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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

COLM JOSEPH SHAW

____

Before: Sir John Gillen, Sir Ronald Weatherup and Deeny LJ

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<u>DEENY LJ</u> (delivering the judgment of the court)

Introduction

[1] The applicant for leave to appeal, Colm Joseph Shaw ("Shaw") was arraigned and convicted on four counts of an amended indictment. The first count was of indecent assault on a male, FH, between 13 December 2003 and 25 April 2005. This was a specimen count alleging that the applicant, in the course of his work as a bus driver would rub the leg of the complainant on ten or so occasions while the complainant was travelling as a small boy in his bus.

[2] Secondly, the applicant was convicted of gross indecency with a child contrary to Section 22 of the Children and Young Persons Act (NI) 1968 in that he stripped off in front of the same boy FH at disabled toilets at Bloody Bridge outside Newcastle and masturbated in the presence of the boy.

[3] The third count on which he was convicted contrary to Article 21(1) of the Criminal Justice (NI) Order 2003 was that on the same occasion he grabbed the penis of the same complainant and started to masturbate him. The complainant ran off and hid in a locker.

[4] On the fourth and final count he was convicted of indecent assault on the same boy contrary to the same provision. This took place at the applicant's home at

Bessbrook when the applicant was found to have touched the complainant over his clothing in the genital area.

[5] Having been convicted by a jury HHJ Grant sentenced the applicant to a custody probation order of five years, three years in custody and two years on probation. An appeal against sentence was not pursued before us.

Prosecution case

[6] FH was born on 13 December 1992. He was a schoolboy in Bessbrook and knew Shaw as the driver of the school bus. He sat at the front to avoid bullying and he got talking to Shaw who suggested that he join him orienteering in the mountains. FH alleged that he put his hand on his leg when driving on at least ten occasions. He also made the allegations summarised above in relation to the three other counts.

[7] Apparently FH attempted to commit suicide in 2005 which he linked to these offences. He and his family later moved away from the area. Some years later when he was aged 20 he reported the matter to his father. He had not seen the applicant for seven years. He subsequently went to the police and they interviewed Shaw. A file was prepared for the prosecution but before the matter came to trial FH died in a road traffic accident. At the trial the prosecution relied on an Achieving Better Evidence (ABE) video of an interview with FH which was played to the jury. There was, therefore, no opportunity for his counsel at that time to cross-examine FH, but the jury were warned of that disadvantage by the trial judge.

[8] There was no direct corroboration or independent evidence of the allegations against Shaw. The Crown, however, did seek to support the case set out in the ABE interview by evidence of bad character of Shaw from four different sources and also by evidence from the parents of FH.

[9] The first bad character evidence was that Shaw had previously been convicted for making and possessing indecent photographs of children. Some 211 still images and 11 videos were found on his computer and other equipment including his mobile phone. Twenty nine of the stills and 6 of video files depicted penetrative activity involving children or both children and adults. The majority of these images depicted boys aged between 10 and 14 years. The boys were depicted in outdoor settings, in the woods, posing on rocks, wrestling with each other in showers etc. There were also photographs of a male masturbating a boy in the woods and boys engaging in sexual activity in the same outdoor context.

[10] The second category of evidence relied upon by the prosecution was from witness A, who was with FH on an orientating trip with Shaw. At Lisburn swimming pool the three of them were changing in one cubicle. As A put on his swimming trunks Shaw bent his head over his shoulder, looked at his penis and said

"I'm just checking you are a boy". Shaw accepted that this had occurred but claimed it had been an innocent joke on his part.

[11] The third source of such evidence came from a lady whom we shall call witness B. She described how, after his earlier charges but before he was charged with these offences, Shaw had been on bail. A condition of bail was not to have unsupervised contact with children under the age of 18. However, it was the evidence of witness B that he had taken her son and a number of other children aged between 10 and 13 years on a cycle ride and later took children for drives in his car. It was also evidenced that he took her son and others to Lisburn swimming pool, although it was not alleged that any improper conduct occurred. Again this was accepted by the applicant, although he contended that it was a prior engagement which he had organised and he had thought he would no longer be on bail by the time it took place.

