Crown

_____

Before: Keegan LCJ, Treacy LJ and Colton J

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KEEGAN LCJ and TREACY LJ (*delivering the judgment of the court)*

Anonymity

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

Introduction

[1] This is a renewed application for leave to appeal conviction, leave having been refused by the Single Judge McBride J on 29 July 2024. The applicant was convicted of 11 counts of assault of a child under 13 years, one count of assault of a child under 13 years by penetration and one count of inciting a child under 13 years to engage in sexual activity.

Factual background

[2] The complainant in this case is the applicant's granddaughter. The applicant was 81 years old at the time of the offending and the complainant was seven years old. The complainant reported repeated offending between 1 February 2022 and 14 April 2022. Count 3 relates to causing or inciting a child under 13 years old to engage in sexual activity, count 5 is sexual assault of a child under 13 by penetration and the remaining 11 counts are sexual assault of a child under 13.

[3] The applicant was interviewed on two occasions. At the first interview he answered no comment to charges 1, 4 and 9 on advice of his solicitor but then answered and gave an account in relation to all charges which was essentially that the allegations against him were untrue as the alleged behaviour did not occur. The applicant also made a case that the complainant had been encouraged to maintain these allegations by her mother who became fixated upon proving them.

[4] The applicant was arraigned and pleaded not guilty to all counts on 4 September 2023. A jury trial commenced before Her Honour Judge McCormick KC ("the judge") on 20 November 2023 and concluded on 1 December 2023 on which date the jury returned guilty verdicts (by majority verdict of 10 – 2) on all counts.

[5] The applicant was sentenced on 25 April 2024 to four years' imprisonment split equally between custody and licence. The sentence is not appealed. A number of ancillary orders were also made as a consequence of the applicant's offending to include being disqualified from working with children under the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003, being included on the ISA Barring Lists as required under the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007, sex offenders registration and a five year Sexual Offences Prevention Order to commence after the applicant's release from custody.

Grounds of Appeal

[6] There were originally six grounds of appeal which have now been helpfully refined to the following three:

(i) The judge erred in failing to remedy the prejudice inherent in the presentation of the complainant's evidence in chief, namely, the use and presence of a large doll known as a "worry monster" which was deployed throughout the ABE process.

(ii) The judge erred in preventing the applicant sufficient time to complete the evidential preparations in respect of the central limb of his defence, namely, the suggestibility of the complainant.

(iii) The judge misdirected the jury regarding the defendant's failure to mention facts when questioned in interview.

[7] Kerr LCJ set out the following well known principles to be applied by the Court of Appeal when considering criminal appeals against conviction in *R v Pollock* [2004] NICA 34, para [32]:

> "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."

We proceed on that basis.

Consideration of the grounds of appeal

Ground 1 – Failure to remedy the prejudice caused by the presence of the "worry monster" at the ABE

[8] The complainant's evidence in chief took the form of four Achieving Best Evidence ("ABE") interviews, two on Friday 27 May 2022 and two on Wednesday 1 June 2022. Issue is taken with the fact that the child had what is known as a "worry monster" sitting beside her which can be seen during the video footage of all the ABE interviews. The worry monster was not present when the child was cross examined by agreement between counsel.

[9] There was no recommendation to this effect from the Registered Intermediary ("RI"). Rather, the child's mother had bought the child the worry monster as this type of toy is often used to assist children with overcoming stress and anxiety in that

a child notes down what is worrying them on a piece of paper and puts it into the worry monster's mouth which is then removed by an adult (in this case by the mother at night). There is no suggestion that the toy was actually used in this way during the ABE. It was simply held by the child.

[10] The defence case is simply that the presence of the worry monster was highly prejudicial as there is a certain association with the toy as a therapeutic tool to those suffering from developmental problems, abuse, trauma etc and that the judge failed to remedy this prejudice. In support of this argument, it was submitted that the toys are distinctive in colour, easily identifiable and widely available.

[11] An application was made to the judge on 8 November 2023 in respect of editing the worry monster out of the ABE's. The specific concern raised before the judge was that if a juror had experience of such a toy it could immediately create an impression that the complainant had been abused.

[12] Following this application the judge asked the defence to prepare a schedule of interactions that the complainant had with the worry monster which counsel did.

[13] The defence application was to have the worry monster who appeared throughout all of the ABEs edited out entirely. The PPS did not object to the application and, in fact, Mr Farrell in his submission on behalf of the prosecution was clearly in favour of this process being undertaken.

[14] Ultimately, the judge ruled that if the worry monster could not be pixelated out by the time the trial was due to commence then the presence of the worry monster was something which could be managed by judicial direction. It was confirmed by the Police Service of Northern Ireland ("PSNI") that they would not be able to pixelate out the worry monster as they did not have the appropriate resources to do so.

[15] It is now submitted by the applicant that no appropriate or proper enquiries were made of any independent sources that could have accomplished this task outside of the PSNI. Furthermore, immediately preceding this appeal the defence solicitor contacted a digital expert who said that in fact it was possible to pixilate out the toy and the process could be completed within a few days. This information was comprised in an application to adduce fresh evidence which we heard as part of the appeal on a rolled-up basis.

