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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **27/01/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

BJ

_____

Before: Stephens LJ, Treacy LJ and Sir Donnell Deeny

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STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] On 29 May 2019 following a jury trial at Belfast Crown Court before the Recorder, His Honour Judge McFarland ("the judge") the Applicant, whom we anonymise as BJ (to protect the anonymity of the complainant) on majority verdicts was convicted of 7 counts of rape, 5 counts of indecent assault and 3 counts of common assault. Those counts all related to the actions of the Applicant on various dates between 1982 and 1991 in respect of his stepdaughter, KC who was born in 1974, so that those actions occurred prior to her seventeenth birthday ("the under seventeen counts"). The Applicant was found not guilty by unanimous jury verdicts in relation to 12 other counts of rape which also related to the actions of the Applicant in respect of KC and which were said to have occurred between 1991 and 2007 after her seventeenth birthday ("the over seventeen counts"). The Applicant who was refused leave to appeal against his conviction by the Single Judge, Colton J, now renews his application before this court.

[2] Section 16(1) of the Criminal Appeal (Northern Ireland) Act 1980 provides that "a person who wishes … to obtain the Court's leave to appeal, shall give notice of … his application for leave to appeal, *in the prescribed manner* within twenty-eight days from the date of the conviction, … appealed against …." That statutory requirement is an aspect of the principle of finality, see *R v Guinness* [2017] NICA 47, *R v Smith* [2013] EWCA Crim 2388 and *R v Doyle* [2017] NICA 35. The prescribed manner of giving notice is not set out in Practice Direction 1 of 2016 as was submitted on behalf of the Applicant but rather it is set out in rule 5 of the Criminal

Appeal (Northern Ireland) Rules 1968 (as amended). That rule provides that a notice of application for leave to appeal to the Court of Appeal from the Crown Court in respect of a conviction or sentence needs to be given in the prescribed form (Form 2) within 28 days of conviction or sentence and that Form 2 needs to be accompanied by Form 3 setting out the grounds of appeal or application. Form 2 which has to be accompanied by Form 3 is required to be served on 'the proper officer.' Rule 2(1) defines the proper officer as being the Master (QB & Appeals). The question then is how service is to be effected. We heard no submissions as to whether sending Form 2 accompanied by Form 3 electronically was sufficient for service to have been effected on the proper officer. We consider that unless the rules themselves expressly state that service by electronic means is valid or some statutory provision provides for the rules to be so interpreted then service is bound to be by post or by hand delivery. We consider that electronic service does not satisfy the requirement of service in Rule 5 and cannot be deemed good service for the purpose of meeting the 28 day time limit for lodging notice of intention to apply for leave to appeal. Neither the Interpretation Act 1889 nor Section 24(2) of the Interpretation Act (NI) 1954 provide for electronic service.

[3] The Applicant was convicted on 29 May 2019 so that the 28 day period expired on 26 June 2019. Forms 2 and 3 together with a skeleton argument were sent electronically to the Court of Appeal office on 26 June 2019 at 13.47 just within the 28 day time limit. A hard copy of the forms and the skeleton argument were posted to the Court of Appeal office on 2 July 2019 and received on 3 July 2019 which was 7 days outside the 28 day limit. The Applicant's solicitor believed that sending Forms 2 and 3 electronically was sufficient. As we have indicated it was not contended that electronic service was good service. Rather an extension of time of some 7 days was sought on behalf of the Applicant. That application for an extension of time was considered by the single judge applying the principles set out at paragraph [8] of the judgment of this court in *R v Brownlee* [2015] NICA 39. It would have been granted by the single judge if he had considered that there was merit in the grounds of appeal given that an electronic Notice of Appeal had been sent to the Court of Appeal office within the time limit and hard copies were served on the proper officer only by a narrow margin after the deadline had expired. The Applicant now renews his application for an extension of time to this court.

[4] Mr Duffy QC and Mr Stephen Toal appeared for the applicant at trial and in this court and Ms Orr QC and Ms McKay for the PPS again at trial and in this court.

Background

[5] The Applicant, BJ who was born in 1949 is now 70 years of age. He began a relationship with KC's mother in the late 1970s, when KC was four years old. They all lived together in the same family home. KC's half-sister, IJ was born in 1983 so that KC is approximately 9 years older than IJ.

[6] KC's evidence was that commencing in about 1982 the Applicant sexually abused her from the age of 8 from when he was 33 years old. All the sexual offences alleged to have occurred during childhood, bar count one were alleged to have occurred at night time in the family home at a time when KC's mother (the Applicant's partner) was working night shift. In her ABE interviews KC identified the place at which her mother worked night shifts as a care home ("the T care home"). KC's mother did not give evidence at trial as to when and in what circumstances she worked night shift. However two witnesses, namely KC's half-sister IJ and WX (a former co-worker of the complainant's mother) did give evidence that KC's mother worked as a care assistant at the T care home but that she only commenced night shift at that home in November 1994 when KC was approximately 20 years of age. It was suggested to the jury that this evidence fundamentally undermined the prosecution case on the basis that KC's mother would have been in the family home at night time until November 1994 and that all the offences (bar count one) alleged to have occurred when KC was under seventeen just could not have taken place.

