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Judgment: approved by the Court for handing down | *Delivered:* **3/6/05**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

GERALDINE ANN MULLEN

Before Nicholson LJ, Campbell LJ and Higgins J

HIGGINS J

[1] This is an application for leave to appeal against conviction. The applicant was convicted on two counts by the unanimous verdict of the jury at a trial before His Honour Judge McFarland at Dungannon Crown Court on 9 September 2004. Count 1 alleged assault occasioning actual bodily harm contrary to Section 47 of the Offences against the Person Act 1861. The particulars of the offence alleged –

> "Geraldine Ann Mullen on a date unknown between the 23 day of October 2002 and the 29 day of October 2002, in the County Court Division of Fermanagh and Tyrone assaulted Carol Mullen, thereby occasioning her actual bodily harm."

[2] Count 2 alleged cruelty to a child contrary to Section 20(1) of the Children and Young Persons Act (NI) 1968. The particulars of the offence alleged –

> "Geraldine Ann Mullen on a date unknown between the 23 day of October 2002 and the 29 day of October 2002, in the County Court Division of Fermanagh and Tyrone, having attained the age of sixteen and having the custody, charge or care of a child under that age, namely Carol Mullen, wilfully assaulted the said

Carol Mullen in a manner likely to cause her unnecessary suffering or injury to health."

[3] The applicant was sentenced to 12 months imprisonment on each count concurrently. A six months suspended sentence for an offence of theft was reduced to two months and put into effect consecutively.

[4] The applicant lived with her husband George at 53 Liskey Road, Strabane. George's brother Harry is the father of five children whose mother is Rosemary Waring. On 9 May 2002 all five of those children were taken into care. A foster placement was arranged with the applicant for three of the children, one of whom was Carol Mullen, the injured party, who was born 19 September 1998. On 27 May 2002 she along with two of her siblings went to live with the applicant and her husband, when the applicant assumed the role of foster mother to them. The children's natural parents maintained twice weekly contact with them. This took place on Mondays and Thursdays at the offices of Strabane Social Services. One such contact visit took place on Thursday 24 October 2002. Nothing untoward was noticed on that occasion.

[5] The next contact visit was scheduled for Monday 28 October. On the morning of that date the applicant telephoned social services and attempted to cancel that visit. However social services declined to agree to that and the visit proceeded. At that visit it was observed that Carol had marks on her body. She was returned to the Mullen household that evening and on the following day, 29 October 2002, was taken to Londonderry where around noon she was examined by Dr Knowles, a paediatrician with 27 years experience. She found faded linear marks on the back of the child's right thigh. She also noted many linear marks on the right buttock, across the sacrum on the left upper buttock and the left lower buttock. They were running obliquely from the upper right area to the lower left and below the linear marks was blue/reddish blue type bruising. The left buttock was slightly tender. The linear marks on the upper buttock ran at a different angle from those on the lower buttock. Superimposed on top of the linear marks was blue bruising that was slightly tender to touch. While acknowledging the difficulty in determining the age of bruising Dr Knowles said that generally speaking they were 2 to 4 days old and could have been caused at the one time. She also said they would have required the application of considerable force to the child's body. Dr Knowles considered the marks were caused by a shoe with a ridged sole.

[6] At 6pm on the same day, 29 October 2003, Carol was examined by a consultant paediatrician, Dr Sandi Hutton. She found the same patterning of injury on Carol's buttocks and thigh as Dr Knowles found and agreed that they were 2 to 4 days old and were likely to have been caused by the sole of a shoe. She was of the opinion that the marks were caused non-accidentally and were almost certainly a clear imprint of a shoe. Significantly she said that the

infliction of them would undoubtedly have been painful and Carol would have been distressed at the time. She could not say for definite that a person would seek medical attention for such marks but added: "there is no doubt that if one saw a child with that extent of bruising I think one would be concerned." Photographs of Carol were taken at this time and were produced to the court and jury. These show clear patterned bruising across the child's buttocks and lower back. The marks are at different angles suggestive of as many as five or six separate applications of blunt force. In Dr Hutton's opinion these were more likely to have been caused by repeated blows than stamping.

