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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

JSK

Defendant/Appellant

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an application for leave to appeal against conviction in respect of eight counts of indecent assault on a child. The applicant is the complainant's uncle. On 12 May 2009, at Londonderry Crown Court before His Honour Judge Marrinan, the applicant was arraigned and pleaded not guilty. His first trial had to be stopped because a juror knew one of the witnesses. On 23 March 2010 the applicant was found guilty on all eight counts and sentenced to a total of 7 years imprisonment.

Background

[2] The complainant was born on the 10 June 1982. The prosecution case was that the offending against the complainant occurred during two different periods, in or about May 1986 when she was aged about 4 years old and later between June 1992 and 1998. Count 1 is a specific count. The complainant, her brother and older sister were staying at the home of the applicant and his wife because the complainant's mother was in hospital undergoing eye surgery. The complainant, her brother and sister all gave evidence that the complainant and her brother slept in the spare bedroom while her older sister and cousin, who was about a year older than her, slept in the boxroom.

[3] During the evening the applicant entered the bedroom where the complainant and her brother were sleeping, lifted the bedclothes, pulled up her nightdress and put his hands under her pants touching her on her vagina and digitally penetrating her vagina. The complainant's sister said that from the boxroom she saw the applicant enter the room and heard some kind of cry

after they had all gone to bed. The applicant denied that he had ever entered the children's rooms after they had gone to bed. In her evidence the complainant explained that she knew it was the applicant because of his smell but also because on this occasion her aunt was not in the house. She was tending to the applicant's aunt who lived a short distance away and needed help with meals and preparation for bed.

[4] In relation to counts 2 to 8 these incidents occurred when the complainant was between the ages of 10 and 16. She shared an interest in horses with her cousin, the applicant's daughter, and frequently visited their home staying over from Friday night until Sunday evening. She slept in her cousin's room, the boxroom, on a makeshift bed and during the night the applicant came into the room, lifted aside the bedclothes, turned her onto her front, pulled down her pyjamas and touched her private parts, sometimes penetrating her vagina and on other occasions penetrating her anus digitally. This happened sporadically and the complainant estimated that it happened on some nine or ten occasions during this period.

The issues in the appeal

[5] In the course of the trial the prosecution introduced evidence from the complainant that she had made disclosures in 2001 to a university friend over a series of several conversations and subsequently in 2002 to members of her family at the time of her grandmother's funeral. The university friend and family members were called to give evidence about these disclosures. The evidence was introduced by agreement pursuant to Article 18(1)(c) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (the 2004 Order). At the time of its introduction no limitation of any sort was placed on the use to which the evidence could be put.

[6] The first issue in the appeal relates particularly to the evidence of the university friend. Her evidence was that the complainant alleged that the first incident occurred when she was about 18 months old and that the course of conduct between 1992 in 1998 included rape. It was, therefore, contended that these assertions were inconsistent with the case now being made against the applicant. The complainant was cross-examined at some length about these inconsistencies and there is no dispute that the learned trial Judge drew these to the attention of the jury in his charge.

[7] The applicant asserts that this evidence was admitted by agreement as narrative hearsay solely for the purpose of considering the consistency of the complainant's account. In his charge to the jury the learned trial Judge indicated to them that if they were satisfied that the complaints were made at the earliest reasonable opportunity in all the circumstances the evidence of the complaints was evidence that they may take into account when considering the complainant's reliability as a witness and secondly as

evidence of what she said occurred. The applicant's then counsel requisitioned the learned trial Judge on this sole issue. The learned trial Judge indicated that there had been no restriction on the purpose for which the evidence could be used at the time of its submission by agreement and accordingly in the absence of any limitation it fell within Article 18(1)(c) as evidence of the matters stated.