[7] KC moved out of the family home when she was around 19 years old in or about 1993. Around this time the Applicant who was then 44 years old began a sexual relationship with KC which lasted until 2007 when they were aged 33 and 58 respectively. Throughout that period the Applicant maintained his relationship with KC's mother to whom he did not reveal his involvement with KC until 2011. The relationship with KC also involved the Applicant procuring 2 abortions for her although it was disputed that the Applicant was the father on either occasion. KC alleged that sexual encounters with the Applicant when she was over seventeen were non-consensual on the basis that her will had been overborne by the sustained abuse she suffered at the hands of the Applicant when under seventeen and therefore that these sexual encounters were rapes.

[8] The background to the circumstances in which KC first made a complaint to social services and then subsequently in November 2011 to the police was one of evolving animosity between her, her mother and the Applicant. There had been a history of arguments, non-molestation orders, and reports to police arising out of family disagreements. The first non-molestation order taken by KC was in December 2000. There was a volatile relationship in which KC would avail of financial family support and then in the event of a disagreement would resort to making complaints to police or the courts about the behaviour of both her mother and the Applicant.

[9] In June 2011, KC's son, E (then aged 16) came to live with KC's mother and the Applicant. He did not return to KC's care despite her requests. There was an argument as to KC not receiving financial benefits for her son and thereafter a dispute as to his custody. Social services became involved at the instigation of KC and it was only then that KC made the case against the Applicant. At trial KC stated that her son could not be allowed to remain in a home resident with the Applicant and her mother, given his past alleged sexual abuse and physical violence.

[10] Social services made it clear that there had been an absence of any report to the police by KC about the alleged sexual and physical abuse. In November 2011 KC proceeded to make a complaint to the police. Her ABE interviews were conducted over a two month period between January and March 2012 with 33 hours of such evidence being recorded. Only 4 ½ hours of the 33 was shown to the jury at the trial.

[11] In about the end of 2011 the Applicant revealed to his partner, KC's mother that he had been having an affair with KC for around 15 years. He stated in evidence that her reaction was like a bomb going off and that she was in bits. He said that he and KC's mother had been together for some 31 years and that this had been "very very much quite the betrayal." The Applicant also gave evidence that in December 2011 he had informed a particular solicitor in the firm of solicitors that he had then instructed that he had had sexual intercourse with KC. He also stated that he had told his daughter IJ.

[12] In January 2012, KC issued High Court proceedings in which she swore an affidavit on 11 January 2012 stating that on 3 June 2011 her son E by agreement went to live with KC's mother. She also stated that the Applicant sexually and physically abused her from the age of 8 into adulthood and that she had tried to bury this knowledge as she felt unable to cope with it.

[13] The Applicant was interviewed by the police in May and December 2012. He was accompanied at the interviews by a different solicitor from the same firm that he had previously instructed. In evidence at trial he stated that prior to the interviews he felt stressful and very uncomfortable. During the first two interviews he made no comment. In subsequent interviews he was asked on numerous occasions whether he had sex with KC to which he replied "never" and described the suggestion as "nonsense." Further illustrations are that he was asked whether he had ever touched KC's breasts and again his reply was "never." At trial he accepted that every time the police asked him questions about whether he ever had sex with KC he had lied. We would observe that those lies came after the Applicant had already confessed to KC's mother and to his daughter IJ. Those confessions had come at considerable emotional cost to both him and to KC's mother and to IJ and no doubt he would have been stressful and very uncomfortable at that earlier time. It was in that context that the jury had to consider his explanation as to why he lied to the police namely that he was stressful and uncomfortable going into the police interview. It was also in that context that the jury would also have to consider why he lied in his defence statement after he had plenty of time to calmly reflect for which see paragraph [15](b).

The proceedings at trial

[14] The Bill of Indictment is dated 1 August 2018. The applicant was arraigned and pleaded not guilty to all 27 counts.

[15] On 28 August 2019 the applicant's then solicitors served a defence statement. There are two matters in that statement which are relevant to this appeal:

(a) First the applicant denied "that between 5 April 1986 and 20 March 2007 or at any time he had ever had sexual intercourse with" KC. That assertion was a lie as at trial the Applicant accepted that he had sexual intercourse with KC between 1993 and 2007.

(b) Second the defence statement asserted that the applicant "specifically" denied "indecently assaulting or raping (KC) … while her mother worked night shifts and in particular he will contend at his trial that her mother did not commence night shifts at (the T) nursing home until in or about the year 1994, when her daughter IJ commenced" at a particular school as a boarder. It is apparent that by 28 August 2019 the Applicant and his solicitors were fully aware of the need to obtain evidence as to the working history of KC's mother in relation to this issue. In this appeal there has been no explanation as to why the Applicant or why the Applicant's previous or present legal representatives did not make any attempt to obtain that employment record from either the relevant employers or from HMRC prior to the trial. That failure to explain is to be seen in the context that it is commonplace to obtain HMRC records in relation to for instance personal injury cases involving exposure to asbestos. It is also to be seen in the context that KC's mother would have cooperated with any enquiry. The HMRC records were not obtained prior to the trial and those records are now the subject of an application to this court to receive them in evidence. We consider that they would have been available prior to trial if they had been requested by the Applicant's legal representatives.

[16] At trial the Applicant denied that he was guilty of any offences against KC. He accepted that they had an adult sexual relationship, however, he insisted that this was consensual. The only issue in relation to counts 16 – 27 (the over seventeen counts) was one of consent. The Applicant's case was that KC had fabricated the allegations in an ultimately unsuccessful attempt to ensure that her son, who went to live with KC's mother and the Applicant in June 2011 when he was 16, was returned to her care.