[7] On the afternoon of 7 January 2003 police officers went to the applicant's home and there seized four pairs of ladies shoes. Three pairs belonged to the applicant and were found in a wicker basket. The fourth pair belonged to her daughter, Jolene. All the shoes were sent to the Forensic Science Laboratory for examination.

[8] The applicant was arrested on the same day and interviewed at Strabane Police Station in the presence of her solicitor. She told the police that sometime between 1 and 2 pm on the Friday before the contact visit, Carol was playing with the applicant's grandson Thomas, then aged 18 months, in the conservatory. (Friday was 25 October) The applicant was in the kitchen. She told the police that there was no-one else in the house. Thomas got out of the conservatory and Carol ran after him and fell down steps at the back of the house. The steps have wire mesh over them. She went out and found Thomas at the top of the steps and Carol was lying on her back on the third or fourth step down and she was crying. She pushed 'Thomas back out of the way and grabbed Carol by the arm and pulled her up. She took her into the conservatory. She noticed the marks on her back. She described them as "wee lines" and rubbed cream on them. The marks looked like the wire on the steps and to her the wire caused the marks. They were in the same position as the marks visible in the photographs, but more red in colour. Over the weekend more bruising appeared in the same location. Carol never complained about the bruising or the fall or about feeling sore. Only the applicant and her husband were in the house over the week-end as their children were grown up and usually stayed with friends. On Saturday she went to Bundoran with her husband and the three foster children. On the Sunday she and her husband were at home with the three children. She could not say if any of her own children were about or had called to the house. On the Monday morning her son Thomas, who is married and lives elsewhere, telephoned and asked her to go to Belfast with him to look at fitted kitchens. She agreed to go with him and to take Carol with her. Then she remembered that Carol was to see her mother that day. So she phoned social services and tried to cancel the visit, but social services declined to agree to this. She did not tell social services about the bruising during this call. When asked why she did not tell them she said that it was because a social worker called Violet was away and

she was waiting for her to come back. She denied hitting Carol with her hand, a shoe or any other object.

[9] Of the four pairs of shoes recovered from the home the forensic evidence was that the black shoes, belonging to Jolene, could not have made the marks, but any of the other three pairs could have done so. Furthermore these marks could not have been caused by falling down the steps at the rear of the house nor by contact with the wire mesh that overlays them. This is self-evident from the photographs of those steps with the wire mesh.

[10] At the conclusion of the case for the prosecution a submission was made that the accused had no case to answer and that the trial judge should direct the jury to find the applicant not guilty. The judge ruled against that submission. The defendant did not give evidence nor was any evidence called on her behalf.

[11] In his submissions to this court Mr McCann, who appeared at the trial, advanced as his principal argument that the trial judge should have directed the jury to find the applicant not guilty at the conclusion of the prosecution case on the ground that a prima facie case against the applicant had not been established. He referred to the well known passage in Archbold at 4 – 294 based on the decision in R v Galbraith. He accepted that a crime had been committed against Carol but not that the applicant had committed it. He submitted –

1. There was no evidence that the applicant had assaulted Carol or treated her with cruelty;
2. if there was evidence (which he did not accept) it was insufficient to establish a prima facie case;
3. relying on R v Strudwick and Merry 1994 99 CAR 327, that the trial judge should have recognised that other persons lived in the house with opportunity to commit the crime and that there was no evidence as to which of them had committed the crime and in those circumstances the judge should have withdrawn the case from the jury, in line with similar cases involving prosecution of parents for harming their children;
4. relying on R v Strudwick and Merry, supra, if the applicant told a lie about how the child sustained the injuries, that lie could not fill the gap in the prosecution case or provide the basis for a conviction in the absence of other evidence.

[12] In R v Strudwick and Merry the mother of a three year old child and her co-habitee were jointly charged with the manslaughter of the child and two counts of cruelty. They both admitted that the child was with them during the period when the fatal injuries must have been inflicted. The prosecution were in the "familiar difficulty" identified by Lord Goddard in R

v Abbott 1955 2 QB 497 at 503. This occurs when two persons are jointly indicted and the evidence does not point to one rather than the other and there is no evidence that they were acting in concert. Lord Goddard said that in those circumstances the jury ought to return a verdict of not guilty because the prosecution had failed to prove its case against either or both of them; see, in a different context, R v Whelan, Whelan and Whelan 1972 NI 153.

