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Judgment: approved by the Court for handing down | *Delivered:* **13/05/2010**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

AG

Before: MORGAN LCJ, GIRVAN LJ AND COGHLIN LJ

MORGAN LCJ (delivering the judgment of the court ex tempore)

[1] On 5th February 2009 the appellant was arraigned and pleaded not guilty to four counts of indecent assault. The trial began before His Honour Judge Finnegan on 31st March 2009 however it was aborted on 1st April 2009. On 16th June 2009 the trial of the appellant was recommenced before His Honour Judge Grant and on 25th June he was found guilty of two counts of indecent assault. The jury were unable to reach a verdict in relation to two further counts of indecent assault concerning the same victim and were discharged in respect of those counts.

[2] The first and second counts, on which the jury were unable to reach verdicts, related to incidents which were said to have occurred in the home of the appellant's and complainant's mutual grandparents. Count 1 involved the allegation that during a game, the appellant had lifted the complainant, holding her breasts. Count two related to an allegation that the appellant had groped the complainant's breasts in a corridor. The third count concerned an incident of indecent assault which was alleged to have occurred in a building used as a barn. The complainant alleged that she had been playing in the barn, climbing bales of hay and swinging down from them on a rope. She stated that while she had been playing in this manner, she had landed in loose corn and that the appellant had landed behind her; she alleged he put his hand down the back of her trousers and inserted his finger or fingers into her vagina and asked her, 'do you like that?'

[3] Count four was alleged to have occurred on 13th July 1998 in a caravan outside the grandparents' former home. The complainant stated she and her family had been living in the caravan temporarily. She stated the appellant entered the caravan while she was inside, locked it and assaulted her by groping her breasts, touching her indecently and inserting his finger or fingers into her vagina. She stated that he moved his fingers up and down and asked if she liked it. The complainant said she escaped by telling him she needed to go to the toilet and she then stayed in the toilet for some time. She produced a contemporaneous diary entry in relation to this count.

[4] The complainant stated she informed her mother of the sexual abuse when she was aged about 19 years, 6-9 years after the events occurred. She stated that she was upset at the time, having just had a row with her father. She reported that she revealed the abuse to her best friend on a night when she had recently turned 17 and had had some alcohol. She stated that she informed her boyfriend of the abuse 2 months after she had met him (when she was aged 21). She also reported that she informed her sister, her doctor and three counsellors although they did not provide evidence at court.

[5] The complainant stated that an incident occurred in November 2007 when she had been out with her partner and encountered the appellant. She recounted that she had become upset, accused the appellant of sexually abusing her and then suffered a panic attack. The following day the complainant made a complaint to police. The appellant stated he was shocked at the allegations of sexual abuse which the complainant had made against him and he took steps to consult with a solicitor.

[6] The appellant's alibi case was that he could not have been at the farm on 13th July 1998 when the 4th count was alleged to have occurred and therefore he could not have carried out an assault against his cousin on that date. In presenting his alibi evidence, the appellant gave evidence; 1) he was living at his mother's address on 13th July 1998 and not on the farm where the incident occurred, 2) his mother's partner recalled that the appellant had been instructed by his mother to remain at home that day due to trouble in the area 3) the appellant's sister recalled she had been at the family home with the appellant on that date.

[7] In rebutting the appellant's alibi evidence the prosecution relied upon the appellant's interview with the police regarding the address at which he had lived following the death of his grandfather and his failure to mention that he had been told to stay at home on 13th July 1998 because of the trouble in the area. At trial senior counsel for the defence raised the lack of a direction on the onus in relation to the alibi evidence but the trial Judge declined to make additional directions to the jury.

[8] In this case the prosecution argued that the alibi was false. The appellant contended that the Judge should have given a full Lucas Direction to the effect that a lie told by a defendant can only strengthen or support evidence against that defendant if the jury were satisfied that a) the lie was deliberate, b) it relates to a material issue and c) there is no innocent explanation for it.

[9] In granting leave the single judge concluded that the judge should, as well as directing the jury that it was for the prosecution to disprove the appellant's alibi, have directed them in accordance with the standard direction recommended by the Judicial Studies Board that an alibi was sometimes invented to bolster a genuine defence, and his failure to do so was a misdirection. Such a direction should routinely be given, but a failure to give it would not automatically render a conviction unsafe. That would depend upon the facts of each case and the strength of the evidence. (see R v Lesley [196] 1 Cr App R 39)

[10] In this case the prosecution case depended on the evidence of the complainant who was recollecting events some 11 or 12 years earlier when she herself was 11/12. The jury must have concluded that they were satisfied beyond reasonable doubt that the evidence of the accused and his sister was false having regard to the manner of the cross examination of the sister of which we have a transcript. The need for an alibi direction arises where there is any concern that the jury may engage in the impermissible reasoning that the presentation of a false alibi leads inexorably to the conclusion that the defendant was guilty. There was in this case considerable exploration in the judge's charge of the credibility of the appellant's sister's account of the alibi and the jury clearly concluded that she had not been truthful. In those circumstances a warning that an alibi might be invented to bolster a genuine defence was in this case necessary.

[11] We take the opportunity to remind the parties of the remarks of this court in R v Paul Hughes [2008] NICA 17 in relation to the manner in which the trial court should deal with delay and the nature of the good character direction which may be appropriate in historic abuse cases. In relation to delay having examined the cases of Percival and R v Brian M the court said

> "While the judge made sure that the jury appreciated the difficulty that a defendant faces so far as remembering where he was at a time in the distant past and therefore in producing alibi evidence he did not ask the jury to reflect on whether delay served to cast any room for doubt as to the complainants' reliability. We consider that the jury should have had it drawn to their attention that because of the delay the evidence had to be examined with particular care

> before they could be satisfied of the guilt of the appellant on any of the counts on the indictment."

In this case there was an important issue about the account given by the appellant at interview in relation to where he was living and his account at trial. It appeared at the hearing of the appeal that the appellant made the case that his change of account occurred as a result of discussions he had subsequent to the interviews. The learned trial judge gave no direction to the jury on how they should approach this. In a historic case of this nature the court must be alert to identifying those issues which may be affected by the issue of delay and direct the jury accordingly. That does not appear to have happened in this case.

[12] We also draw attention to the remarks of that court in relation to the importance of good character in historic abuse cases.

> "This direction deals with the first and second limb of a good character direction, as they are sometimes described. In a case such as this where a considerable length of time has passed since the date of the alleged offences and there was no suggestion that any similar allegations had been made against the appellant the jury should have been told that he was entitled to ask them to give more than usual weight to his good character when deciding whether the prosecution had satisfied them of his guilt. In the passage of the summing up which preceded the reference to good character the judge gave the normal direction on the burden and standard of proof. In a case of delay such as this we consider that more was required along the lines that we have indicated."

The good character direction in this case does not contain the advice contemplated in Hughes. In our view such a direction was appropriate in a case where the appellant had a clear record both at the time of the offence and for the 12 years subsequent to the alleged offences.

[13] The last issue which caused us concern was the treatment of the evidence of recent complaint. That evidence was admissible by virtue of article 24(4) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 as evidence of the matters stated. At paragraph 20-12 Archbold raises the issue of the weight to be given to such evidence as it emanates from the complainant whose evidence it is adduced to corroborate. Mr Barlow accepts that the evidence is admissible for that purpose but contends that it is necessary to direct the jury carefully on the weight that they should give to it. That submission seems to us to be clearly right. No such direction was given

in this case. Particularly in historic cases where the complaint may understandably be made at a late stage such a direction is required.

[14] For the reasons set out we consider the verdict in this case is unsafe.