[17] Counsel on behalf of the Applicant wished to cross examine KC as to when she lost her virginity and to adduce evidence as to a conversation between KC and IJ in which it was suggested that KC described losing her virginity in circumstances inconsistent with her evidence at trial. The restrictions imposed by Articles 28 - 30 of the Criminal Evidence (Northern Ireland) Order 1999 ("the 1999 Order") required the Applicant to apply for leave both to adduce evidence and to cross-examine KC about any sexual behavior. The manner in which an application should be made, the time at which it should be made and the requirement for a hearing in relation to the application are all contained Rule 44H of the Crown Court Rules (Northern Ireland)

1979. There was no written application prior to trial as provided for in Rule 44H. Rather an application was made orally at trial under Rule 44H (10).

[18] During the course of that oral application a summary of the evidence which it was proposed to adduce was provided to the judge. That summary was that KC had told her half-sister IJ that KC had lost her virginity when she first had sexual intercourse when she was 14 or 15 with a boyfriend, N in a park near to her home. The judge enquired what were the proposed questions and was informed that defence counsel was "going to put it to (KC) that she told her sister previously that she lost her virginity to a person (N) who had been mentioned already by her (in evidence). That that occurred in (a) Park and that she told her sister, she was 14 or 15 at the time, and that that is when she lost her virginity." The name of the half-sister was known to the court. Her date of birth was not given. No reasons were given to the judge as to why the Applicant had failed to make the application in writing prior to trial. Ms Orr on behalf of the prosecution opposed the application stating amongst other matters that it would be extremely unlikely that in a conversation between KC and her step-sister IJ that KC would inform her step-sister that she had sexual intercourse with or had been raped by her step-father. The judge declined the application stating that he did not consider that the issue was sufficiently relevant to permit questioning on this point.

[19] There were a number of inconsistencies in KC's evidence which were fully explored in a lengthy cross examination by senior counsel for the defence. All the alleged inconsistencies in her evidence were referred to by senior counsel for the defence in closing. They were also referred to by the judge in his charge where he gave guidance as to how the jury should deal with them.

[20] The jury were told in the prosecution opening, the prosecution closing and the defence closing, as well as having it reinforced strongly by the judge in his charge, that they should put aside any feelings of sympathy, prejudice or moral outrage they would have towards the Applicant for his behaviour or towards KC in respect of the highly emotive subject of abortions. They were also told the counts on the Bill of Indictment were not a "job lot" and that each count and the evidence in respect of each count should be considered separately.

[21] The first count involved an allegation of indecent touching when KC was 8 years of age. The next count was of a rape some 4 years later. At trial in cross examination KC stated that she had been confronted by her mother when she was about 11 years old who had asked her if she had been "abused" by the Applicant. KC stated that she had denied anything had occurred to which her mum replied that she could then commence night shift work in the care home. The Applicant asserts that the intended impact of the evidence was to suggest to the jury that her mother suspected abuse from an early stage. The Applicant also asserts that this account had never been mentioned by KC during her 33 hours of ABE interview. After the jury retired to consider their verdicts they asked the following question:

> "Did (KC) state the following phrase in her cross-examination "Mum had questioned me about abuse"? KC answered "no". Can we confirm KC was asked this by her mother?"

The Applicant suggests that this meant that the jury was attempting to infer that KC's mother suspected abuse. It is acknowledged on behalf of the Applicant that the judge then gave a strong warning to the jury in the following terms:

> "On Monday afternoon just after lunch Mr Duffy was asking (KC) a series of questions about the alleged abuse in (the family home) – indecent assaults and rapes in the parents' bed and in the living room. (KC) stated that the period of this abuse was from about 1986 to October/November 1992 (when she said she signed the tenancy agreement for (a particular house).
>
> She was then asked by Mr Duffy – "So we had a time frame of 1986 up to the end of 1993, and it was all happening at night?" She replied "Yeah. My Mum had questioned me about the abuse, and I had denied it, and then she had decided to get night jobs."
>
> So to answer your question, yes she did say that when she was asked by her mother if she had been abused she had denied it. This was the first time (KC) mentioned this, as it was not mentioned during her lengthy interviews with the police in 2012 and there is no other evidence that this conversation took place.
>
> In addition, she said that she was 11 at the time of the conversation and at that time there had only been one incident of abuse - the … Street incident when she was 8.
>
> I also need to remind you that if such a conversation took place and it precipitated (KC's mother) commencing her night shift work this would have been 8 or so years before KC's mother actually commenced her night shift according to (WX).
>
> You need to treat this evidence very carefully in case you may be attempting to draw an inference that (KC's mother), by asking the question, was somehow aware of, or had suspicions about, the abuse that had taken place in … Street, three years earlier. **That would be an entirely**

improper inference to draw in light of all the evidence that you have heard." (emphasis added)

[22] After retiring the jury indicated unanimous agreement in respect of the counts at 16 - 27 on the indictment ("the over seventeen counts"). The verdict was not taken at the time it was reached but rather was delivered once the jury had indicated a resolution to all of the counts (see *R v Harbinson* [2012] NICA 20, *R v A* [2014] NICA 2 *R v S and C* [2015] NICA 51 and *R v Smyth* [2018] NICA 10). After a period of further deliberation the verdicts of the jury were taken and it transpired that the verdicts on counts 16–27 (the over seventeen counts) were unanimously "not guilty." However, by majority verdicts the Applicant was convicted on counts 1-15 (the under seventeen counts).