[12] All of this evidence was admitted under Article 6(1) (d) of the Criminal Justice (Evidence) NI Order 2004 ("the 2004 Order") to which we will return. It can be seen that it was relatively uncontroversial from a legal point of view and of assistance to the prosecution.

[13] The fourth area of supportive evidence relied on by the prosecution came from a witness to whom we shall refer as C. It was alleged to have happened with Shaw many years previously in 1991 and 1992 when C was 10 or 11. He had complained of the matter and made statements to the police in November 1992 and January 1993. The police did question the applicant about these allegations but ultimately a decision was made not to prosecute him. However, in the course of preparing for this prosecution the police spoke to C again. He indicated he wished to pursue his complaint. By the time police spoke to him FH was deceased. The prosecution made the decision to introduce his allegations as evidence of bad character rather than seeking to add a count to the existing charges referring separately to C.

[14] C alleged that when he was 10 he was a member of a youth club of which the applicant was a leader. A group of boys spent a weekend with Shaw in the Warrenpoint area. He described Shaw inviting him to share his bed and masturbating him. He alleged that on another occasion when they were sleeping over at the youth club a similar incident occurred.

[15] The jury heard the evidence of C and heard him cross-examined. We acknowledge the submission of counsel that in the judge's charge, on the one hand, there was something of a tendency to speak of the allegations of C as if they were also part of the Crown case being tried by the jury. On the other hand he expressly said, for example at page 614 of the papers, the following:

> "You will have to decide whether the allegations of C are true and whether the defendant abused C as he

> alleged, or whether it is the denial of the accused that is correct."

[16] Later on at page 638 the judge said the following:

> "If you are not satisfied beyond a reasonable doubt that the defendant abused C in this way then you simply ignore this, you should leave this evidence aside and you should not consider it further. If, however, you are satisfied that the defendant sexually abused C in this way, in the way that he has described, then you are entitled to go on and consider whether this assists you in determining whether the defendant committed these offences against FH. The defendant denies that he abused C or FH and he says that each of these individuals has made up this evidence and that it is simply untrue. On the other hand, there are similarities in the defendant's behaviour as described by each of these due witnesses. They say that they were approximately 11 years of age, that the defendant involved them in outdoor activities, that he was in a position of trust and control over them, they say that he touched or attempted to touch their penises and to masturbate them in a similar way and the prosecution suggest to you that it is no coincidence that each of these boys have made similar, but otherwise unconnected, complaints against the defendant's behaviour. The prosecution say that the fact that two boys make similar complaints with such detail means it is more likely that these complaints are true and that the evidence of each of these two complainants is capable of lending support to the other. You are entitled to view the evidence in this way but I should explain to you the approach that you should adopt. First, you must consider whether the complaints made by each are truly independent of one another. I can tell you that there is no connection between either C or FH and no suggestion of any sort has been made that they have got together to make up a story between them. Second, you need to assess the value of the evidence. If you have decided that the witnesses are independent, the closer the similarities between the complaints, the less likely it is that they can be explained away by a simple coincidence. It is for you to decide the degree to which the evidence of C

> assists you to assess the evidence of FH, that is a matter for you to judge."

[17] There is very little criticism of the charge by the applicant. We will now set out the grounds on which he does rely after dealing with one preliminary point.

Extension of Time

[18] The application for leave to appeal conviction was out of time by a short measure. However, applying the principles recently summarised by this court in *R v Brownlee* [2015] NICA 39 the court has determined to grant the extension of time sought by the applicant.

Grounds of Appeal

[19] The applicant was given leave to amend his grounds of appeal at the hearing before this court so that those grounds read as follows:

(i) That the Learned Trial Judge ("LTJ") erred in admitting evidence of non-conviction bad character (the allegation of C) for the purpose of establishing a propensity on the part of the applicant to sexually abuse young children.

(ii) The LTJ erred in admitting evidence of bad character, namely that the applicant had breached his bail terms. Though it may have been evidence of bad character in that it amounted to a breach of bail it was not evidence that it could ever have been considered sufficient to prove a sexual interest in young persons.