[16] In any event, the trial proceeded with the ABE unedited. Issue is taken with that and the fact that the judge did not provide any judicial direction to the jury to disregard the worry monster.

[17] The relevant part of the transcript where the judge addresses this issue reads as follows:

> "I think any of us who would be planning an interview would plan to have an interview without a teddy bear in sight. Nothing by way of dancing bears on the wallpaper. We would all be looking for a neutral environment with no distractions and save the focus for the child.
>
> In the circumstances where this is the child's evidence and where I am being told that at the moment Sea Park does not have the wherewithal to edit it out and although the police officer is making an enquiry it is not clear from whom or what the timeframe is. My concern is this is a purple file case which has a hearing slot for next Monday…"

[18] The judge explained that it was her obligation and that of all the parties to ensure that the trial was conducted as expeditiously and fairly as possible, taking into account the interests of the child and the grandfather. The judge referred to the fact that she has been aware of worry monsters for a while now from her time as a family judge. The judge stated:

> "I haven't seen anything which indicates to me that there is anything notorious about this toy. Some would say I am sure that it is a highly useful item to deploy when working with children, but have I missed any judicial criticism of the worry monster?"

[19] It was confirmed by counsel on behalf of the applicant that the judge had not missed any negative criticism and furthermore the defence had no evidence of negative criticism of this toy.

[20] Plainly, the judge wanted to find out more about the other avenue being explored in relation to editing out the worry monster from the police officer involved. In particular, she enquired as to who police were talking to and what the time frame could potentially be. The judge specifically said that if 24 hours could have made a difference that she would be happy to swear a jury on the Monday and not start hearing the evidence until the Tuesday but if the timescale was longer the parties would be having a different conversation. Therefore, the judge adjourned the matter until the next morning to give the parties the opportunity to see what the police could do in the time frame and to allow the parties to reflect on the type of direction the judge could give in due course if nothing could be done to pixelate out the worry monster in time for the trial. The judge considered that in default of pixelation the presence of the worry monster could be managed by judicial direction.

[21] The next morning the Public Prosecution Service ("PPS") explained that the police were investigating whether the technology available to obscure individuals on body worn footage could be deployed to the ABE, but it could not. It was confirmed that they were unable to pixelate the worry monster in time for the trial. Any oral reference to the worry monster was however edited out.

[22] The judge explained to Mr Halleron who appeared on behalf of the applicant that the PPS had done their best and if one or two days would have done it she would have worked with his preference to have the worry monster removed however in the absence of any indication that it could be done in a small number of days the judge felt it was important to get the trial heard. In addition, the judge stated that she would give appropriate directions to the jury in respect of the presence of the worry monster. Finally, the judge highlighted the fact that there was no further slot for the trial until well into the spring.

[23] Ultimately, the judge did not provide a direction to the jury in respect of the presence of the worry monster. The PPS point out that the defence did not requisition the court on this point, that it is a child's toy at the end of the day which acted as a comforter and did not ultimately detract from the quality or reliability of her evidence. It is argued that it may have in fact improved the quality of her evidence by acting as a calming influence.

[24] In relation to this ground the Single Judge stated at para [12]:

> "I do not consider it is arguable the presence of the worry monster rendered the convictions unsafe and indeed no application was made to exclude the ABE interviews on this basis. Whilst it may have been good practice for the learned trial judge to have given a direction in respect of the worry monster's presence, I do not consider, it is arguable that the absence of such a direction, rendered the convictions unsafe. Accordingly, I refuse leave on this ground of appeal."

[25] We have considered the competing arguments and have informed ourselves as to the characteristics of the worry monster. Having done so, we reach the following conclusions on this appeal point.

[26] There was consensus between the prosecution and the defence that the worry monster should if possible be removed from the ABE. Therefore, the judge gave the PPS an opportunity to have the worry monster pixelated out of the ABE. Unfortunately, they were unable to do this. The fresh evidence application filed by the defence shows that this may, in fact, have been possible, however, this is not knowledge that the PPS had at the time.

[27] We are satisfied that the PPS made all reasonable efforts at the time of trial. Having done so the judge had to balance the inability to pixilate the toy out with her duties to have the case dealt with expeditiously along with ensuring a fair trial. This was an exercise in judicial discretion.

[28] We think that in future it is best that the child does not have a toy with her/him at all as the judge herself averted to this can be a distraction. However, this cannot be an inflexible rule as the purpose of ABE and special measures is to help a witness who is young or otherwise vulnerable give best evidence. If a child needs a comfort to attend at ABE a toy should not be ruled out. However, we think, if a toy such as this is to be present the defence should be sighted, an RI should be consulted and there should be a properly documented note on the issue to avoid difficulties arising at trial. The overarching imperative to support witnesses is reflected in Practice Direction No. 2/2019, Case Management in the Crown Court, including Protocols for Vulnerable Witnesses and Defendants.