[23] The jury verdicts demonstrated a clear, logical and fundamental difference in approach as between the under seventeen counts and the over seventeen counts. We have inserted a line demarcating that difference in relation to the verdicts which were as follows:

(i) Indecent assault (1983) – Guilty 10/2

(ii) Indecent assault (1986-1988) – Guilty 10/2

(iii) Rape (1986-1988) - Guilty 10/2

(iv) Rape (1986-1988) - Guilty 10/2

(v) Indecent assault (1986-1991) – Guilty 10/2

(vi) Rape (1986-1991) – Guilty 10/2

(vii) Indecent assault (1986-1991) – Guilty 10/2

(viii) Rape (1986-1991) – Guilty 10/2

(ix) Rape (1986-1991) – Guilty 10/2

(x) Rape (1986-1991) – Guilty 10/2

(xi) Rape (1986-1991) – Guilty 10/2

(xii) Common assault (1987-1988) - Guilty 10/2

(xiii) Common assault (1987-1988) - Guilty 11/1

(xiv) Indecent assault (1987-1988) – Guilty 10/2

(xv) Common assault (1987-1988) - Guilty 11/1

(xvi) Rape (1991-1994) – Unanimous not guilty

(xvii) Rape (1991-1994) – Unanimous not guilty

(xviii) Rape (1999) – Unanimous not guilty

(xix) Rape (1999-2000) – Unanimous not guilty

(xx) Rape (2000) – Unanimous not guilty

(xxi) Rape (2000) – Unanimous not guilty

(xxii) Rape (2000) – Unanimous not guilty

(xxiii) Rape (2003-2004) – Unanimous not guilty

(xxiv) Rape (2003-2006) – Unanimous not guilty

(xxv) Rape (2003-2006) – Unanimous not guilty

(xxvi) Rape (2006-2007) – Unanimous not guilty

(xxvii) Rape (2006-2007) – Unanimous not guilty

[24] The jury by their unanimous not guilty verdicts in relation to counts 16–27 was not satisfied to the requisite standard that KC's will was overborne so that there was an the absence of consent (or alternatively but perhaps more theoretically as to the absence of the Applicant's reasonable belief in such consent).

The grounds of appeal

[25] The grounds can be summarised as follows:

(a) The jury incorrectly decided the case in a way that was contrary to clear and unequivocal evidence given by two witnesses, namely KC's half-sister, IJ and WX (a former co-worker of KC's mother) which evidence it was suggested was inconsistent with the Applicant's guilt on the basis that KC's mother only started night shift at the T care home in November 1994. This ground of appeal was stated on behalf of the applicant to be "front and centre in this appeal." We will refer to this ground of appeal as "the night shift ground of appeal";

(b) The judge erred by failing to give a *Makanjuola* warning to the jury regarding the inconsistencies and lies in KC's evidence ("the Makanjuola ground of appeal");

(c) The judge erred by refusing a defence application to cross examine KC as to an account given by her to her half-sister in 1998 or 1999 as to the circumstances in which KC first had sexual intercourse and lost her virginity at the age of 14 or 15 with her then boyfriend N which account if correct meant that KC's evidence of having sexual intercourse and losing her virginity through rape by the Applicant at the age of 12 could not be correct ("the sexual behaviour ground of appeal");

(d) The closing speech by Crown counsel contained a number of inappropriate comments that sought to excite the minds of the jury and as such any verdict from the jury cannot be regarded as safe ("the closing speech ground of appeal"); and

(e) The judge erred in the management of the trial by creating a situation that led to pressure being exerted on the jury to make a decision by allowing the deliberations to stretch to a period of 4 days ("the jury pressure ground of appeal").

The appeal hearing and the application to admit fresh evidence

[26] In support of the first ground of appeal the Applicant made an application that this court receive fresh evidence which had not been given at trial.

[27] The admissibility of fresh evidence in criminal appeals is governed by section 25 of the Criminal Appeal (Northern Ireland) Act 1980:

> "25. - (1) For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice -
>
> (a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to the Court necessary for the determination of the case;
>
> (b) order any witness to attend and be examined before the Court (whether or not he was called at the trial); and
>
> [from 14 July 2008 not confined to a witness who was compellable at the trial, so that the Court can compel testimony from persons such as jurors or lawyers]
>
> (c) receive any evidence which was not adduced at the trial.
>
> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to-
>
> (a) whether the evidence appears to the Court to be capable of belief;

(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible at the trial on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence at the trial."

[28] Rule 7 of the Criminal Appeal (Northern Ireland) Rules (Northern Ireland) 1968 provides for the manner in which applications to receive fresh evidence are made.