[8] We have no criticism to make of the approach of the learned trial Judge but in any event it is not necessary for us to decide whether the evidence was admissible pursuant to Article 18(1)(c) of the 2004 Order. It is common case that the complainant was cross-examined at some length about the alleged inconsistencies between her statements to the university friend and her evidence before the court. It is clear that this was on the basis that the statements to the university friend constituted previous inconsistent statements which consequently cast doubt on the credibility of the complainant. The evidential value of such statements is provided for in Article 23 of the 2004 Order. Where a person giving oral evidence admits making a previous inconsistent statement or a previous inconsistent statement by that person is proved the statement is admissible as evidence of any matter stated of which oral evidence by that person would have been admissible. Since the previous statement was in large part admitted by the complainant in cross-examination and in any event was proved through the university friend in cross-examination the relevant conditions for Article 23 were satisfied. In those circumstances the learned trial judge was correct to advise the jury that they could take those statements into account as evidence of the matters stated.

[9] The next issue concerns the manner in which the learned trial Judge charged the jury about the weight that they should give to the evidence of complaints. Because the complaint emanates from the alleged injured party it is clearly not from an independent source. It is important, therefore, that the jury should be clear that it does not provide any kind of independent corroboration. This Court has already referred to the importance of such a direction in R v AG [2010] NICA 20. It is common case that no such direction was expressly given in this case and it is necessary, therefore, to consider the charge to establish whether the absence of the direction rendered the conviction unsafe.

[10] The contents of the complaints and the circumstances in which they were made were dealt with at some length by the learned trial Judge. He reviewed the arguments which the prosecution put forward in support of the contention that the complaints demonstrated consistency and the contrary arguments advanced by the defence suggesting that the complaints were inconsistent with the evidence of the complainant. The defence suggested that these inconsistencies pointed to the complaints being falsely made up. The thrust, therefore, of the learned trial judge's direction made it abundantly

clear to the jury that the complaints emanated from the alleged injured party and in our view the jury could not have been left under any impression that the complaints represented any form of independent evidence in support of the complainant's case. We do not consider, therefore, that the absence of an express direction on this point rendered the conviction unsafe.

[11] The applicant also challenged the adequacy of the learned trial judge's direction on delay. It is accepted that the learned trial Judge advised the jury that they should consider whether there had been any real prejudice to the defendant because of delay and if so to take it into account in the defendant's favour in considering verdicts. The applicant submitted that the delay direction should have referred to the difficulties the applicant may have had in recollecting any alibi defence. In addition the evidence indicated that the applicant had been working a mixture of day, evening and night shifts up until 1994 which it was submitted made it more difficult for him to recollect his movements.

[12] There was no requisition on this point. The learned trial Judge told the jury that they would only have to imagine what it would be like to have to answer questions about events which are said to have taken place between 12 and 24 years ago. He suggested that they could appreciate the sort of problems and difficulties which might be caused by the delay. He noted, however, that the applicant did not point to any particular disadvantage or prejudice suffered by him because of delay and maintained a firm denial. This was not a case where there was any possibility of misunderstanding arising out of uncertain circumstances.

[13] We are satisfied that the learned trial Judge properly brought the issue of delay to the jury's attention and adequately emphasised to them the difficulties arising from delay. Although we accept that the effect of delay will vary from case to case we do not consider that there is any material omission in this case which could have rendered this verdict unsafe.

[14] In his evidence in chief the applicant stated that he had never been interviewed by the police about any matter until he was interviewed about these charges in 2007. He was, therefore, a man of good character at the time of his trial. The learned trial Judge instructed the jury that this supported his credibility in respect of the evidence that he had given and also meant that it was less likely than otherwise that he might have committed this crime or indeed any sort of crime.

[15] It was submitted on behalf of the applicant that this direction was inadequate having regard to R v Hughes [2008] NICA 17. That was a case involving historic sexual abuse allegations in which the learned trial Judge instructed the jury that the weight of previous good character varied with the type of offence. The Court of Appeal took the view that this diminished the

standard direction on good character and rendered the conviction unsafe. Campbell LJ went on to say that where a considerable length of time had passed since the date of the alleged offences and there was no suggestion of any similar allegations against the appellant the jury should have been told that he was entitled to ask them to give more than usual weight to his good character.