[29] In any event we are not convinced that pixelation or some other form of obscuring of the toy would have improved matters. Mr Connor made a good point that the fact of pixilation may have sparked jury curiosity and been counterproductive. There is strength in this submission. That is why we think a toy like this should not normally be present but if it is absolutely necessary to achieve best evidence that must be after a discussion between counsel and the judge.

[30] Whilst this process that we recommend was not followed we are not satisfied that any real prejudice has been caused to the applicant in this case. Applying common sense, we think a jury would have understood this was simply a toy. Furthermore, there is no evidence that this is only a recognised therapeutic tool that the jury would associate with a person who has been abused and, therefore, ascribe guilt more readily to the defendant. This defence submission takes the point too far without any evidential basis.

[31] The Single Judge found that it may have been good practice for the judge to have given a direction to the jury in respect of the worry monster's presence and we agree. However, we consider that the absence of such a direction does not render the convictions unsafe. Indeed, it is arguable that a direction may have drawn even more attention to this toy. Either way we are satisfied that the presence of the worry monster with the child during the ABE does not render the convictions unsafe. This ground of appeal is dismissed. Given our conclusions we also dismiss the application for fresh evidence as it is unnecessary.

Ground 2 – Preventing sufficient time to complete evidential preparation of a central plank of the defence

[32] This appeal point arises as a limb of the applicant's case at trial namely the alleged suggestibility of the complainant. Dr Timothy Green, Chartered Consultant

Clinical Psychologist, was instructed to comment on this. Dr Green provided an initial report dated 6 November 2023 in which he explained that in order to comment more effectively on suggestibility he required to interview several persons to include the complainant, her teachers, GP, "and any other individuals who may have experience of objective observation such as any group/extra-curricular activities, leaders (such as her Irish dancing teacher) to see how she may behave around peers and others, investigating how easily led she might be, how she might respond to bullying, her relationship to adults/authority figures etc."

[33] Correspondence was entered into, in respect of seeking access to the relevant individuals. Specifically, correspondence was sent from Dr Green's office to the PPS on 30 October 2023 in which he proposed to speak to the complainant's mother, father, schoolteachers, GP, social worker, if allocated, and any other relative or professional who knew the complainant well.

[34] On 2 November 2023, the directing officer in the case wrote to the defence with the following reply:

> "… the issue of suggestibility relates to the conduct of the ABE interviews and the admissibility of the evidence gathered by that means. Some 17 months have passed since the ABEs were conducted and the complainant has matured and developed her communication skills during this time. It is difficult to see how a consultation with her now will assist the court in determining the admissibility of the ABEs.
>
> We are all aware of her vulnerability due to her tender years and note Practice Direction No. 2/2019, Case Management in the Crown Court, including Protocols for Vulnerable Witnesses and Defendants, Annex A in particular. Whilst ensuring a fair trial is paramount, the trial process should seek to minimise any unnecessary trauma to the complainant, and we would suggest meeting Dr Green as unnecessary.
>
> …
>
> Given the PPS position that no examination of the complainant is necessary, nor will it assist the court in determining the admissibility of the ABEs completed over 17 months ago it is considered that the need to speak to the individuals identified above is also unnecessary. Dr Green will have access to the reports of the RI, Lynsey Andrews.

> Ultimately, the reliability and credibility of the complainant will be assessed and determined by the jury. …"

[35] The trial was originally due to commence on 14 November 2023. At that point the judge acceded to an application on behalf of the defence to adjourn the trial to allow Dr Green to consider recently disclosed material to include video footage taken by the applicant's wife of the complainant and her grandfather and cousin watching television in the living room on the night of the index offence, audio footage of two separate conversations between the complainant and her mother about the complaint prior to the ABE being conducted and NSPCC documentation of the 'Keeping Safe Programme' and the complainant's completion of this in school as well as for homework. The trial was adjourned to start the following Monday 20 November 2023.

[36] Dr Green's addendum report was provided on 19 November 2023. At para [4] he opined as follows:

> "Ultimately, there is nothing in the evidence additionally supplied to me that alters my views from my substantive report: I still believe it would be useful for me to speak with the school, the mother and if possible the complainant, all of which would be standard practice for an assessment of this kind. Without ascertaining for myself from the school changes in behaviour that might have occurred, concerning comments for behaviours that might have been observed common, or changes in mood appearance or other elements of presentation it's not possible to commit myself properly to any opinion … Interviews with both mother and father are apposite for similar reasons."

[37] Following receipt of the addendum report the defence applied to adjourn the trial for a second time. At this point the prosecution indicated that they were not consenting to the child being examined. The applicant's counsel simply left the decision whether to adjourn or not to the discretion of the court and did not apply for an order for discovery of the notes and records of the complainant. The judge proceeded with the trial.

[38] It is submitted by Mr McCartney that the court ought to have allowed the adjournment to ascertain whether permission could be obtained for the expert to speak to the relevant witnesses, the vast amount being professional individuals. Failing any consent, it is argued that an order from the court could have been made

to either summons the relevant informants to attend court and consult with the expert or relevant third-party disclosure applications could have been made.

