Neutral Citation No. [2010] NICA 18

Ref: **MOR7857**

Judgment: approved by the Court for handing down

Delivered: **20/05/2010**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

DS

Before: MORGAN LCJ, COGHLIN LJ AND GILLEN J

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

[1] The applicant was first tried in June 2006 before His Honour Judge Markey with a jury at Craigavon Crown Court in respect of the subject offences. The applicant was found guilty of a total of 11 counts, 7 counts of indecent assault and 3 counts of rape in respect of his daughter RM and one count of indecent assault against his daughter LM. He was acquitted on 2 counts of rape against RM and 6 counts of rape against and one count of indecent assault against LM. The jury failed to reach a verdict in respect of 3 counts of rape in respect of LM and 2 counts of rape and one count of indecent assault against another daughter, (JS).

[2] The applicant was sentenced to a total of 12 years imprisonment in respect of the counts against RM and 18 months consecutive in relation to LM. He then appealed his convictions in respect of offences committed against RM only. The main ground of appeal was that the trial judge had erred in refusing leave for the defence to cross-examine the victim about the circumstances of her making a fourth statement in August 2002 in which she alleged that she had been abused by several family members. The Court of Appeal was not satisfied that the verdicts were safe as the credibility of the victim was a critical feature and the jury was unaware that when she had made her first statement she had omitted important allegations which were contained in the fourth statement. The convictions in respect of RM were therefore quashed and a re-trial was ordered.

[3] The applicant did not appeal his conviction in respect of the indecent assault on his daughter LM and that position was confirmed by his counsel on the hearing of the appeal in 2008.

[4] The applicant was re-tried on the 10 counts in relation to RM; 5 specimen counts of indecent assault occurring between July 1988 and July 1991, two specific counts of indecent assault occurring between July 1988 and July 1990, one specific count of rape and two specimen counts of rape occurring between July 1989 and July 1991. He was arraigned on 1 May 2008 and pleaded not guilty to all counts. He was tried before His Honour Judge Markey sitting at Craigavon Crown Court with a jury and on 20 January 2009 was convicted of all counts. He was sentenced by His Honour Judge Markey on 27 February 2009 to a total sentence of 12 years imprisonment consecutive to the sentence imposed in relation to LM.

[5] A Notice of Appeal against conviction in respect of the second trial containing grounds for appeal was lodged on 21 July 2009. Higgins LJ subsequently granted an extension of time in which to lodge that notice as it was, of course, by then out of time.

[6] RM was one of the children of the applicant and his wife. RM claimed that the applicant started abusing her when she was 12 years of age. The applicant told her that she was starting to become a woman and asked if he could see if she was starting to become a woman. He asked her to lift up her top and touched her on her breasts and then touched her between her legs inside her pants on her vagina. He touched her with his fingers and rubbed the outside of her vagina. He said she was beautiful and had a great body and that if she was "on the game" she could make a lot of money.

[7] Her father she alleged continued to abuse her on a number of occasions, mainly late at night. On one occasion she was on the settee in the living room with her brother. Her father told her brother to go to bed and then he proceeded to touch her as he had done previously. Her father then progressed to putting his fingers inside her vagina and then went on to have sexual intercourse with her in the bathroom of the house one night. She believed that she was 13 at that time. He laid her down on the bathroom floor between the toilet and the bath and lay on top of her and put his penis into her vagina and ejaculated. Her father continued to have sex with her in the family home on various occasions. Her mother was an alcoholic and was often very drunk and unaware of what was happening. Her father gave her money on a regular basis and told her to say that she was receiving the money for doing jobs for him.

[8] The complainant did disclose to the Social Services that she had been abused by other family members when she was aged 14 and those allegations were investigated. However at that time she did not make an allegation about

her father and says that was because she was scared as her father was violent and would have beaten her regularly. The complainant stated that her father had sex with her around twice per month since she was 13 years until she went into care in May 1991. During that time he also continued to touch her on the vagina and breasts.

[9] LM was a younger child in the family. She alleged that on one occasion when she was aged around 12/13 she was in the living room with her mother and the other children. Her father returned home drunk. She went up to the bathroom and on her way back downstairs met her father on the middle landing. He asked her to show him how she was developing which she refused to do. Later she was in the bathroom and her father entered and got her against the wall. He put his tongue inside her mouth and touched her chest over her clothes. He also grabbed her between the legs outside her clothes and rubbed himself against her. Shortly after this occurred she and her other siblings were taken into care (a year after RM had been taken into care).