(iii) If the allegation of C was properly admitted to lead evidence of complaint by C an application was required to be made pursuant to Article 24 of the 2004 Order. This was not done and thus the evidence of his complaint was wrongly admitted to trial.

(iv) The LTJ misdirected the jury in law by directing them that in proving the complainant's complaints and C's allegations to the criminal standard that the evidence of each was capable of being treated by the jury as capable of lending support to the other.

[20] We record that at the conclusion of his submissions Mr O'Donoghue expressly accepted that this was an exceptional case and made no submission on the basis of unfairness arising from the admission of hearsay evidence.

[21] The relevant statutory provisions applicable to this trial are to be found in the 2004 Order. Part II deals with Evidence of Bad Character. The relevant provisions read as follows:

“Bad character

3. References in this Part to evidence of a person's “bad character” are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which—

(a) has to do with the alleged facts of the offence with which the defendant is charged, or

(b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

Abolition of common law rules

4.—(1) The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished.

(2) Paragraph (1) is subject to Article 22(1) in so far as it preserves the rule under which in criminal proceedings a person's reputation is admissible for the purposes of proving his bad character.

Defendant's bad character

6.—(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—

(a) all parties to the proceedings agree to the evidence being admissible,

(b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,

(c) it is important explanatory evidence,

(d) it is relevant to an important matter in issue between the defendant and the prosecution,

(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,

(f) it is evidence to correct a false impression given by the defendant, or

(g) the defendant has made an attack on another person's character.

(2) Articles 7 to 11 contain provisions supplementing paragraph (1).

(3) The court must not admit evidence under paragraph (1) (d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(4) On an application to exclude evidence under paragraph (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

Matter in issue between the defendant and the prosecution

8.—(1) For the purposes of Article 6(1) (d) the matters in issue between the defendant and the prosecution include—

(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;

(b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect."

Ground 2

[22] It is convenient to deal at this time and shortly with the second ground advanced by Mr O'Donoghue i.e. that the fact that the applicant had breached his bail terms was not evidence that "could ever have been sufficient to prove a sexual interest in young persons" as he submitted and should not, therefore, have been admitted as evidence of bad character by the judge. As summarised above at paragraph 11 of this judgment the evidence here was of particular breaches of bail conditions. He was awaiting trial on the matters of possessing indecent photographs of children, particularly young boys between the ages of 10 and 14. A condition of his bail was that he was not to have unsupervised contact with children under 18 years. In defiance of that he had taken a boy of that age and a number of other children between 10 and 13 on a cycle ride and had also taken such children for drives in his car. He had also taken a boy and others to Lisburn swimming pool. For the accused, in contravention of an order of the court for which his bail could have been revoked and he committed to prison, to still consort unsupervised with young boys who were not his relatives is clearly evidence in the view of the court of his sexual interest in such children and of his propensity to commit crimes of the sort alleged by FH. We consider the judge was right to admit this evidence and we reject this ground of appeal.

Ground 3

[23] It is convenient to deal with the applicant's third ground of appeal at this stage of the judgment. As set out above it was to the effect that the evidence of complaint by C to his brother required that an application be made pursuant to Article 24 of the 2004 Order. The applicant contends this was not done and evidence of his complaint was wrongly admitted at trial.

[24] We note that this point does not seem to have been raised by the experienced and competent counsel who appeared for Shaw at the trial. We note further that Mr O'Donoghue conceded at the hearing that it was hard to see how such an application could have been resisted by defence counsel.

[25] The prosecution go further and argue that on a proper reading of Article 24 no application of such a nature was necessary. The relevant evidence was confined to the complaint by C to his brother. It was served as additional evidence on 6 February 2015, well in advance of the trial.

[26] Article 24 of the 2004 Order so far as relevant reads as follows:

> "24.—(1) This Article applies where a person ("the witness") is called to give evidence in criminal proceedings.
>
> …

(4) A previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if—

(a) any of the following three conditions is satisfied; and

(b) while giving evidence the witness indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth.