[39] The applicant relies upon the protections provided by article 6(3)(b) of the European Convention on Human Rights ("ECHR") namely the right to a fair trial. The applicant also prays in aid section 47(1) of the Judicature (Northern Ireland) Act 1978 which provides the Crown Court power to adjourn the trial from "time to time", see paras [33]–[41] of *Re Bunting's Application* [2023] NICA 90. It is argued that the refusal to adjourn had the effect of unfairly depriving the applicant of a fair hearing.

[40] It is accepted by the applicant that the decision whether to adjourn is a matter of discretion for the judge. The prosecution submit that the judge was correct in refusing the application as an adjournment would not have assisted the defence as the complainant was not submitting to examination. It is argued that there is no requirement for a prosecution witness to submit to any medical examination on behalf of the defence, especially for such a young witness. Dr Green was provided with all the relevant materials including the ABEs and additional disclosures which resulted in the trial being adjourned from 14 to 20 November. Significantly, apart from one issue as to how many times the child said she was abused, Dr Green does not make any substantial criticisms of the ABE.

[41] In fact, as we read his report Dr Green is positive about the child's abilities and the quality of her interviews save for a modest criticism, he raises at para 7.3 of his report as follows:

> "The intermediary report is of good quality in my experience of having read many intermediary reports over the years, however, in reference to her comments about suggestibility I was unclear how the opinion, which is stated in a direct and categorical way, was arrived at, as there is no evidence of examples of anecdotes of behavioural observations mentioned. It is my view that there may have been some evidence of suggestibility in ABE police interview when the interviewer suggests that there may have been other times [the child] may have been touched and she says that there was, when shortly beforehand (within one minute earlier) she said that there had been no other occasions."

[42] At para 7.4 he also states that to comment more effectively upon "suggestibility" further steps are necessary. These include various interviews. The ensuing discussion is a high level of generality and Dr Green himself refers at para 7.7 to the fact that his comments are "somewhat speculative." We agree. Further assessment of the kind suggested by Dr Green must be relevant to the issues to be

necessary. In this case, with only one minor query raised by Dr Green as to the questioning at ABE, we query whether there was the foundational basis to have an expert comment on suggestibility at all.

[43] Further support for our view is found in the material provided by the RI. This report was not pointing in the direction of the need for an expert. Specifically, the RIs two reports do not raise suggestibility in the following key sections:

> "Report of 6 May 2022
>
> 'KB did not demonstrate suggestibility during the assessment, however given her young age and in a potentially more tense environment, she may be agreeable …'
>
> Report of 6 October 2023
>
> 'KB did not consistently show evidence of suggestibility in the context of the assessment, however, given her age in a potentially more tense environment, she may be agreeable …'"

[44] Properly analysed this ground of appeal is without merit. Firstly, this was a protocol case involving a very young child and, therefore, there was need for expedition. Secondly, this was not a case where an order for discovery of notes and records alone would have assisted the expert in preparing his report as he wished to interview certain witnesses. Thirdly, the evidence of suggestibility is weak. Fourthly, the prospects of Dr Green securing an interview with the complainant was negligible given the entirely proper objection raised by the PPS and the risks of trauma which would be occasioned to the complainant by such an interview process. Finally, defence counsel had the opportunity to test the complainant's allegations in cross examination in any event.

[45] Accordingly we find that the judge was entitled to refuse an adjournment and did not stray beyond the bounds of her discretion in relation to this application. We agree with the prosecution that the defence were effectively embarking on a fishing exercise in seeking to obtain a favourable report from Dr Green. There was no unfairness occasioned to the applicant by the judge's refusal to allow an adjournment of the trial for further expert evidence. This ground of appeal is also dismissed.

Ground 3 – Article 3 adverse inferences

[46] This ground of appeal focuses on the applicant's first interview on 28 June 2022 during portions of which he responded "no comment" to a number of

questions on the advice of his solicitor. Once the background to each of the allegations was explained to him, he answered each question fully.

[47] The applicant was cross-examined by the prosecution in relation to his decision to do so as follows:

> "Q. It seems that at various stages at the interview your solicitor advised you not to answer police questions.
>
> A. That's right.
>
> Q. And were you not keen to say what you had to say about this?
>
> A. Well, I'd never been in that situation before and I went by what my solicitor had told me.
>
> Q. Yes.
>
> A. I'd never been in a case like this or anything like this before.
>
> Q. Well, why would that matter? You see, the reason I'm saying is because it's only advice, you understand?
>
> A. Yeah. Yeah.
>
> Q. And did you not say, "No, no, it didn't happen, I didn't do any of this, I can deal with these questions?" That didn't occur to you?
>
> A. No I didn't really know the procedure, so I just went by what I was told.
>
> [The applicant is then questioned on a specific example from his first interview.]
>
> Q. You weren't exactly keen to answer the questions is what I'm really putting to you.
>
> A. No, that's not the case, no.
>
> Q. That's not the case?