[29] On 28 November 2019 on the hearing of this appeal counsel on behalf of the Applicant applied to this court to receive in evidence an HMRC document dated 26 June 2019 which was not in evidence at the trial. It was not suggested that KC's mother would be called to prove the document dated 26 June 2019 nor was it suggested that any further evidence from her should be received on the hearing of the appeal. KC's mother had been present throughout the trial and had consulted with the Applicant's legal representatives both prior to and during the trial. She had not been called to give evidence. In making the application to receive this evidence the Applicant did not comply with Rule 7 but rather at the commencement of the hearing counsel on his behalf handed in an undated document entitled "Supplemental submission & Application to adduce fresh evidence pursuant to S 25(1)(c) of the Criminal Appeal (NI) Act 1980" together with a proposed second amended notice of appeal dated 7 November 2019. It was asserted that counsel having looked at the rules without seeing any guidance considered that the application should be made by way of amendment to the Notice of Appeal together with a skeleton argument. Neither the amended notice of appeal nor the supplemental submissions had been included in the book of appeal without any explanation as to why not nor was there any explanation as to the delay between receipt by KC's mother on 29 June 2019 of the document dated 26 June 2019, that document being shown to the Applicant's legal representatives on 1 July 2019 and 28 November 2019 when the application was made albeit in an incorrect form.

[30] The evidence which it was proposed should be received was an HMRC document dated 26 June 2019 setting out the employment and tax records compiled by HMRC in relation to KC's mother. It was asserted that these records "further support the otherwise un-impugned evidence of two defence witnesses" on the issue as to when KC's mother worked night shift at the T care home.

[31] At the conclusion of the hearing before this court on 28 November 2019 we directed that a written application should be lodged in accordance with Rule 7. By Form 7 dated 4 December 2019 the Applicant applied for an order permitting KC's

mother to produce the documents supplied to her through HMRC. Attached to Form 7 was not only the document dated 26 June 2019 but also an affidavit sworn by KC's mother on 4 December 2019. That affidavit explained the attempts made prior to the trial by KC's mother to obtain her employment records from the T care home. She stated that she consulted with the Applicant's new legal team in the week before the trial which would have been week commencing 13 May 2019. She also stated that as a result of this consultation she became clear that her work history was going to become an evidential feature of the trial and that as a result on Thursday 16 May 2019 just days before the trial commenced on Monday 20 May 2019 she contacted the T care home but was unable to obtain her employment records. She asserted that (as far as she was aware) the Applicant's previous set of legal representatives had not requested any proofs of this type and that is why earlier efforts were not made by her to obtain this information. She also stated that she had not thought of contacting HMRC until it was suggested to her by another relative after the trial had concluded. The affidavit not only addressed the issue as to why the HMRC records were not obtained prior to trial by her but also went on to assert:

(a) that she never worked night shift in any other care home nor did she work night shifts cleaning at any other employer. This assertion is to be seen in the context that during the hearing of the appeal it became apparent that the HMRC records identified other employers prior to the T care home but did not speak to the question as to whether she worked night shift with those employers;

(b) that she never witnessed nor had any knowledge or suspicion of any sexual assaults or rapes taking place against KC;

(c) she never asked KC about such matters when KC was a child contrary to what KC had said in evidence; and

(d) that there were a number of discussions about whether she should give evidence at the trial and that her reluctance to do so was because of the emotional and physical stress she was suffering and not because she had anything to hide.

It can be seen that the affidavit contains substantially more evidence than is contained in the HMRC records. It is also apparent that the evidence at (a) is being introduced in response to the argument at the hearing of the appeal that the records did not establish that KC's mother did not work night shift with any other employer.

[32] The admission of evidence under section 25 is a matter of discretion. This Court will admit evidence if it is necessary or expedient in the interests of justice. The factors listed in section 25(2) are not preconditions for the admission of evidence, but are merely factors to take into account in deciding whether evidence should be received. Lord Judge stated in *Erskine* [2009] EWCA Crim 1425, [2009] 2 Cr App R 29 (461) (at [39]) that "[v]irtually by definition, the decision whether to

admit fresh evidence is case and fact specific. The discretion to receive fresh evidence is a wide one focusing on the interests of justice." Lord Bingham stated in *R v Criminal Cases Review Commission, ex parte Pearson* [1999] 3 All ER 498 that:

> "The Court of Appeal would ordinarily be less ready, and in some cases much less ready, to receive evidence which the appellant had failed without reasonable explanation to adduce at the trial, since receipt of such evidence on appeal tends to subvert our system of jury trial by depriving the decision-making tribunal of the opportunity to review and assess the strength of that fresh evidence in the context of the case as a whole, and retrials, although sometimes necessary, are never desirable."

[33] In considering the application to receive evidence it is important to distinguish between the evidence contained in the HMRC letter of 26 June 2019 and the additional evidence contained in the affidavit of KC's mother sworn on 4 December 2019.

[34] We will deal with the HMRC letter first having regard to the particular factors set out in Section 25(2). The evidence contained in the letter in essence amounts to the identity of the employers, the dates of employment and the amount earned each year. It does not speak to the issue as to whether KC's mother worked night shifts with any of those employers. The evidence contained in the letter appears to the Court to be capable of belief. The next factor is whether it appears to the Court that the evidence may afford any ground for allowing the appeal. The evidence in the letter establishes the dates of employment at the T care home but does not address the issue raised at trial that the night shifts could have been with another employer. That is why the evidence contained in the letter has to be supplemented by evidence from KC's mother before it could give rise to any concerns as to the safety of the convictions. The next factor is whether the evidence would have been admissible at the trial on an issue which is the subject of the appeal. We consider that it would have been. The final factor is whether there is a reasonable explanation for the failure to adduce the evidence at the trial. We consider that there is no reasonable explanation. The issue was clearly identified in the defence statement dated 28 August 2018 and the trial commenced on 20 May 2019. This type of evidence is commonplace and there is no reason why it could not have been obtained prior to the trial commencing.