…

(7) The third condition is that—

(a) the witness claims to be a person against whom an offence has been committed,

(b) the offence is one to which the proceedings relate,

(c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence,

(d) the complaint was made as soon as could reasonably be expected after the alleged conduct,

(e) the complaint was not made as a result of a threat or a promise, and

(f) before the statement is adduced the witness gives oral evidence in connection with its subject matter."

[27] The prosecution submit that all these necessary elements were in fact present in the admission of evidence to the effect that C had complained about his abuse by Shaw to his brother and therefore that the evidence of the brother of that complaint made "as soon as could reasonably be expected after the alleged conduct" was admissible without any application.

[28] In those circumstances we need not decide whether it was actually consented to. We reject this third ground on behalf of the applicant also.

Further Grounds

[29] In considering grounds 1 and 4 of the applicant's grounds for appeal it is right to remind ourselves of the further evidence which the Crown called over and above that summarised above. A deposition of the mother of the deceased complainant was read to the jury and his father gave evidence. He related that his son had complained of this sexual abuse in July 2013 and spoke of a general change in his character between the years 2000 and 2005 and of his attempted suicide in that later year. The mother's deposition confirmed that the deceased complainant had been picked up by the applicant on occasions and that the deceased complainant later showed reluctance to participate in his outings and showed a change in his character.

Ground 1

[30] The first ground relied on by the applicant is that the trial judge erred in admitting the evidence of C as non-conviction bad character evidence "for the purpose of establishing a propensity on the part of the applicant to sexually abuse young children". It can be seen that this contains the implication that this evidence was admitted just to show propensity, which the Crown did not accept. Mr O'Donoghue's contention was that the admission of similar fact evidence other than to show propensity had been abolished by the 2004 Order. Article 4(1) reads as follows:

> "4.—(1) The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished.
>
> (2) Paragraph (1) is subject to Article 22(1) in so far as it preserves the rule under which in criminal proceedings a person's reputation is admissible for the purposes of proving his bad character."

[31] Article 22(1) in fact sets out over some 8 paragraphs rules of law which are preserved from the common law to continue after this Order. It does not however refer to similar fact evidence. Mr O'Donoghue submitted that bad character is therefore confined to the provisions of Articles 6 and 8 of the 2004 Order, set out above, that is, he suggested, only proving propensity.

[32] He drew the court's attention to the decision of the Supreme Court in *R v Mitchell* [2016] 3 WLR 48. In that case this court had quashed the conviction of a woman convicted of the murder of her ex-partner by stabbing him with a knife. The Crown had adduced disputed evidence on the other incidents in which the defendant was said to have attacked or threatened to attack a person with a knife

although there had been no convictions. The court certified the following point of law of general public importance for the Supreme Court.

> "Is it necessary for the prosecution relying on non-conviction bad character evidence on the issue of propensity to prove the allegations beyond a reasonable doubt before the jury can take them into account in determining whether the defendant is guilty or not?"

[33] The judgment of the court was delivered by Lord Kerr of Tonaghmore JSC. The first relevant passage in his judgment is to be found at paragraph [23].

> "23. *Makin*, together with the later cases of *R v Kilbourne* [1973] AC 729, *R v Boardman* [1975] AC 421 and *Director of Public Prosecutions v P* [1991] 2 AC 447, established the common law rule that, in order to be admissible, similar fact evidence had to go beyond simply demonstrating a criminal tendency (or propensity). It had to show sufficient pattern of behaviour, underlying unity or nexus to exclude coincidence and thus have probative force in proving the indicted allegation. In Scotland the same distinction was long recognised: see *Moorov v HM Advocate* 1930 JC 68. Clearly, the evidence in *Makin* was relevant in that, if accepted, it had, at least, the potential to show that the defendants were more likely to have killed the child. The decision in that case does not address the issue which is central to this appeal, however, since the question of how evidence of similar facts, if properly admitted, should be treated, did not arise. The case is of interest only as part of the background to the exception to the general common law rule that evidence of antecedent misconduct is not admissible unless shown to be directly relevant to an issue in the trial. Since, as I shall discuss below, evidence of propensity or similar fact evidence is, essentially, extraneous to that which is directly probative of the accused's guilt of the charges on which he stands trial, the case can be made that it should be subject to the conventional criminal standard requirement of proof beyond reasonable doubt. And, it may be said, this is especially so where the claims in relation to similar fact evidence or propensity are disputed."