A. No

…

A. I did answer the questions.

Q. You did? You said, "no comment" and then do you agree with me your solicitor had to sort of give you the green light as it were … I'm going to put it to you, you weren't exactly bursting yourself to answer the police questions, Mr [H]?

A. No, that …

Q. Were you happy just to hide behind your solicitor's advice?

A. No, I don't think I was hiding behind anything, I said it was the first time I was ever in this position and the procedure was what I thought I followed, what the solicitor advised me to do."

[48] During re-examination, senior counsel on behalf of the applicant read out and confirmed with him what his solicitor had informed police shortly after the commencement of this interview. This aspect of the transcript of his interview states:

> "For the benefit of the recording Mr [H} has no objections to actually answering questions but these are the first time he's hearing about any of these allegations and he has no idea of the background to them, so on that basis he's been advised to answer no comment, but if they are put to him in full I've no doubt he will be able to answer questions at that stage."

[49] The matter was also raised in the parties' closing speeches. The prosecution during their closing speech informed the jury as follows:

> "Now, you remember, he initially, on the advice of his solicitor, replied "no comment" to questions that were put to him. As I put it to him, members of the jury, it's only advice, he doesn't have to take it. Well, you might think well this is his first time in a police station, why wouldn't you take the advice that the professional there, the solicitor gave him? Or you might think, well look, would you not be keen in those circumstances? If none of this

> happened, why not just say that? Why the no comment, members of the jury, would you not have been keen, if you were in this position, even if your solicitor was saying, "Look I'd advise you to say, 'no comment'", would you not have said, "Well look, what do you mean 'no comment', I want to get it out there, I want to tell them and explain to them how none of this happened."

[50] Senior counsel on behalf of the applicant addressed the issue as follows in his closing speech:

> "My client is 81, he has three children, and he has seven grandchildren. In all his 80 years, he was never questioned in a police interview in his life, never in court before. He relied totally [on] the guidance of his solicitor guiding him (sic). But yet he was criticised for following that solicitor's advice. My experience normally is you get criticised for not following it, but he was actually criticised in this court for following his advice, good advice, professional advice of the highest standard: "You will not comment until we hear the details of these allegations." If the solicitor hadn't have advised him in those terms, he'd have been professionally negligent, so he followed it. But it's quite clear … he's anxious to say "no." It's quite clear."

[51] Article 3 of the Criminal Evidence (Northern Ireland) Order 1988 ("the 1988 Order") is the relevant provision which covers circumstances in which inferences may be drawn from an accused's failure to mention particular facts when questioned later relied in his defence in the trial. It provides as follows:

> "(1) Where, in any proceedings against a person for an offence, evidence is given that the accused:
>
> (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, *failed to mention any fact relied on in his defence in those proceedings;* or
>
> (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, paragraph (2) applies.

(2) Where this paragraph applies—

…

(c) the court or jury, in determining whether the accused is guilty of the offence charged, may—

(i) draw such inferences from the failure as appear proper;

…

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention …"

[52] Section 4.19 of the *Northern Ireland Crown Court Bench Book and Specimen Directions,* 3rd Edition, 2010 sets out the standard direction in cases where Article 3 of the 1998 Order is in play due to a defendant's failure to mention during a caution interview a fact later relied upon in his defence in the trial. The specimen direction is in the following terms:

"(1) When arrested, and at the beginning of each of his interview(s), the defendant was cautioned. He was told that he need not say anything, and it was therefore his right to remain silent. However, he was also told that it may harm his defence *if he did not mention something when questioned which he later relied on in court*; and that anything he did say may be given in evidence.

(2) As part of his defence the defendant has relied upon ... (specify precisely the fact(s) to which this direction applies). (The prosecution case is/he admits) that he did not mention the fact(s) when he was questioned under caution about the offence(s).

(3) The prosecution case is that, in the circumstances when he was questioned and having regard to the warning he had been given by the caution, he could reasonably have been expected to mention (it/them) at

that stage, and so you may decide that the reason why it was not mentioned was because (e.g. it has since been invented/tailored to fit the prosecution case/he believed that it would not stand up to scrutiny at that time).

((If you are satisfied beyond reasonable doubt that the defendant did fail to mention (…) (when he was questioned), then it is for you to decide whether, in the circumstances, it was something which he could reasonably have been expected to mention at that time. If it was not, then that is the end of the matter and you should not hold the defendant's failure to mention the fact(s) against him in any way.

…

(5) (Where legal advice to remain silent is relied upon, substitute the following for paragraph (4)):

"If it was something which the defendant could reasonably have been expected to mention at that time, the law is that you may draw such inferences - that is conclusions as appear proper from his failure to mention it at that time. You do not have to hold it against him. It is for you to decide whether it is proper to do so.