[35] We turn to consider the particular factors set out in Section 25(2) in relation to the additional evidence contained in the affidavit of KC's mother sworn on 4 December 2019. The evidence appears to the court *on paper* to be *capable* of belief. We also consider that it would afford a ground for allowing the appeal as for the first time it is being asserted that the only employer for whom KC's mother worked on night shift was at the T care home. If that evidence was accepted then KC's mother may have been at home at night when the alleged abuse was stated by KC to

have occurred and also the jury might have formed the view that a part of KC's account that the abuse occurred when her mother was working night shift was incorrect calling into question KC's credibility. We also consider that the evidence would have been admissible at trial. The final factor is whether there is a reasonable explanation for the failure to adduce the evidence at the trial. We consider that there is no reasonable explanation. The issue was clearly identified in the defence statement dated 28 August 2018 and the trial commenced on 20 May 2019. KC's mother was present each day of that trial. She consulted with the Applicant's legal representatives. The issue as to whether she worked night shift with another employer was clearly raised at the trial during the cross examination of KC. Her mother would have heard that evidence and could have been called as a witness to deal with that issue. Indeed, she was the most obvious witness to call in relation to the issue as to when and where she first worked night shifts. There is no medical evidence to support the contention that KC's mother was suffering from any greater degree of emotional or physical stress than would be expected and no details are given of the emotional or physical stress. We consider that a positive decision was made not to call her to give evidence at the trial. To go back on that positive decision would subvert our system of jury trial. We consider that this is a factor of particular importance in this case.

[36] The two pieces of additional evidence are to an extent interdependent with the strength of the evidence in the HMRC letter being dependent on the further evidence in the affidavit of KC's mother. We have considered whether if it is necessary or expedient in the interests of justice to admit either of those pieces of evidence and we decline to do so taking into account not only the particular factors in section 25(2) but also the overall interests of justice.

The task of this court on an appeal

[37] Before considering the various grounds of appeal we set out task to be performed by this court when determining an appeal. That task has been clearly and authoritatively expounded by Kerr LCJ in *R v Pollock* [2004] NICA 34 after a review of the relevant authorities. At paragraph [32] of his judgment the Lord Chief Justice set out the following principles to be distilled from the authorities:

> "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."

Those are the principles which we will apply.

The night shift ground of appeal

[38] KC was cross-examined in relation to the date upon which her mother commenced night shift in the T Care Home. She was asked by defence counsel whether her mother worked night shift anywhere else and she said that "yes she did." She was then asked where else did her mother work night shift and she replied that her mother had a cleaning job where she would be out of the house at night and she named the particular employer in relation to that job. She also stated that she remembered the T Care Home "but when he was raping me she was not in the house." She also stated that all she remembered was "my mum was not in the house, she was working." She was challenged that she had never mentioned in her ABE interview the particular employer where her mother had worked at nights as cleaner. In fact, on this appeal, it is clear that her mother did work with that particular employer.

[39] This part of the appeal is based on the proposition that the evidence that KC's mother only started working night shift in November 1994 was un-impugned. That is incorrect. The evidence was not that categorical. It was open to the jury to accept that a young girl of some 8 or 12 years of age was confused as to the identity of the employer but was correct in her assertion that her mother was not in the home when KC was physically and sexually abused.

[40] We dismiss this ground of appeal.

The *Makanjuola* ground of appeal

[41] We were informed that discussions took place in chambers prior to closing speeches as to the directions to be given by the judge in his charge to the jury and that during those discussions counsel for the Applicant requested that a *Makanjuola* warning should be given to the jury but that the judge indicated that he was not minded to do so. There is no record of those discussions. There is no record of the ruling given by the judge. We make it clear that counsel should not have raised this issue in chambers.

[42] The basis of this ground of appeal is that there were a number of inconsistencies and/or lies in KC's evidence that ought to have led to a *Makanjuola* warning being given by the judge in his charge.

[43] We summarise some of the inconsistencies and/or lies identified on behalf of the applicant as follows:

i. In her ABE interview KC had alleged that the sexual abuse continued when she moved to another property. There was no count relating to any such allegation and at trial KC in cross-examination denied that she had ever contended that abuse had occurred at this location. KC continued to deny having made this assertion even when it was put to her in the form of a transcript of her ABE interview.

ii. KC stated that the sexual abuse as a child happened at night time between 1987 – 1992 when her mother was working at the T care home. KC stated that she remembered seeing her mother in her T care home uniform the next day after the abuse had occurred. This evidence was inconsistent with the evidence of IJ and WX.

iii. A medical note recorded that in 2011 KC stated that the sexual abuse stopped when she left the house at 18. Her account that it continued was inconsistent with that statement or was a lie.

iv. KC gave evidence that two social workers took her out of school to ask her about sexual abuse. No records of this having occurred were found and the teacher at the time had no memory of any such incident.

v. KC stated at trial that she was, unknowingly, 6 months pregnant when she first discovered that she was pregnant with her first child. The child was born in March 1995 after a full term and consequently must therefore have been conceived in or about June 1994. KC accepted that she first communicated knowledge of the pregnancy to her mother in August 1994 after her mother returned from a summer holiday in Tenerife. On this basis KC cannot have been more than 2 to 3 months pregnant when she knew that she was pregnant.