[10] At the commencement of the hearing of the appeal Mr Barlow applied for leave to appeal the conviction in relation to LM out of time. No notice of appeal had by then been lodged in respect of this application although there had been some intimation that it might be made in the notice of appeal in relation to the counts in respect of RM. It was common case that the decision not to appeal that conviction had been made with the benefit of legal advice in 2006 and confirmed to the Court of Appeal in 2008. No explanation for the decision not to pursue the appeal on either occasion was offered. We did not consider that the fact that Mr Barlow had a point which he wished to argue in relation to the appeal was a sufficient basis in these circumstances for reopening the appeal and accordingly we refused leave. In those circumstances Mr Barlow abandoned the ground of appeal relying on the unsafety of that conviction.

[11] In his notice of appeal the applicant advanced a ground that the Judge did not direct the jury to consider the 10 counts separately. In fact it is clear that the judge did exactly that at page 131 of the papers and repeated it at pages 147-148. There is no basis for this ground and Mr Barlow very properly abandoned it at the start of the hearing.

[12] At the hearing the Applicant's first contention was that the Judge wrongly directed the jury that it could take the applicant's previous convictions for violence into account when deciding whether the applicant's evidence in his police interviews was truthful. The portion of the Judge's charge which deals with the previous convictions for violence begins at page 122 line 17 of the papers and goes on to page 124 line 27.

[13] It is clear that the Judge directed the jury at Page 124 lines 8-10 that these convictions could show propensity to violence and support the victim's

claim that she was afraid of the applicant which was a reason for not making her complaints earlier. The Judge expressly stated that those convictions were not relevant to the alleged sexual assault. At line 27 the Judge then moved on to deal with the previous conviction for indecent assault and rightly stated that this conviction was "the more important one for the purpose of this case" as it may be evidence to support the allegations of sexual abuse. The direction that the jury could take "the previous conviction into account when deciding whether the defendant's evidence was truthful" at page 126 lines 7-9 clearly refers to the previous conviction for indecent assault as that is the conviction mentioned explicitly by the Judge in the preceding lines 5-6. The Judge was not referring to the previous convictions for violence.

[14] Mr Barlow submitted, however, that the decision of the Court of Appeal in R v Campbell [2007] EWCA Crim 1472 had extensively reviewed the authorities on the circumstances in which evidence of a previous conviction could establish propensity to untruthfulness and concluded that the only circumstances where there is likely to be an *important* issue as to whether a defendant has a propensity to tell lies is where telling lies is an element of the offence charged. Consequently it is submitted that the learned trial judge was in error in advising the jury that the contested indecent assault conviction was of assistance in deciding whether the defendant's evidence was truthful.

[15] We accept that the effect of the decision in Campbell is broadly as submitted to us. We consider, however, that in dealing with this issue it is necessary to examine the context in which this conviction was introduced in evidence. In his interviews the defendant had stated that he had no sexual interest in his children. The conviction in relation to LM was introduced as important explanatory evidence to deal with that assertion. In the context of this case it did, therefore, go to the issue of propensity and inevitably bear on the truthfulness of the applicant at interview. We do not consider that in this passage the learned trial judge was making any case of propensity to untruthfulness generally. We accept that this might have been put more clearly.

[16] The principal argument advanced on behalf of the applicant was that the Judge failed to give a direction on delay to the jury. This, the applicant submitted, was a serious non-direction in the context of historic allegations where there is an inherent danger of prejudice to the defendant. The applicant relied on recent authorities which he suggests have recognised the importance of a direction to the jury on the prejudice to a defendant caused by delay in such cases; R –v- Percival [1998] 19th June COA 97/6746/X4, R –v- Mayberry [2003] EWCA Crim 782, R –v- Smolinski [2004]EWCA Crim 1270 and R –v- Bell [2004] EWCA Crim 319.

[17] The issue of a direction on delay in historic sexual abuse cases was dealt with by the Court of Appeal in **R –v- Hughes** [2008] NICA 17. The offences were alleged to have occurred between 1990 and 1995 but the complaint to police was not made until 2005 and the trial occurred in 2006. The appellant submitted that the trial judge's direction to the jury on delay was too brief and "offered no assistance to the jury in deciding the degree of difficulty that delay may have caused the defence". The appellant relied on R -v- Percival. The Court reviewed the authorities including R -v- Brian M (2000) 1 Cr. App. R. 49 which held that Percival did not lay down a blue print for summing up on delay; trial judges should tailor the direction to the circumstances of the particular case and that whilst in a case of many years delay a clear warning would usually be desirable, in some cases such a warning may be unnecessary. The Court concluded that whilst the direction may have been deficient the conviction was not rendered unsafe on that ground.

