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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**19/9/08**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

A H

____

Before Kerr LCJ, Girvan LJ and Coghlin LJ

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<u>KERR LCJ</u>

Introduction

[1] Leave to appeal having been granted by the single judge, this is an appeal by an appellant (whom we shall refer to as 'AH') against his conviction on five counts of rape, two counts of buggery and two counts of indecent assault, all committed against his daughter who will be described as 'the complainant', 'the injured party' or 'LH'. AH was sentenced to a total of fifteen years' imprisonment. He has also appealed against this sentence. Nothing must be reported about the proceedings before the Crown Court or this court that would tend to reveal the identity of the complainant.

[2] At the conclusion of the hearing of the appeal, we dismissed it and indicated then that we would give our written reasons for doing so. This judgment supplies those reasons.

Background to the charges

[3] The appellant, his mother and his two children (the complainant and her brother) lived together in England until April 2002. In that month the appellant's mother moved to Northern Ireland with the two children. The appellant joined them some time later. On 11 February 2003, the complainant (who was then aged twelve years) informed two of her school friends that her

father had raped her the night before. They persuaded her to tell a teacher and in due course the school principal and social services were also informed. Subsequently police became involved and the appellant was arrested and questioned about his daughter's allegations.

[4] The account that the injured party gave was that her father had been painting her bedroom the previous evening, 10 February 2003, and that he had put her on the bed and raped her. She claimed that this had occurred regularly from the time that she was about seven years old. She also alleged that her father had sexually assaulted her the previous Thursday evening. This had taken place on the sofa in the downstairs living room while her grandmother was at bingo. (It was later established that the child's grandmother had indeed been at bingo on that evening). On that occasion, according to the complainant, her father had penetrated her anally. She said that this had happened two or three times previously and that her father gave her £2 when he did this to her.

[5] The first count related to the incident of rape on 10 February 2003. Counts 2 – 5 of the indictment were specimen charges arising from the account that the complainant had given that she had been the victim of regular rape by her father. Count 6 contained the charge of buggery in relation to the offence that was said to have taken place on the Thursday evening of the previous week and count 7 was a specimen charge of the same offence.

[6] The counts of indecent assault related to two specific incidents. In 2001 when the family were visiting the appellant's uncle in Northern Ireland from their then home in England, LH claimed that, as she was drying herself in a bedroom after swimming, her father entered the bedroom, removed her towel, touched her vagina and masturbated. The second incident occurred when she and her father were walking the dog one evening. On this occasion also he touched her vagina and masturbated.

The evidence at trial

[7] Apart from the injured party's testimony and the account that she had given others of her father's sexual abuse of her, medical evidence was given that the appearance of a tear of the complainant's hymen was, because of its location, diagnostic of sexual abuse and that an anal fold was consistent with penetration of the anus. Evidence was also given of the discovery of traces of the appellant's semen on the injured party's bedclothes and underwear. During interview the appellant had denied that evidence of his seminal fluid would be found in his daughter's bedroom and denied having masturbated there. During his trial, he sought to explain the forensic findings by claiming that they were indeed the result of his having masturbated in the bedroom.

The prosecution relied on what it claimed were the appellant's lies during interview as further indication of his guilt.

[8] It emerged that on two occasions before the trial, the complainant had retracted her allegations and had sought to have the charges against her father withdrawn. She has accepted that she had not come under any pressure to make those retractions. They were made when she was living with her grandmother, the appellant's mother. When she returned to live with her own mother, the allegations were reinstated and during the trial she admitted that her mother hated her father, although she denied that her mother had pressurised her to maintain the allegations against her father.

[9] The injured party had spent some time in foster care and, while there, she and another girl, who was also in care, exchanged telephone text messages about two boys who lived nearby. The messages suggested that the girls may have gone out with the boys but the complainant denied that there had been any sexual contact between them or, indeed, that she had any sexual experience other than at the hands of her father.