The defendant says that the reason why he did not answer (any/those) questions was because his solicitor advised him not to answer (any/those) questions and he followed that advice. This is obviously an important consideration, but it does not automatically prevent you from holding his silence against him, because the defendant had the choice whether to accept his solicitor's advice or to reject it, and he had been warned that any failure to mention facts which he relied upon at his trial might harm his defence.

You should also take into account (here set out any circumstances relevant to the particular case, for example the age of the defendant, the nature of and/or reasons for the advice given, and the complexity or otherwise of the facts upon which the defendant has relied at the trial).

> If he genuinely and reasonably relied on the legal advice to remain silent, you should not draw any conclusion against him.
>
> If you are satisfied beyond reasonable doubt that the true explanation for the defendant's failure to mention the fact(s) is because he had no answer, or no satisfactory answer, to the questions being put to him, and that the advice of the solicitor did no more than provide the defendant with a convenient shield behind which to hide, then, and only then, can you hold his failure to mention the fact(s) against him and draw such conclusions as you think proper from that failure. However, you must not find him guilty only, or mainly, because he failed to mention the fact(s). But you may take it into account as some additional support for the prosecution's case and when deciding whether his (evidence/case) about (the/these) facts is true."

[53] Guidance as to the equivalent standard direction in England and Wales on this specific issue is also set out at section 17-1, paras 26–31 of *Crown Court Compendium Part 1 (July 2024)* produced by the Judicial College.

[54] The trial judge directed the jury in the following terms which closely resemble the specimen direction in the *Northern Ireland Crown Court Bench Book*:

> "You know that he denied all of the allegations in the interview. He denied when he gave evidence to you that he had hidden behind his solicitor in interview. He denied that he needed a green light from his solicitor to be able to deal with some questions. And he told you, and it's a matter for you to make your judgement on it, that that was the first time that he had been in that position and that he followed what the solicitor told him to do. Now it's fair to say that's just advice. We can all go anywhere and get professional advice on a range of matters, and we can either follow it or disregard it. But it's up to you, ladies and gentlemen, to make an assessment of whether you think it's appropriate or reasonable for an 81 year old who has never been interviewed by police before to follow the advice of the solicitor and, in fact, then, in any event, once he was given the details of the each of the parcel of allegations to go ahead and give what he remembered about the circumstances under consideration. It's a matter for you,

ladies and gentlemen, as to how you feel he reacted to that particular set of circumstances.

…
Now yesterday I addressed some submissions made by or some commentary made by Mr Connor about the defendant hiding behind the protection of a solicitor advising him not to answer questions … A defendant is always cautioned at the start of every interview, absolutely always. And every defendant is told in that caution that they don't have to say anything and he, like every other person being interviewed, did have the right to remain silent. Ladies and gentlemen, that's a cornerstone of our system of justice, that right to remain silent. He like everyone else in the same predicament, was told that it might harm his defence if he didn't mention something when questioned that he later relied on in court and that anything he did say might be given in evidence.

Now you know that the prosecution have criticised him for not giving immediately answers to some of the questions when he was questioned under caution. And in cross-examination Mr Connor suggested to him that he was hiding behind his solicitor's intervention to make a no comment answer until he could have the full detail of what was being alleged, or as Mr Connor put it until he got the green light from his solicitor to give his account of the particular matter that was under discussion at that point in the interview. But I remind each of you, ladies and gentlemen, that when the defendant did say "no comment" and then was given the detail of the allegations that was being discussed by the police at that point in the interview, he inevitably engaged with the interviewing officer and continued to answer the questions which were put to him about that event.

The defendant told Mr Connor in cross-examination that the reason why he didn't answer those no comment questions straight off was because his solicitor advised him not to answer those questions and he was following that advice. He was following the advice not to answer until the full allegations were put to him. Now this is obviously an important consideration because the mere advice not to doesn't automatically prevent him from

> speaking, so he had the choice to accept his solicitor's advice or to reject it. But ladies and gentlemen, if the defendant genuinely and reasonably relied on the legal advice to remain silent, you should not draw any conclusion against him.
>
> If you're satisfied beyond reasonable doubt that the true explanation for his failure to deal with matters straight off and his failure to mention facts straight away is that he was waiting to have the detail of the allegations put to him and he was doing so on the advice of his solicitor, if you consider that he was prevaricating because he had no answer and no satisfactory answer and the advice of his solicitor was doing nothing more than giving him a shield, *then you could hold that failure to mention the facts against him and draw such conclusion as you would think proper from that failure.* But this is a case in which every time, once he got the detail, he gave his account of the incident under consideration."

[55] There were two requisitions in respect of the judge's charge to the jury. The first requisition came after the first day of the charge and was that the judge had not explained to the jury that the applicant has the right to remain silent, he did not have to answer the questions but did willingly. The trial judge stated that she would address this clearly the next day which she did, in the passage set out above. The second requisition related to the phase "stall for time" used by the judge which the judge agreed was incorrect and outlined this to the jury, explaining that the correct phrase used by the prosecution was "waiting for the green light from the solicitor once the detail of the allegation was shared." No further issues were raised in respect of the judge's charge.