vi. KC gave evidence that she never intended under any circumstances to allow her son to live at her mother's house as her abuser lived there. The defence put the affidavit sworn by KC on 11 January 2012 (see paragraph [12]) in respect of family proceedings to KC, where it was said that E by agreement went to live with her mother. In response, KC said that she hadn't really read that affidavit and didn't realise what she had signed.

vii. It was also suggested that KC told a series of lies about her former partner who had previously been described by her as 'gentle and easy going.' It was suggested that the lies concerned evidence about an abortion obtained by KC assisted by the Applicant. KC accepted in her ABE interview that she

had initially told her former partner that she had a miscarriage and that this was a lie. Police in her ABE interview asked her when he found out that it had in truth been an abortion. KC then described in detail a conversation she stated she had with her former partner. She stated this had taken place two weeks before the ABE interview in early 2012 and was a detailed account. The former partner was called as a witness by the defence. He stated that he had believed the initial lie from KC and in fact had placed a scan of the baby in his mother's coffin believing it to have been miscarried. He then stated that contrary to the KC's evidence he had not found out the truth until February 2014.

[44] The headnote to *R v Makanjuola* [1995] 2 Cr. App. R 469 is in the following terms

> "(1) It was a matter for the trial judge's discretion whether or not to give a warning to the jury in respect of the unsupported evidence of an alleged accomplice or complainant in a sexual case. The nature of the warning and whether or not to give it would depend upon the circumstances of the case, the issues raised and the content and quality of the witness's evidence.
>
> (2) There would need to be an evidential basis for suggesting that the evidence of a witness was unreliable, which did not include mere suggestions by cross-examining counsel.
>
> (3) If the question arose whether a special warning should be given, it was desirable that the question be resolved by discussion with counsel in the jury's absence before final speeches.
>
> (4) If such a warning was to be given, it should be done as part of the judge's review of the evidence and his comments as to how the jury should evaluate it, rather than as a set-piece legal direction.
>
> (5) Where some warning is required, it will be for the judge to decide the strength and terms of the warning; it does not have to be invested with the whole florid regime of the old corroboration rules.
>
> (6) The court will only interfere with the judge's exercise of his discretion if it is unreasonable in the *Wednesbury* sense (see *Associated Provincial Picture Houses v. Wednesbury Corpn.* [1948] 1 K.B. 223)."

[45] The evidential basis as to whether in the exercise of discretion a warning should be given is "unreliability" of the complainant as opposed to whether the complainant has "lied." Again, in the exercise of discretion whether there is an evidential basis that the complainant has lied goes not only to the exercise of discretion as to whether a warning should be given but also to the strength of the warning. This can be seen from what Lord Taylor said at page 732:

> "The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she *may* consider it necessary to urge caution. *In a more extreme case, if the witness is shown to have lied,* to have made previous false complaints, *or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence.* We stress that these observations are merely illustrative of some, not all, of the factors which the judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury" (emphasis added).

[46] This court stated at paragraph [10] of *R v Gerard Judge* [2017] NICA 22 that "historic sex cases where there is no independent evidence are difficult to defend." We consider that to be a factor to be taken into account in the exercise of discretion in such cases as to whether to give a *Makanjuola* warning and as to the nature of the warning to be given.

[47] It is suggested that the judge misdirected himself in law by ruling that a *Makanjoula* warning could only apply if there were lies or if the lies were accepted by the complainant. That would have been a misdirection but given the manner in which the application for a *Makanjoula* warning was made we are not persuaded that this was the reason or alternatively was the only or the predominant reason for the judge indicating that he was not inclined to give such a warning.

[48] However, given the nature and number of the potential inconsistencies in KC's evidence all the members of this court would have given a *Makanjuola* warning urging caution particularly given the historic nature of the counts. However, we are not prepared to state that the decision of the judge not to do so was *Wednesbury* unreasonable. He had the considerable advantage of being immersed in this trial and was in a far better position to form a discretionary judgment than the members of this court working from transcripts of evidence. Even if a warning ought to have been given we do not consider the verdicts to be unsafe as the alleged inconsistencies and/or lies were extensively explored in cross-examination, carefully and extensively put before the jury in the defence closing speech and referred to by

the judge both clearly and robustly in his charge to the jury. Furthermore, the jury could quite properly form the view that the inconsistencies did not undermine the prosecution case. For instance we consider that it was open to the jury to have accepted KC's explanation as to how she came to swear an affidavit which conflicted with her evidence. That explanation was that she was presented with a document by her solicitor, did not read it but signed it. That explanation being seen in the context of the jury's assessment of her character and intellectual ability and on the basis of the life experience of members of the jury.

[49] We dismiss this ground of appeal.