Events following the trial

[10] For some months after the trial, LH lived with her mother in England. There was then a falling out and an estrangement between mother and daughter. LH left her mother's home and sought refuge in the home of her paternal grandmother (with whom, of course, she had lived previously as earlier described). According to LH, her grandmother stipulated that if the complainant was to come to live with her, she would have to retract the evidence that she had given against the appellant. The complainant agreed to do so and she was taken by her grandmother to a solicitor for that purpose. LH has given evidence to this court that the solicitor informed her that, since the prosecution had taken place in Northern Ireland, there was nothing that he could do and that if she disavowed her evidence, she might be prosecuted for perjury.

[11] Following this, LH returned to live with her grandmother but some months later, she was told that her grandmother had no longer enough room to allow her to continue to stay and the possibility of her moving to stay with V, her father's girlfriend, was mooted. V also took her to a solicitor and, according to LH's evidence to this court, instructed her on what to say. LH denied that V had put her under pressure, however. She gave an account to the second solicitor that she had lied at her father's trial. She did so, she claimed, because, in that way, she would be permitted to live with V and, indeed, that came to pass.

[12] Some months after giving this second account, two members of PSNI came from Northern Ireland to interview her. She told them that she had lied

during her father's trial and that he had not sexually abused her. When asked why she had done so, she said that she had come under pressure from her mother to give evidence against her father. She claimed that she had sexual experience with a teenage boy in Northern Ireland but refused to name him. This accounted for the medical findings. Now, LH claims that this account to the police officers was entirely mendacious. At the time that she gave it, she was apprehensive about the possibility of being prosecuted for perjury and was greatly relieved to be informed by letter some time later that this would not happen. V had told her that she would stand by her if such a prosecution had materialised.

[13] The prosecution was granted leave by this court to call LH to give evidence on the appeal. She asserted that the evidence that she had given on the trial of her father had been true all along. She had only sought to retract it because she had nowhere to stay. Her mother had not put her under pressure to give lying testimony against her father. She accepted that she told her brother that she had lied in the trial of their father but she said that she did so, "because he is my only full brother, I love him and did not want to hurt him".

The proceedings before trial

[14] After being returned for trial in January 2004, the appellant was arraigned on 26 February 2004 and pleaded not guilty to all counts. His trial was fixed for 4 May 2004. Early in April, LH contacted the police and told them that she did not want to continue with her complaint. Police officers and social workers interviewed her. She also spoke to counsel. There was no evidence at that time that she had been threatened or that she was acting under duress. She said that she wanted to withdraw the complaint because her mother had left her; she only had her father and she wanted him to return to her.

[15] On 4 May 2004, the prosecution applied for an adjournment to allow LH to be interviewed by a psychologist and/or a psychiatrist. It was suggested that this was required so that the prosecution service could decide how to proceed. Judge McFarland refused the application, observing that there was no evidence that AH would agree to be interviewed. At that time, the prosecution indicated that the complainant should not be forced to give evidence in view of her age.

[16] On 13 May 2004, the prosecution made a different application. They asked for a stay of proceedings, with the bill of indictment to remain on the books, not to be proceeded with without leave of the court. The defence opposed that application, stating that their client was ready to meet the charges and asked that a jury be sworn. Judge McFarland acceded to the prosecution's request. He gave his reasons for doing so in the following passages from a written ruling delivered on 27 May 2004: -

"[6] The jurisdiction to stay proceedings on the basis that they are not to be proceeded with without the leave of the Crown Court or the Court of Appeal, normally arises when there are several counts on an indictment, the defendant has pleaded guilty (or has been found guilty) to some, but not all of the counts, and the Crown do not wish to have him tried on the outstanding entire matter could go before a fresh jury, with the leave of the Court of Appeal. In practice that is the end of the prosecution, as it would not normally be envisaged that several years later the case against the defendant would be resurrected and proceeded with. The nature of the order gives protection to the defendant, as his or her rights are safeguarded by the requirement that the leave of the Court is required.

[7] Mr. Mateer, for the DPP, has referred me to the unreported ruling of Mr. Justice Coghlin in Bill No. 107/02 at Belfast Crown Court when he stayed proceedings for a period of 18 months after a witness in a murder trial had withdrawn his statement under apparent duress.