[16] One of the differences between historic crimes and other crimes is that the jury may have the opportunity to consider not alone how the accused behaved in the period leading up to the alleged offence but also how he behaved in the period after the alleged offending. The fact that he was of good character both before and after the alleged offending should be taken into account by the jury in his favour in determining the weight that they should give to the evidence of his good character. In this case the evidence of the applicant plainly put in issue the fact that he was of good character both before and after the alleged commission of these offences. It was against that background that the learned trial Judge invited the jury to give the weight to his good character that they felt appropriate having reminded them in the standard terms about the likelihood of his offending.

[17] In our view the enhanced direction referred to in Hughes requires no more than that the jury should be aware that the accused was of good character both before and after the offending, that the jury are advised in the standard terms about the effect of good character and that the jury are invited to give weight to the accused's good character both before and after the alleged offending in considering the circumstances of the particular case. For the reasons that we have set out we consider that those elements were properly put before the jury in this case although that was no express direction by the learned trial judge in those terms. We repeat, however, that such an express direction should be given in cases of this sort.

[18] The last point raised on behalf of the applicant in respect of the learned trial judge's charge is the submission that the learned trial judge ought to have advised the jury that they should exercise special caution when considering the evidence of the complainant. It was submitted that this was appropriate in this case having regard to the fact that the complainant's aunt and the applicant had separated and divorced and the jury ought, therefore, to have been warned of the danger that the complainant may hold a grudge against the applicant.

[19] We consider that this submission is entirely without merit. In the course of an extensive cross-examination of the complainant no suggestion was made to her that the relationship between the applicant and his former wife had in any way influenced her evidence. In his own evidence the applicant denied that the divorce had engendered any particularly bad

feeling. There was in our view no basis on which the learned trial Judge could have exercised his discretion in the manner suggested.

The application to introduce fresh evidence

[20] The applicant sought to introduce fresh evidence from his former wife in support of his appeal. We decided that we should hear the evidence before ruling on the application. The applicant's wife said that she was divorced from the applicant in 2000. She was the sister of the complainant's mother. She first became aware of these allegations in March 2008 when she was visited by Detective Constable Simpson who was then the investigating officer. He explained to her that he was about to retire and that any further investigation would be dealt with by a colleague. He told the applicant's wife that there was an allegation that her ex-husband had "brushed" the complainant's vagina when she was three. She says that she spoke to the officer for about an hour and explained the children's sleeping arrangements. Her recollection is that the officer took notes during the interview. The notes could not be found by the prosecution. He prepared a short statement indicating that the complainant, her brother and sister had stayed at her home when the complainant's mother had an operation on her eye and that the complainant had been a regular visitor to her home. She knew nothing about the allegations.

[21] A few days later the officer returned to interview her daughter, the complainant's cousin. She made a similar statement indicating that she knew nothing about the allegations. During that interview the applicant's ex-wife says that the officer disclosed that there was more than one allegation. The officer indicated that it was likely that police would have to speak to them again. In fact there was no further contact by the police and the applicant's ex-wife assumed that the matter had not proceeded.

[22] Sometime after his conviction in March 2010 the witness's sister pointed out to her a report in a local newspaper which she believed might refer to her ex-husband. She decided that she should tell her daughter who then made inquiries and established that it did in fact relate to her father. This was the first that the applicant's ex-wife knew about the conviction.

[23] During the first trial on 21 October 2009 the applicant's solicitor had written to the Public Prosecution Service asking for the current home addresses of the witness and her daughter. It appears that the statements of March 2008 had been disclosed by that stage but the current addresses were not provided and the correspondence remained unanswered. After the notice of appeal had been lodged the solicitors were put in contact with the witness and her daughter as a result of the inquiries which they had made.