[34] That passage carries the implication that similar fact evidence is distinct from evidence of propensity with his use of the disjunctive "or". The same might be said of the opening sentence of paragraph [26]:

> "What of the situation where there are several disparate instances of alleged antecedent conduct, said to demonstrate propensity or evidence of similar facts?"

[35] The same might be said of paragraph [31] of the judgment. Mr O'Donoghue relied on paragraph [32] where Lord Kerr quoted from Article 4 as set out above. We have considered that and paragraphs [34] and [37] of the judgment. It is difficult to see how this assists the applicant. Lord Kerr observes as follows at [37]:

> "The respondent is unquestionably right in the submission that neither the 2003 Act nor the 2004 Order stipulates that only the common law rules as to the *admissibility* of bad character evidence have been abrogated. Common law rules as to how such evidence should be evaluated have not been affected, the respondent says."

[36] The core of the decision is summarised effectively in the headnote:

> "that the proper issue for the jury was whether they were sure that the propensity had been proved beyond a reasonable doubt; that when a sole incident was relied on as showing propensity the facts of that incident had to be proved to the criminal standard; but that, where there were several incidents relied on for that purpose, the jury did not have to be convinced of the truth and accuracy of all aspects of each of the alleged incidents, and the facts of each individual incident did not have to be considered in isolation from the others."

[37] Unlike *Mitchell* this case is not one where the evidence of propensity was confined to a sole incident which then needed to be proved beyond reasonable doubt. In any event when we turn to the charge we will see that that was the direction which the trial judge gave to the jury regarding the evidence of C.

[38] Counsel submitted that the initial notice of intention to adduce evidence of defendant's bad character dated 16 September 2014 only addressed evidence of propensity by way of the criminal record of the then accused, but in fact it referred more widely to Article 6(1)(d) as well. Subsequently, additional evidence was served and the broader application was determined by the judge. At page 442 of the

Appeal Books one finds that he stated that he was satisfied that the conduct described by C (and the other witnesses) constituted bad character within the provisions of Article 6 of the 2004 Order. With express reference to C he noted that this was of serious sexual abuse of him "by the defendant when he was a child. It is similar in nature to that complained of by the complainant." It can be seen therefore the judge was addressing similar fact evidence in that short ruling. At page 443 he expressly finds as follows:

> "I am satisfied that the proposed bad character should be properly admitted through the gateway of Article 6(1)(d) and that to do so will not impact inappropriately upon the defendant's right to a fair trial."

[39] It can be seen therefore that the judge was alert to his statutory discretion to exclude evidence which might be unfair to the accused. Article 6(3) of the 2004 Order has an express reference to the duty of the court to consider whether the admission of evidence under Article 6(1) "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".

[40] Counsel relied on *R v Hansen* [2005] 1 WLR 3169 but we do not see that that assists him. We were referred to Archbold 2017 Edition paragraphs 1340-1343. The views of the learned authors run quite contrary to the submission that similar fact evidence is now only admissible in support of showing a propensity. At paragraph 1338 one finds the following:

> "At common law, evidence of previous misconduct ("similar fact evidence") was admissible to prove identity, or to rebut a defence of mistake, accident or innocent association or to rebut a suggestion of mistake or fabrication on the part of the complainant or complainants. Evidence that was admissible at common law under this principle undoubtedly remains admissible under the 2003 Act."

[41] Counsel properly conceded that the judge can be seen to have been alert both to his discretion under Article 30 of the 2004 Order to exclude evidence and his discretion under Section 76 of PACE. But he argued that the particular facts of this prosecution meant that the evidence of C should not have been admitted. The defence could not cross-examine FH because he was dead but the jury were able to see all of his interviews. There was not just one piece of bad character evidence but four pieces.

[42] We have considered those submissions and the cogent written and oral submissions of Mr McDowell QC for the prosecution. Mr O'Donoghue elided his fourth ground as set out above at paragraph [19] into his submissions regarding his

first ground. His contention, but without citation of authority, was that the evidence of FH and C could not be mutually supportive.