[18] In this case the complainant was 32 at the time she gave evidence and the case related to abuse which allegedly had commenced when she was 12. She eventually went into care before her 15th birthday. Although he did not give a direction on delay the learned trial judge specifically warned the jury that a sexual accusation is easily made but hard to defend. He instructed the jury that they should, therefore, scrutinise the evidence "with care, special care and apply the standard of proof strictly. This is the main defence of anybody accused of any criminal charge and in particular an alleged sexual charge." When he was interviewed about these matters the applicant met them head on with a robust denial. He did not express any difficulty in recollecting or dealing with events. The episodes in respect of which he was charged were events which did not involve eye witnesses and no issue of possible alibi was advanced at interview. Although defence counsel at the trial made a large number of requisitions no such application was made in respect of a delay direction. This was not, therefore, a case in which there was any specific prejudice to the defendant and indeed his counsel had available extensive social services records to assist in cross examination. The reason for such a direction was, therefore, to remind the jury of the anxious scrutiny which they should give to the complainant's account in view of the passage of time. The passage referred to above shows that this issue was addressed in general terms by the trial judge in the course of the charge.

[19] The principal authority on which the applicant relies is Percival which was reviewed by the Court of Appeal in R v Graham W [1999] 2 Cr App R 201. That was a case in which a complainant who was 30 at the time of trial gave evidence about allegations of indecent assault and rape committed when she was aged between 11 and 13. The judge did not give a delay direction and the appellant was convicted. His appeal was then dismissed but his case was referred to the Court of Appeal by the CCRC. The court expressed support for the general proposition advanced in Percival but said that the trial judge is

best placed to determine what is called for in each case. It noted that the Court of Appeal first hearing the case had indicated that it would have been preferable for the judge to have said something about the difficulties facing the appellant but concluded that there were no grounds for holding that the conviction was unsafe. The reasoning of the court is set out in the following passage.

> "It is in our judgment important that, when the allegations were first put to the appellant, he did not claim inability to remember. No application was at any stage made to stay the proceedings as an abuse and no application was made for greater particularity in the framing of the counts. The complainant, as already pointed out, was cross-examined on the basis of clear, specific instructions. The appellant, when he came to give evidence, did not claim inability to remember. It was not indeed suggested at the trial that the appellant was in any way prejudiced in the presentation of his defence by the passage of time. At no stage was the judge invited to give the jury any direction on that subject, and when he failed to do so the point was not raised with him.
>
> Viewing this case retrospectively and with the benefit of the Commission's helpful reference, we think it plain that the incidents to which the complainant deposed were incidents of which there never would have been eye witnesses, no matter how quickly the complaint had been made. Nor were they incidents of which there would at any time have been any record or in relation to which any diary entry would have existed. It was plain from the evidence, which was common ground, that the appellant had the opportunity to commit the offences alleged and the case was not one in which any alibi could ever have been advanced."

[20] As appears from paragraph 17 above many of the same factors apply in this case. We have given careful consideration to the submissions advanced on behalf of the applicant. We consider that it would have been preferable to have given a delay direction but its absence does not render the conviction unsafe.

[21] The last ground advanced is that the Judge made inappropriate generalised comments to the jury about sexual abuse of children within a family and why complaints are not made at the time of the abuse. He invited

the jury to consider why no complaints may be made by children at the time of the abuse. He referred to a misplaced sense of shame or fear, confusion or an unjustified sense of guilt meaning that it is difficult to talk about it especially where the perpetrator is a family member.

[22] It is common case that a judge is entitled to make comment in his summing up. It is important that the judge does not take on the role of advocate. The applicant relies on the English Court of Appeal decision in R v Dooley [2008] EWCA Crim 2557 where the passage quoted in the judgment shows that the judge in that case had become an advocate for the prosecution. The court went on, however, to offer guidance at paragraph 11.

> "11. The judge is entitled to make comments as to the way evidence is to be approached particularly in areas where there is a danger of a jury coming to an unjustified conclusion without an appropriate warning. This was the reasoning behind the directions suggested in Turnbull in relation to identification, and Lucas in relation to the treatment of lies. We think that cases where a defendant raises the issue of delay as undermining the credibility of a complainant fall into a similar category save clearly that the need for comment is in this instance to ensure fairness to the complainant. But any comment must be uncontroversial…. However, the fact that the trauma of rape can cause feelings of shame and guilt which might inhibit a woman from making a complaint about rape is sufficiently well known to justify a comment to that effect. …In the present case, the judge was entitled to add to that general comment, the particular feelings of shame and embarrassment which may arise when the allegation is of sexual assault by a partner. He was also entitled to remind the jury of the way in which the complaint in fact emerged, as explained by the complainant herself."

In our view the comments of the judge complied with this advice. Looking at the charge as a whole it is clear that the defendant's case was fully put and we do not consider that it was necessary to refer to the possibility that the accounts were made up at this particular point.

[23] We do not consider that the grounds individually or cumulatively render this conviction unsafe and accordingly we dismiss the appeal.