[8] It would appear that the order the Crown seeks today is not subject to appeal, or susceptible to judicial review, and in the circumstances I agree with the text in Archbold (2004 paragraph 4-191) that a court should proceed with caution. I do however disagree with the author's assertion that it should never be used were (as in this case) the Crown are disinclined to proceed, but wish to offer no evidence. As with any discretionary power, it is wrong to set down restrictions. That being said, it is a power that should be exercised sparingly. However, if the facts of a particular case require it, then the Court should not feel constrained in any way.

[9] I believe that there are exceptional features in relation to this case. First, there is evidence to suggest that the girl has been abused in a systematic way. She has clearly been the victim of serious crime, at the very least unlawful carnal

knowledge and buggery. Secondly, the presence of the defendant's semen on her underwear, dressing gown, bedding and bedroom carpet presents strong prima facie evidence against the defendant. Thirdly, the girl is only 13 years of age. There is clear evidence that she has been the victim of sexual abuse at the hands of a male, and she may not appreciate fully the course she now wishes to take. Fourthly, she has, at no stage, indicated that she told lies or was in anyway inaccurate in relation to her earlier statement. She has merely stated that she wishes "to drop the charges". Fifthly, in the absence of any adequate excuse or reason for her now stated position, it is impossible for the court to assess fully the situation.

[10] Whilst the rights of an accused person must always be the primary consideration of the court, it cannot completely ignore the position of a victim. The European Court of Human Rights in *X and Y –v- Netherlands* (1985) 8 EHRR 235, at para. 27 stated that: -

> "..the protection afforded by civil law in the case of wrongdoing… is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal law provision; indeed it is by such provisions that the matter is normally regulated."

Dutch law was considered to be defective as it prevented a 16 year old woman with a mental disorder from bringing a complaint of sexual assault.

[11] I have considered the defendant's position, particularly in relation to the proposed order. Unlike the typical case when this order is made, H will be aware that these charges continue to hang over him. He will not leave the court with the knowledge that the proceedings are over. His rights to a fair trial will, however, be protected, if and when such a trial should ever take place. The trial judge will be able to assess the nature of the

> delay, applying all the well-established principles, to ensure that the defendant receives a fair trial.
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> [12] Taking everything into account, I am of the opinion that it is in the interests of justice that the matter be stayed and left on the books of the court, not to be proceeded with, without leave of the Crown Court or the Court of Appeal."

[17] Some time after this order was made LH decided that she wanted the prosecution of her father to continue and in February 2006 Hart J considered an application that the matter be permitted to proceed. It was submitted that Judge McFarland should not have made an order allowing the charges against the appellant to remain on the books in defiance of his expressed wish that his trial should proceed without delay. Counsel relied on the commentary in *Archbold* 2006 at 4-191 where it is stated that an order that the charges should lie on the file "should never be made where the defendant pleads not guilty and the prosecution are disinclined to proceed, but are unwilling to offer no evidence; in such circumstances the defendant's consent is insufficient reason for ordering a whole indictment to lie on the file." In permitting the trial to be reactivated, Hart J referred to a less emphatic statement in *Blackstone's Criminal Practice* 2006 at page 1463 to the following effect: -

> "It is thus still arguable in theory that orders to lie on the file should be dependent on the defence consent but, whether that be right or wrong, there is nothing *in practice* to prevent a judge doing what the judge in *Raymond's* case did, that is, making the order in the face of defence objections."

The appeal

[18] For the appellant, Mr Martin McCann, who appeared with Mr McGuinness, argued that the order made by Judge McFarland represented a radical departure from what he described as "the established practice" in the making of such orders. The power existed as an administrative convenience, Mr McCann said, for those exceptional cases where a conviction on a more serious charge might be reversed on appeal and charges which had not been proceeded with because of the conviction might subsequently have to be reactivated. He submitted that the judge had been wrong to use the power to allow the case to remain "in limbo" pending a change of heart by the complainant as to whether she wished to give evidence.