Consideration

[43] The evidence of which the applicant complains was admitted pursuant to the provisions of Article 6(1) (d) of the 2004 Order as set out above i.e. that it was relevant to an important matter in issue between the defendant and the prosecution. In this case that was the most important issue i.e. whether or not the defendant was guilty of the matters alleged on the indictment. Article 6 says nothing about propensity. That is to be found at Article 8 which deals with Article 6(1) (d) but the opening words of Article 8(1) are important:

> "8.—(1) For the purposes of Article 6(1) (d) the matters in issue between the defendant and the prosecution <u>include</u>—
>
> (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
>
> (b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect."
>
> (Emphasis added)

[44] Article 8 (1)(a) and (b) do indeed deal with propensity but the use of the word '<u>include</u>' by the legislature clearly conveys that Article 6(1)(d) is not confined to the issue of propensity. We are, therefore, strongly inclined to agree with the learned editors of Archbold on this topic. Indeed, it may well be that Article 6(1) (d) is not confined to just propensity and similar fact evidence but to any evidence that meets the statutory requirement i.e. "relevant to an important matter in issue between the defendant and the prosecution". That would be in line with the longstanding principle of the law of evidence that the test of admissibility is relevance, subject, of course, to the common law and statutory requirements for fairness overall.

[45] However, it is not necessary for us to express a final and concluded view on this particular point given the facts of this case.

[46] Mr O'Donoghue relied on Lord Kerr's judgment in *R v Mitchell* to advance a requirement that while it may be permissible in some circumstances for some

examples of propensity not to be proved beyond a reasonable doubt the requirement here was that that should be shown. But that is exactly what the judge did.

[47] One finds the following at page 638 of the judge's charge. He has been discussing the evidence of C in detail. It is true to say that at times in his charge he gives a considerable degree of equivalence with the evidence of the deceased FH even though there were no counts on the indictment relating to C. However, he addresses the jury firmly in these terms at pages 638 and 639:

> "If you are not satisfied beyond a reasonable doubt that the defendant abused C in this way then you should simply ignore this, you should leave this evidence aside and you should not consider it further. If, however, you are satisfied that the defendant sexually abused C in this way, in the way that he has described, then you are entitled to go on and consider whether this assists you in determining whether the defendant committed these offences against FH. The defendant denies that he abused C or FH and he says that each of these individuals has made up this evidence and that it is simply untrue. On the other hand there are <u>similarities</u> in the defendant's behaviour as described by each of these two witnesses. They say that they were approximately 11 years of age, that the defendant involved them in outdoor activities, that he was in a position of trust and control over them, they say that he touched or attempted to touch their penises and to masturbate them in a similar way and the prosecution suggests to you that it is no coincidence that each of these boys have made similar, but otherwise unconnected, complainant's against the defendant's behaviour. The prosecution say that the fact that two boys make similar complaints with such detail means it is more likely that these complaints are true and that the evidence of each of these two complaints is capable of lending support to the other."

[48] It might have been argued that as the evidence of C was not the sole bad character evidence in the case it was, in theory on foot of *R v Mitchell,* not necessary to direct the jury in this way. But the judge has done so. In those circumstances we cannot see that he has made any error or caused any injustice to the applicant.

[49] We acknowledge that both Lord Kerr in *R v Mitchell* and the Court of Appeal in England in *R v O'Dowd* [2009] 2 Cr App R 16 made it clear that caution must be exercised by a trial judge before permitting the trial of one or more satellite issues to prove bad character or propensity, especially if the alleged incidents happened

sometime in the past. As Lord Kerr said the jury "should be told to focus on the indicted offence(s)". But this is a very different case from *O'Dowd* where the introduction of such satellite evidence led to a trial of some 6½ months in length. Here the trial only lasted 6 days and the evidence of C took up only one of those days.