[56] Following from the above the court finds itself in an unusual position in respect of the Article 3 ground of appeal. It was argued in the applicant's skeleton argument and at hearing before us that the judge did not give a full and proper Article 3 adverse inference warning in respect of the applicant's failure to mention facts initially during his first interview rendering the convictions unsafe. Counsel for the applicant approached the argument in this way: they referenced the opening words of Article 3 "at any time …" and the fact that the applicant had responded "no comment" to a number of questions thereby triggering Article 3. They, however, contended by reference to *R v Haughey & Ors* [2001] NICA 12 that the jury were not warned that:

(i) They should not act on any such inference alone and they should act upon them only if, in combination with other evidence, they were thereby satisfied of the guilt of the accused to the requisite standard; and

(ii) The judge did not specifically identify the matters now said to be relied upon in his defence which were not mentioned at the time of the questioning.

It was also pointed out that the "no comment" responses related only to three of the 13 counts and the judge did not give any direction in respect of this.

[57] Following the hearing before us the parties were directed to reconsider the relevant law on Article 3 adverse inferences and furnish further written submissions. In their refined position the applicant contended that based on the case as a whole, the manner of the Crown's cross-examination and the relevant portions of their closing speech that the judge was obliged to address this issue. It was submitted that there can be no legal 'no man's land' in that type of situation. It was argued that the applicant was entitled to a so-called *McGarry* direction (where the jury are directed not to hold the defendant's silence in interview against him) to protect against the obvious risk of the jury placing unfair weight on that silence. It was argued that the judge failed to do that and did not discuss the direction with counsel. Instead, the jury were directed that they could draw inferences from the "no comment" answers in interview.

[58] In complete contrast the prosecution submitted that the trial judge did not give an article 3 adverse inference direction as there was no basis upon which the judge would have been justified in doing so. This was because all matters relied upon by the defence were mentioned in interview. As they put it, "There were no facts that were not revealed at interview that were later relied upon by the defence." In other words, the mischief that the legislation was designed to cater for did not arise in this case even though he answered "no comment" to a limited number of questions.

[59] In support of their position the prosecution in oral submissions contended that the relevant passages in their cross-examination and in their closing to the jury were concerned only with the credibility of the witness arising from his 'no comment' responses to a number of questions on his solicitor's advice. They also pointed to the fact that the judge's written directions, shared with parties and to which no objection was taken, made reference to a variety of matters but not to giving an Article 3 adverse inference direction.

[60] If, contrary to the prosecution submission, the judge did give such a warning when none was required or justified, that gives rise to its own problems. If, on the other hand, no warning was given when such a warning was required or an insufficient warning was given that also gives rise to its own problems.

[61] It is highly unusual and unsatisfactory in a criminal trial that such a material divergence should exist between the parties as to whether or not the jury had in fact been given an article 3 direction and whether or not there was any basis for

giving/not giving such a direction. This is particularly so in an historic sex case in which, as here, it is the word of the complainant against the word of the defendant and where the scales may be tipped unfairly against the defendant by no direction or no proper warning on a matter which was given some prominence in the course of the trial as is apparent from the extracts we have earlier set out.

[62] In respect of the prosecution suggestion that their line of questioning in cross-examination was in respect of the applicant's credibility the applicant contended that this was not a case in which there were inconsistencies between his interview under caution and what he said during his evidence at trial.

[63] The prosecution in their further written submissions emphasised that they never applied to the judge to direct the jury regarding adverse inferences. Whilst they did however accept that the trial judge, "(arguably) appears to have strayed into Article 3 territory," it was contended that the judge dealt with the issue fairly and did *not* ultimately invite the jury to draw adverse inferences. The case of *R v Harris* [2015] EWCA Crim 1293 was relied on in support of their line of questioning.

[64] The applicable legal principles regarding inferences from silence are set out in *Blackstone's Criminal Practice 2025* at para F20 and bear repeating in some detail as follows. An accused person in a criminal trial has traditionally been accorded a right to silence, sometimes termed a privilege against self–incrimination. These concepts constitute generally recognised international standards which lie at the heart of the notion of a fair procedure under article 6 ECHR (*Murray v UK* [1996] 22 EHRR 29; *Saunders v UK* [1997] 23 EHRR 313). Although the right is said in *Murray* not to be an absolute right, it remains essential to construe the inferences from silence provisions in accordance with it.

[65] Para F20.2 of *Blackstone* outlines that where the statutory scheme comes into play, a jury must be properly directed regarding the inferences that can be drawn.

[66] F20.5 of *Blackstone* also states that:

> "The provision applies **only** where a particular fact is advanced by the defence which is suspicious by reason of not being put forward at an early opportunity: s34 [the English equivalent] does not apply simply because the accused has declined to answer questions."
> [our emphasis added]

[67] In *Abdalla* [2007] EWCA Crim 2495, the Court of Appeal approved the statement of Hedley J in *R v Brizzalari* [2004] EWCA Crim 310:

> "The mischief at which the provision is primarily directed is 'the positive defence following a "no comment" interview and/or the "ambush" defence.' Counsel should not complicate trials and summings-up by invoking the section unless the merits of the individual case require it."