The sexual behaviour ground of appeal

[50] We have set out the nature of the application which was made to the judge at paragraphs [17] and [18]

[51] As we have indicated there was no written application for leave to cross-examine KC as to the content of the conversation with IJ and there was no written application for leave to adduce evidence from IJ as to that conversation. We have also indicated that no explanation was given to the judge as to why the application was made orally at trial. The explanation given to this court was that as a result of the consultation with the Applicant's present legal representatives in the week prior to the trial an extensive document was prepared by IJ which had a reference in it to this evidence but that given all the other issues in that document it was overlooked. The matter was then brought to the attention of counsel by IJ during the trial and an immediate application was made to the trial judge. That explanation has to be seen in the context that IJ had known about the allegations that the applicant had raped KC as a child for a number of years and yet she did not immediately state that this just could not be correct given that KC had told her that she had lost her virginity to N at a later date. There has been no explanation proffered by IJ as to why she did not alert the Applicant's legal representatives, or indeed, the Applicant or her mother as to this evidence at a much earlier stage rather than effectively waiting until the first day of the trial.

[52] Article 28(2) of the 1999 Order provides that the "court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied - (a) that paragraph (3) or (5) applies, and (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case." Article 28(3) provides that this "paragraph applies if the evidence or question relates to a relevant issue in the case and either - (a) that issue is not an issue of consent; …." The issue identified on behalf of the Applicant is whether KC first had penetrative sexual intercourse in 1998 or 1989 with her boyfriend N. If the jury relied on the evidence of IJ to that effect then the Applicant could not have had penetrative sexual intercourse with her at the earlier date for instance contained in count three. That issue was not an issue of consent but rather was an issue as to

whether the Applicant had had penetrative sexual intercourse with KC prior to 1988 or 1989.

[53] In relation to the question as to whether the refusal of leave might have the result of rendering unsafe a conclusion of the jury Blackstone 2020 at paragraph F7.32 states that the:

> "test will be satisfied, it is submitted, when to disallow the evidence or question would be to prevent the jurors (or court) from taking into account material which might cause them to come to a different conclusion on a relevant issue. If this is correct, the test in (the equivalent statutory provision in England) is not particularly onerous: the judge need only be satisfied that refusal might lead the jury to a different conclusion, not that such consequence is probable…."

[54] We consider that the issue in relation to for instance count 3 was whether the applicant had penetrative sexual intercourse with KC in 1986 when she was aged approximately 12. If the account allegedly given by KC to IJ was correct then penetrative sexual intercourse first occurred with N in 1988 or 1989 when KC was approximately 14 or 15. If the jury relied on the account which was proposed to be given by IJ then penetrative sexual intercourse could not have taken place with the Applicant at the earlier date in 1986.

[55] We consider that leave ought to have been granted to ask questions in cross-examination and leave ought to have been granted for the evidence of the conversation to be adduced by IJ. The issue then becomes whether the verdicts are unsafe. IJ has not provided any explanation as to why this evidence was not adverted to until in effect the first day of trial when the evidence ought to have been at the forefront of any defence to the allegations of the under 17 rapes. That failure has a considerable impact on our assessment of the potential effect of the evidence which was not before the jury. We also take into account the persistent lies told by the Applicant to both the police and in his defence statement that he never had any sexual intercourse with KC. KC persisted in the allegation that sexual intercourse did take place and she was proved entirely correct to have done so. Also the context of this case was that the Applicant accepted that he was sexually attracted to KC when she was 19 and it is understandable that given her evidence the jury took the view that he was also sexually attracted to her prior to that. Our consideration of the evidence does not lead to a significant sense of unease about the correctness of the verdicts.

[56] We dismiss this ground of appeal.

The closing speech ground of appeal

[57] The Applicant abandoned this ground of appeal, in our view correctly.

The jury pressure ground of appeal

[58] The chronology of jury deliberations is that the jury was sent out to consider its verdict on Thursday 23 May 2019 from approximately 3.10 - 4.30 pm, which included a short break. The following day, Friday 24 May 2019, the jury continued to deliberate. The judge spoke to the jury in the morning about the question referred to at paragraph [21] which had been raised the previous afternoon relating to KC's evidence. He also reiterated that they were not to feel under any pressure about coming to a rapid decision. The jury finished shortly before 1.00 pm on Friday 24 May and continued their deliberations, after the Bank Holiday weekend, on Tuesday 28 May. At approximately 2.30 pm on Tuesday 28 May, the jury indicated that they had unanimous verdicts on Counts 16 - 27. The verdicts were not taken at that stage, however, the jury were given a majority direction in relation to the remaining counts. The following day, Wednesday 29 May at approximately 2.30 pm counsel informed the judge that there were concerns as to the length of time involved in the deliberations. The judge indicated to counsel that he was minded to stop the jury if verdicts had not been reached by close of play on 29 May 2019. At 2.45 pm, the jury indicated that it had reached majority verdicts on the remaining counts.

[59] We consider that the judge was carefully monitoring the time the jury was spending on its deliberations. This was a trial which involved multiple counts. All 27 counts had to be considered individually. In our view the jury were given adequate time to consider the verdicts, with adequate breaks and with appropriate directions. We do not consider that they were put under any pressure. Rather we consider that the jury was carefully and appropriately managed by the judge and that the length of the jury deliberations are indicative of the care taken by the jury in coming to their verdicts.

[60] We dismiss this ground of appeal.

Conclusion

[61] We have considered the grounds of appeal both individually and cumulatively. The court concludes, pursuant to statute, that the verdicts are not unsafe and do not engender a significant sense of unease.

[62] The application for an extension of time falls within paragraph [8](i) of *Brownlee* in that the Applicant missed the deadline by a narrow margin. However, we consider that there is no merit in the grounds of appeal so we also refuse to extend time for giving notice of the application for leave to appeal.

[63] We dismiss the appeal.