[50] Furthermore, as set out above, although the fact that FH could not be cross-examined owing to his decease was a factor that had to be carefully taken into account by a trial judge to ensure fairness, it did not preclude, in our view, the admission of the evidence against the applicant. Shaw cannot complain of the convictions which were indisputable and highly relevant. He admitted the incident with A which was admittedly minor. We consider the admission of the evidence of witness B regarding his breach of bail by unsupervised contact with boys was properly admissible. We consider also that the admission of the evidence of C was proper in the circumstances, given the judge's direction that the jury had to be satisfied beyond reasonable doubt of the truth of those allegations before they took them into account.

Propensity

[51] Even if counsel for Shaw was right in the submission that similar fact evidence could only be admitted now as a species of propensity, contrary to our view above, we consider it would not assist his client here because the evidence of C also went to propensity and was admissible on that basis.

[52] It is useful to remember the meaning of propensity which is not defined in the 2004 Order. The 6th Edition of the shorter Oxford English dictionary defines it as:

> "(an) inclination, (a) tendency, (b) leaning, bent, disposition …"

Chambers English dictionary describes it as:

> "inclination of mind; favourable inclination; tendency to good or evil: disposition: tendency to move in a certain direction."

[53] I had to address this issue in *R v Louis Maguire and Christopher Power* [2016] NICC 14 at paragraphs 15 and 16:

> "[15] In deciding whether these convictions show a propensity to commit murder and to make it more likely that the defendant, Maguire, did, commit the murder, one has to look at the nature of the killing here. It is not by poisoning. It is not by hiring a contract killer. It is not by terrorists in the pursuit of

> some alleged political aim. It is not by drowning or by motor vehicle. It is the application of brute force to another human being, in this case with a hammer.
>
> [16] In that context it seems to me that previous assaults or, to a degree, threats of assault, do demonstrate a propensity to assault; that is undeniable. The situation here is that the fatal attack on Mr Ferguson was an assault at one extreme of a scale of gravity of assault. The opposite end of that scale is a simple threat to punch someone which in law is an assault. In one sense at least, therefore, the history of wounding, assaults and threats are of the same kind as this type of murder. It seems to me that decisions of this sort are likely to be fact specific and I note the express finding of the Court of Appeal in England that it will be slow, as our Court has been slow, to interfere with the exercise of judgment by a Trial Judge in these circumstances."

[54] It seems to us that there is analogy with the situation here. Here we consider that the evidence of C was enough to show a propensity given the similar modus operandi, form of behaviour and sexual assault and age of the victim with regard to both C and FH.

Ground 4

[55] With regard to the fourth ground of the appeal we consider it would be flying in the face of common sense, which Lord Diplock in *DPP v Hester* [1072] 3 All ER 1056, at 1072, said was "the mother of the common law", to direct a jury not to take into account what FH had alleged in his ABE interview against the applicant when considering the veracity of C. Such a direction would be artificial and very difficult for a jury to achieve. It was not being used to obtain a conviction with respect to Shaw and C but Shaw and FH. It would be natural to compare and contrast what was said. The evidence should be taken as a whole by the jury to enable them to decide if the prosecution has proved its case beyond a reasonable doubt. It is undoubtedly the case that they were to take into account C's evidence against Shaw. Such matters should be treated with caution but we consider the judge did do this.

Conclusion

[56] The judgment of the Supreme Court in *R v Mitchell* upholds the longstanding principle that the prosecution case in a criminal trial is to be compared not to a chain but to a rope. If the weakest link of a chain breaks the case would fall and, therefore, every link in the chain would have to reach the standard of beyond reasonable doubt - but that is not the law. Rather, the prosecution case is like a rope woven of many

strands not all of which need to be established beyond a reasonable doubt so long as the jury are satisfied to that standard, overall or as to an essential aspect of the case such as propensity. Here, in fact, the judge strode on the side of caution by directing the jury that the evidence of C should only play a part in their deliberations if they were satisfied beyond a reasonable doubt.

[57] Despite the death of FH this was a strong prosecution case with supportive evidence from the parents of the complainant and not one but four pieces of bad character evidence of varying weight and importance, some of it cogent similar fact evidence. This court has no doubt about the safety of the verdict. We acknowledge that relevant and arguable matters have been raised on behalf of the applicant and we grant leave but dismiss the appeal substantively.