[68] The prosecution expressly concedes that that this was neither a 'no comment' interview nor an 'ambush defence' and that the mischief that Article 3 was directed at simply did not arise in this case.

[69] *Blackstone* at F20.10 confirms that this provision does not apply where there is no attempt to put forward at trial a previously undisclosed fact [this provision being equivalent to our Article 3]. To give such a direction in a case where the accused has put forward no more than a bare denial is said to be tantamount to directing that guilt may be inferred directly from silence which runs counter to the purpose of the provision (*R v Troy Nicholas Smith* [2011] EWCA Crim 1098). The court in *R v Aftab Ulhaq Khan* [2020] EWCA Crim 163 held that it was wrong to direct the jury that the defendant's decision to respond "no comment" part way through his interview might suggest that he had a sinister reason sufficient to support an adverse inference without first identifying a specific fact that had been relied on.

[70] Para F20.11 of *Blackstone* also outlines that if the prosecution is unable to establish that the accused has failed to mention a fact, the jury should be directed to draw no inferences (*R v B(MT)* [2000] Crim LR 181). In the present case the prosecution makes the case that they were not trying to establish that the defendant had failed to mention a fact during his interview that he later relied upon during his trial. Indeed, they expressly concede that he did not so rely, and that Article 3 was not triggered and that the judge was not therefore justified in giving an Article 3 warning.

[71] The jury in the present case were not directed to draw no inferences. On the contrary, although the judge was doing her best to be fair to the applicant, she expressly left it open to the jury in the portion of her charge which we have highlighted at para [54] above that they could draw an adverse inference in the circumstances. In our view this was a material error.

[72] It was also held in *R v McGarry* [1999] 1 WLR 1500 as referred to by the applicant, that where the judge concludes that the statutory requirement has not been met but the jury have been made aware of the accused's failure to answer questions a direction should be given to the jury that they should not hold the accused's silence against him. That was not done in the present case. This largely overlaps with the point made in the previous paragraph and also constitutes a material error.

[73] Furthermore, where the judge directs the jury on the basis that the statutory provision applies, it is important that the facts relied on should be identified in the course of the direction (*R v Chenia* [2002] EWCA Crim 2345; *R v Lewis* [2003] EWCA Crim 223). Any proposed direction should also be discussed with counsel before closing speeches. In this case the judge did circulate her directions however no issues were raised which is regrettable because of the consequences that arise as follows.

[74] If, contrary to the prosecution case the judge did give an article 3 warning, it is clear that the judge did not identify the facts relied upon at trial which he failed to mention when questioned. We do not accept that the prosecution contention that the judge did not give an adverse inference warning. In the first place her charge in this respect closely mirrors the specimen charge set out earlier in this judgment. Secondly, she expressly leaves it open to the jury to draw an adverse inference. She directed them:

> "… if you consider that he was prevaricating because he had no answer and no satisfactory answer and the advice of his solicitor was doing nothing more than giving him a shield, *then you could hold that failure to mention the facts against him and draw such conclusion as you would think proper from that failure*."

[75] In *Argent* [1997] 2 Cr App R 27 Lord Bingham CJ, giving the judgment of the court, set out six conditions which must be met before the jury can draw an adverse inference from a failure to mention a fact in interview. One of those conditions was that the defendant must have failed to mention "any fact relied upon in his defence."

[76] The applicant's brief 'no comment' answers assumed an extraordinary, disproportionate and prejudicial prominence at various key moments of the trial process. The prosecution justify their cross-examination and closing on the basis that they were addressing the credibility of the applicant. This is hard to fathom when there were no inconsistencies between his interview under caution and what he said during his evidence at trial. We have a concern that the prosecution attempted by the back door of credibility to get in what they could not get in through the front door of Article 3 and that in their closing they were in fact inviting the jury to draw an adverse inference from the applicant's brief 'no comment' responses. Such an approach is impermissible.

[77] Furthermore, we simply do not understand why, if the jury were not being asked to draw an adverse inference from 'no comment' answers, the prosecution still saw fit to remind the jury of this and place such reliance upon it in their closing in the passage we set out at [45] above. Finally, it should have been clear to the prosecution that the judge in her closing was doing that which they say she was not being asked to do and which the prosecution say she was not justified in doing.

That being so we remain surprised that the prosecution (or the defence) did not requisition the judge so that the matter could be corrected and the jury brought back and directed that they should draw no adverse inference.

Overall conclusion

[78] We dismiss grounds 1 and 2 of this appeal. However, given the serious flaws that we have identified above in relation to ground 3 on the Article 3 adverse inference issue we are left with no alternative but grant leave, allow the appeal on that ground only and to quash the convictions. That is because by reason of the flaws we have identified, we cannot be satisfied that the resulting convictions are safe. We will hear the parties as to whether a retrial should be directed.