[13] Mr McCann submitted that the trial judge in this case should have assumed that there were three persons on trial – the applicant, her husband and her daughter. If he had done so he would have noted that the prosecution case could not prove which of them assaulted the child and accordingly he would have directed the jury to find the applicant not guilty. In R v Strudwick and Merry both parents, who were present at the material time were prosecuted, but the prosecution could not prove which parent had caused the injuries to the child or whether both had been involved.

[14] In the instant appeal only one person, the applicant, was accused and the evidence was circumstantial in nature. The prosecution case was that Carol was injured at a time when she was in the sole custody of the applicant and no other person. The applicant told the police that Carol sustained injuries when she fell down the steps and that those injuries, which she saw at that time, albeit not fully developed, were the same ones and in the same place as those shown in the photographs. The evidence of the experts was that the injuries could not have been caused on the wire mesh on the steps and that while it is difficult to age bruising the injuries were probably 2 – 4 days old. The applicant told the police the injuries shown in the photographs were caused on the Friday. If the jury accepted the evidence of the experts, as they clearly did, it was open to them to conclude that the injuries were caused by the application of blunt force probably with a shoe at that time when the applicant was the only adult present. Thus the prosecution case did not involve the question – which of the occupants of the house caused the injury. The applicant did not seek to say in her interviews with the police that someone else was alone with the child during a critical period or that another member of the household was responsible for Carol's injuries. We do not consider that this was a case in which the "familiar difficulty", identified by Lord Goddard, arose. If it did, once the trial judge decided that a prima case existed, it would have been open to the applicant to have given evidence about it. This was a case, as Mr McKay contended for the Crown, where the strength or weakness of the prosecution evidence depended on the view to be taken of matters which were generally speaking within the province of the jury. On one possible view of the facts there was evidence on which the jury could properly come to the conclusion that the defendant was guilty. In such a case the judge should allow the matter to be tried by the jury (see Lord Lane CJ at p, 127 of Galbraith).

[15] Counsel for the applicant submitted that if the applicant told a lie about how the injuries were caused, that is to say in suggesting that they were caused through contact with the wire mesh on the steps, the fact of that lie could not prove that she assaulted Carol. It could not "plug the gap" to adopt Mr McCann's words. He relied on a passage in the judgment of Farquharson LJ in R v Strudwick and Merry at page 331 in which he said –

> "Lies, if they are proved to have been told through a consciousness of guilt, may support a prosecution case, but on their own they do not make a positive case of manslaughter or indeed any other crime."

In that case there was no evidence that either appellant struck the fatal blows and no evidence that one assisted or encourage the other. In those circumstances the lies they told could not make a positive case of manslaughter against them. In R v Lane and Lane [1986] 2 Cr.App.R. 5 a mother and stepfather were charged with the manslaughter of a child. The evidence against each other separately did not establish his or her presence whenever the child was injured or any participation by either in those injuries. Neither made any admission but both told lies, the purpose of which was to provide each with an alibi. As Croom-Johnson LJ pointed out, the lie did not advance the prosecution case and lead to an inference of the appellants' presence at the crucial time. Such lies may support a case for the prosecution but are insufficient to make such a case on their own.

[16] In this case the issue of guilt and the lie were central to the case and so inextricably linked that they stood or fell together. It was open to the jury, as they clearly did, to conclude that the injuries to Carol were inflicted on the Friday when the only adult present was the applicant, that the account that the injuries were sustained on the steps was false and that this account was given by the applicant to cover up the injuries that she inflicted on the child.

[17] There was a clear prima facie case against the applicant based on circumstantial evidence and the trial judge was correct in allowing the case to go to the jury. The applicant did not give evidence and no complaint is made about the trial judge's direction on that issue. There was sufficient evidence for the jury to conclude that the injuries sustained by Carol were non-accidental and that they were inflicted by the applicant. Therefore the application for leave to appeal is refused.