[24] The witness says that she had a clear recollection of the sleeping arrangements in 1986. She said that the children were all young and all four children slept together in one big bed. She said that she had made up the bed on the following morning. She said that the complainant started to stay over with her cousin from the age of 12. On Friday evenings both children regularly visited their grandmother and about every six weeks the complainant would stay over or the cousin would visit her house. She said that the complainant slept in her cousin's bed and the cousin in a made up bed on the floor. This was at variance with the complainant's account.

[25] She said that the children did not get home until about midnight on Fridays and usually went to the pictures on Saturday evenings. Later they went to junior discos. Her husband would have driven them in and out to the city. She agreed that she would have regularly visited her husband's aunt about 9 p.m. in the evening to assist with putting her to bed but said that on Saturdays the children were usually at the pictures or the disco. When the children went to bed they had a television in their room which they watched for a while. When she went to bed she would often say goodnight or put her head through the door. The children normally were not asleep at that stage. She agreed that she and her husband did not regularly go to bed at the same time.

[26] The importance of this evidence arises from the manner in which the learned trial Judge described the prosecution case. In the course of his charge the learned trial Judge stated that the prosecution case was that these assaults were perpetrated on the complainant when his wife was out of the house attending to his aunt. It was common case that the applicant's wife often went down to see the aunt around 9 p.m. in the evening and stayed for approximately 45 minutes. Her evidence suggested, however, that during this time the children were out either at the pictures or the disco. In any event they were normally still awake by the time she was going to bed around 11:30 p.m.

[27] The evidence of the complainant did not in fact suggest that the incidents alleged in counts 2 to 8 necessarily incurred in those circumstances. In her direct evidence she described the incidents as occurring at night, often after she had gone to sleep. It does appear, however, that the cross-examination of the applicant was directed towards establishing that his opportunity to commit this series of offences occurred while his wife was visiting his aunt. If the evidence of his ex-wife is believed it seems highly unlikely that the offences occurred at that time.

[28] The basis upon which the court should permit the introduction of fresh evidence in a criminal appeal is set out in section 25 of the Criminal Appeal (Northern Ireland) Act 1980.

"25. - (1) For the purposes an appeal under of 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 who would have been a compellable witnesses at the trial to attend and be examined before the Court, whether or not he was called at the trial; and

(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."

[29] In this case the evidence appears to be capable of belief and would have been admissible at the trial. The statements provided by the prosecution as a result of the interviews in March 2008 did not suggest that the witness had any material evidence to give. The defence sought the address of the witness to interview her but that address was not provided nor was the correspondence answered. In those circumstances there is a tenable explanation for the failure to adduce the evidence at the trial although it is fair to say that the applicant's solicitors did not follow this matter up.

[30] The real issue is whether this evidence affords any ground for allowing the appeal. The evidence disputes the corroborating evidence of the

complainant's sister on count 1 who said that from the boxroom she could see the applicant enter the room in which the victim was sleeping. It also suggests that if the offences in counts 2 to 8 occurred they did so at a time that was somewhat later than that for which the prosecution contended. Of itself that does not cast any material doubt on the safety of the conviction since the issue for the jury was whether they believed the complainant and she had not tied the timing of these events as apparently the prosecution did. There is, however, an additional feature in that the prosecution case at the trial was that the applicant only had an opportunity to commit these offences when his wife was out of the house. The evidence of the witness suggests that if the offences occurred they did so when his wife had gone to bed. That is a case which was not apparently made by the prosecution according to the judge's charge and which the applicant has not, therefore, had a chance to meet. The extent of the opportunity available to the applicant would have to be explored before a jury. We sought to obtain a transcript of the manner in which the prosecution closed the case to the jury in case that transcript might have reassured us about the safety of the conviction but it could not be obtained.

[31] In those circumstances we consider that this evidence may afford some ground for allowing this appeal. Accordingly we admit the evidence and conclude that there is a lurking doubt about the safety of the conviction. In the circumstances we direct that there should be a retrial.