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Judgment: approved by the Court for handing down | *Delivered:* **11/06/2015**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

LUCASZ ARTUR KUBIK

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Before: Morgan LCJ, Coghlin LJ and Gillen LJ

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MORGAN LCJ (giving the judgment of the court)

[1] This is an application for leave to appeal the applicant's conviction on 11 December 2013 by majority verdict at Belfast Crown Court of one count of rape contrary to Article 5(1) of the Sexual Offences (Northern Ireland) Order 2008 and one count of sexual assault contrary to Article 7(1) of the Sexual Offences Order. Mr O'Donoghue QC and Mr Sherrard appeared for the appellant and Mr McCollum QC and Ms Kitson for the prosecution. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] The complainant is a 53 year old woman. Her evidence was that on the evening of 30 January 2013, she went to the home of her sister, who was there with her husband and two other men. They had drinks during which the victim consumed five beers. She left at about 3 a.m. on 31 January 2013 and went to a local cab company where she had planned to take a taxi home. When she arrived there she found the premises closed. The applicant was there with a number of females. The complainant spoke to them all and the applicant told her that he was French and that his name was Chris. One of the girls was admiring a ring the complainant was wearing and she then gave it to her. At that point it appeared that the atmosphere was fairly convivial.

[3] The complainant looked at her mobile phone and found that there was no credit on it. She did not know what to do at that point and she said that the applicant asked her if she wanted to go to their house and she agreed to do that. She said that she thought she was going there to use a phone to get her home. She said that as they walked they chatted and it was getting darker and darker. She said that the applicant then shouted something to the females in a foreign language and they then disappeared. The applicant asked her if she wanted to work for him and then said, "I'll show you".

[4] The complainant's evidence was that he then started to molest her against a parked car. She had a plastic bag in one hand containing her remaining cans of beer and she had her handbag in the other hand. She described that she was wearing slip-on type shoes and that it was very dark. She said that the applicant exposed his penis, took her hand and put it onto his penis. The complainant repeatedly told the applicant that she was a grandmother but he persisted, pulled her trousers down and attempted to penetrate her vagina with his penis. She said he managed to penetrate her by about an inch at which stage she pushed him off her. Her evidence was that when she managed to push the applicant away, he masturbated and ejaculated before running off.

[5] The applicant agreed that the complainant met up with him and his friends at the cab company. He said that she wanted to join them for a party in their house. He claimed that the girls went on and he went round the corner to urinate. The complainant approached him and asked why he was not taking her to the party. He invited her to masturbate him and said that he put his hands in the air while she did so voluntarily. He then touched her vagina and masturbated himself. He agreed that during nearly five hours of interviews he had denied any form of sexual contact with the complainant but said that he had done so because he did not want his girlfriend to discover that he had cheated on her. This changed account first appeared in an amended defence statement served three working days before the trial commenced.

[6] After the incident the complainant made her way to a nearby traffic island where she attracted the attention of a stranger, Ms Green, and asked her for some help. She told her that she had just been raped behind K Cabs by a Polish fellow and this account was supported by the evidence of Ms Green. Ms Green telephoned the police. Dr Hall examined the victim at 8.30 on the same morning. She said the victim informed her that there was an attempted penile vaginal penetration to "about an inch". Dr Hall took vaginal swabs which were sent for analysis. Two low vaginal swabs were found to have a clear pre-dominant partial profile matching that of the applicant. The evidence of the forensic scientist was summarised by the judge in the charge to the jury as follows:

- "Now he said that item one consisted of external vaginal swabs. They were examined for the presence of semen. So the area outside the

vagina sperm heads were present, they were submitted but there was insufficient material to obtain a profile.

- Item two was the swab taken between one and a half to two centimetres inside the vagina. …. sperm heads were present in the lower vagina swab. They too were submitted for DNA profiling and they gave a clear predominant partial profile result matching the defendant. That's the one and a half to two centimetres inside the vagina.

- … and then the high vaginal swab which also had sperm heads but insufficient for profiling again."

The issues in the appeal

Sperm transfer

[7] The first ground of appeal was that the learned trial judge failed to direct the jury adequately or at all on the issue of the reasonable possibility that the applicant's semen was found in the complainant's vagina as a result of the circumstances put forward by the applicant in the course of his evidence. Both Dr Hall and the forensic expert were asked to comment on the possibility that on the applicant's account sperm on the applicant's hands or in the external region could have made their way inside the vagina by one and a half or two centimetres. The learned trial judge commented on this evidence as follows:

> "Now, it's a matter for you, members of the jury. Both of the experts said they're not in a position to comment. Mr Grant has told you "well the prosecution haven't called anybody to comment about that. The defence haven't called anybody to comment about that. You don't have anybody to comment for one side or the other." He's quite right in that Mr Grant says the defendant doesn't have to prove anything. But just as he has commented that the Crown haven't called anybody, the defence haven't called anybody either. You may well decide that issue, if you even think it's necessary to decide, on the basis of your own common sense."