[19] By way of alternative to this principal submission, Mr McCann contended that the consent of the appellant was required before such an order

could be made. He relied on the appellant's right to a fair trial within a reasonable time under article 6 of the European Convention on Human Rights and Fundamental Freedoms and the jurisprudence that this provision has generated.

[20] Finally, Mr McCann submitted that the vacillations of the complainant and the various *volte-faces* that she had performed in relation to the giving of evidence and the assertion of its truth must raise a reasonable doubt in the minds of the members of this court as to the safety of the appellant's conviction on the various counts on which he had been found guilty.

The extent of the power to order that charges remain on the books

[21] There is no doubt that this power has been traditionally and most commonly exercised in the circumstances described by Mr McCann *viz* where a defendant has been convicted, whether on his plea of guilty or following trial, of a more serious offence and other less significant offences are allowed to remain on the books. This will normally mean that such offences will not be proceeded with but their reactivation after a reversal of the conviction of the more serious offence remains a theoretical possibility.

[22] We consider, however, that there is no warrant to confine the circumstances in which the power may be exercised to this exclusive territory. We do not accept that it is 'established practice' to do so, if by that expression is meant that the power may only be exercised in these restricted circumstances. The power is self evidently akin to the power to adjourn proceedings but it includes an added safeguard that the trial may only be recommenced where that has been sanctioned by the court.

[23] Mr McCann sought to persuade us that the authorities indicated that the power had been used exclusively as an administrative device in the way that he had described. He referred to the case of *RF and AF v United Kingdom* 3034/67 [1967] ECHR 33 where the government had been recorded as stating that it was not aware of any case in which a second indictment (containing additional charges to the offence of murder charged in the first indictment) ordered to remain on the file had subsequently been proceeded with while the conviction on the charge of murder remained undisturbed. In *Withey v United Kingdom* 59493/00 ECtHR described the practice of leaving charges on the books in the following passage: -

> "An order that charges be left on the file … is often made where an indictment contains several counts and the plea(s) of guilty entered by the defendant to some of these counts are regarded as adequate by the prosecution. The order is made to protect the position of the prosecution in case a defendant

> convicted in this manner successfully appeals. The intention is that, if there is no successful appeal, the defendant should never stand trial on the counts left on the file. A successful appeal would allow the prosecution to apply to the trial court to pursue the other counts left on the file."

[24] Counsel relied on this passage as indicating the limits on the use to which the power could be put but we do not so interpret it. We consider it to be quite clear that the court was not suggesting that there were no circumstances other than those instanced in which the power could be used. The prefatory words of ECtHR's description of the practice of leaving charges on the file are "The Crown Court may leave some *or all* of the counts in an indictment on the file" (emphasis added). Moreover, the court referred to the decision in *R. v. Central Criminal Court ex parte Raymond* [1986] 83 Cr.App.R. 94 where Woolf LJ described an order to leave the charges on the file as "… having the same effect as an order for an adjournment, but … [going] … beyond the ordinary order for an adjournment since they have the effect of not only postponing a trial but, in effect, ordering that there should be no trial without the leave of the court". Woolf LJ referred with approval to Ackner LJ's description of such an order in *R v Crown Court at Preston* [1984 unreported] as "doing no more and no less than adjourning the trial … but maintaining control over it to the extent that the prosecution would not be able to bring the matter back without the leave of the court".

[25] The matter is put beyond doubt, in our opinion, by the following passage from the current edition of *Blackstone* at D12.75: -

> "Contrary to what was previously understood to be the position, there is no objection to an entire indictment remaining on the file, as opposed to merely dealing with some counts of a multi-count indictment in that way (e.g., in *Central Criminal Court, ex parte Raymond* [1986] 1 WLR 710, as a result of R's conviction on one count of a severed 14-count indictment, the trial judge ordered that both the remaining counts of the original indictment and all counts of a completely separate indictment should lie on the file)."

[26] It appears to us that since an order that a charge should remain on the books is to all intents and purposes an adjournment, albeit with the further safeguard that it may not proceed again without leave, the same considerations as should be taken into account in deciding whether to adjourn will apply. By the same token, a judge should be at liberty to consider whether to make such an order in equivalent circumstances to those which

arise where an adjournment of the proceedings is sought. As Mr McMahon QC for the prosecution accepted, article 6 of ECHR is engaged in both instances. Such an order should not be made if it would violate a defendant's right to a fair trial. But it has not been argued in the present case that the making of the order by Judge McFarland or the direction by Hart J that the trial should proceed interfered with (much less breached) the appellant's right to a fair trial. Rather it was argued that the appellant enjoyed a particular right under article 6 that the order that the charges remain on the books should not be made unless his consent to it was forthcoming and it is to that argument that we now turn.

Is the defendant's consent required before an order can be made?

[27] The commentary in the current edition of *Archbold* at paragraph 4-191 is the same as that cited to Hart J and set out at paragraph [17] above. Mr McCann relied on this in support of his claim that a minimum requirement for the valid exercise of the power was the defendant's consent. He also referred to D12. 76 of the current *Blackstone* which is in rather different terms from the 2006 text on this issue. It states: -

> "The applicant in *Ex parte Raymond* argued that a Crown Court judge should not order that counts lie on the file unless the defence agree to that course, and, in the absence of such agreement, he ought to require the prosecution to elect between proceeding to trial and offering no evidence. The court ultimately refused to state its view or give any guidance on when orders to lie on the file are appropriate. This reticence was because of its primary decision that it did not in any event have jurisdiction to review the decision of the court below."

[28] It appears to us that the fact that a defendant is ready and wishes to proceed with his trial should weigh heavily with a judge who is asked to accede to an application that charges should be allowed to remain on the books. If, by adopting that course, the court condemns a defendant to an open-ended period of uncertainty as to when, if ever, he may be required to stand trial, obviously article 6 considerations will be immediately relevant. Likewise, a judge who is asked to authorise the reactivation of a trial that has been deferred in this way must closely examine whether to allow the trial to proceed would bring about unfairness to the accused.

[29] As we have already observed, however, it has not been suggested that any *actual* unfairness has accrued to the appellant. It has not been suggested that his defence was compromised or made less easy to present. Nor has it

been argued that any evidence that might otherwise have been available to him has been denied. In the absence of any suggested disadvantage, we cannot accept that a judge would not have the power to make the order sought *solely* because the appellant objected to it. We are satisfied that Judge McFarland was right to agree to the prosecution's request (albeit, as Hart J pointed out, the order was wrongly referred to as a stay of the proceedings). Likewise, we are satisfied that Hart J's order that the trial should proceed cannot be faulted.

Safety of the verdict

[30] In *R v Pollock* [2004] NICA 34, dealing with the proper approach of an appellate court to the issue of the safety of a conviction, this court said: -

> "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."

[31] In the present case, the complainant has unquestionably altered her position on the allegations of sexual abuse on a number of occasions. In her testimony before this court, however, she was unshakeable in her assertion that they were true. She has also explained to our satisfaction the reasons that she disavowed her statements. In considering this aspect of the case, we must keep in mind the impact on the mind of a young girl of familial pressures, whether they were overt or implicit. We have found her account of why she changed her story compelling and convincing.

[32] Quite apart from these considerations, however, the forensic evidence against the appellant combined with his assertion that no traces that could be connected to him would be found in her bedroom to make a formidable case against him. Having carefully reviewed the evidence we were in no doubt of its adequacy to establish the appellant's guilt. For these reasons, we dismissed the appeal.

Appeal against sentence

[33] Wisely, Mr McCann did not press the appeal against sentence to any substantial extent. These were outrageous crimes perpetrated against the complainant when she was at a vulnerable age in circumstances where she should have been able to look to the appellant for protection and care rather than the disgraceful and egregious exploitation that was her fate at his hands. The sentences imposed could not be characterised as being in any way

excessive or wrong in principle. The appeal against sentence is also dismissed.