[8] Mr O'Donoghue accepted that this evidence was admissible in order to show the closeness and sexual nature of the contact between the applicant and the complainant. He submitted, however, that once the applicant altered his account the use to which the evidence about the sperm heads in the vagina could be put needed careful consideration. No expert went so far as to say that the distribution of the

sperm heads were consistent only with vaginal penetration by the applicant's penis. Further, there was no evidence to suggest that the distribution of the sperm heads was inconsistent with the applicant's version of events. The learned trial judge by her direction did not ensure that the jury exercised proper caution in relation to the use to which the evidence could be put.

[9] Mr McCollum submitted first that this was a straightforward matter of common sense. This was not a matter of expert evidence. It was for the jury to exercise their judgement in determining whether the sperm might have come from some external source. Secondly, he submitted in any event that the evidential base necessary to raise this issue was not present. Finally, he submitted that even if some fault was found with the direction the conviction was nonetheless safe.

[10] In order to deal with this submission it is necessary to set out the evidence dealing with the circumstances in which the applicant said that he ejaculated. His case was that his left hand had been down the front of the complainant's trousers but that he had removed it when he was masturbating with his right hand just before he ejaculated. There is, therefore, no evidential basis whatsoever for the suggestion that contact between the applicant's hand and the complainant's vagina could have been responsible for any transfer of sperm heads.

[11] The applicant gave no evidence about the direction in which he ejaculated. In her ABE interview the complainant said initially that she thought he ejaculated over himself. She then said that she felt something wet round herself but did not know where it was. When she was asked to recap in that interview she said that she felt something wet on her trousers but later said that she thought it was the front of her trousers or clothes. She said that it was a wet night and her trousers had got wet from sitting down earlier but when she felt this wetness she thought to herself that it was him.

[12] There was no forensic examination of her clothing. There was nothing to indicate what if any part of her clothing had been the recipient of the applicant's ejaculate. There was no evidence about the route by which the sperm heads might have been transferred to the complainant's vagina. We consider, therefore, that there was no factual material before the jury which would have enabled them to reach any conclusion about transfer and no expert evidence suggesting that any transfer of sperm heads could have occurred.

[13] Although we accept that in a case where the issue of sperm transfer arises on the evidence it would be appropriate to explain clearly to the jury the evidential and expert factors relevant to the issue of transfer we do not consider that there was either factual material or expert evidence in this case which raised the issue before the jury. It was accepted that the charge by the learned trial judge left open to the jury the possibility of such a transfer and in that regard it was, therefore, a benefit for

the applicant to which in our view he was not entitled. The charge could not, therefore, have rendered the conviction unsafe on this issue.

Alternative count

[14] The applicant sought leave to add two further grounds. First, it was submitted that the learned trial judge erred in failing to leave to the jury the alternative count of attempted rape and secondly, it was contended that if the court had a sense of unease over the rape conviction it should substitute a conviction for attempted rape.

[15] The evidence given by the complainant was contained in her ABE interview. She described how the applicant tried to put his erect penis into her vagina and that he managed to do it when he pushed backwards on the car. She said that he put it in about an inch. He inserted his penis for about two seconds and she then succeeded in pushing him off. It was accepted that there was nothing to suggest that she had deviated from this account in the course of cross-examination. Indeed it was not suggested that the issue of penetration was a feature of the cross-examination. Almost immediately after the incident she had made a complaint to a stranger who assisted her that she had been raped by a Polish fellow.

[16] The issue of the judge's obligation to leave alternative verdicts to the jury was considered by this court in R v Croome [2011] NICA 3 where reliance was placed on the following passage from a speech by Lord Bingham in R v Coutts [2006] 1 WLR 2154:

> "23. The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support…. I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial."

[17] In support of his submission Mr O'Donoghue relied upon the fact that this was a partial penetration for a short period. He accepted that neither of those factors called into question the commission of the offence of rape. In the absence of any deviation by the complainant in her account or testing of her evidence in relation to the question of penetration we do not accept that there was an obvious alternative that this offence was committed without penetration. The fact that penetration

occurred was supported by the forensic evidence finding sperm heads attributable to the applicant in the lower vagina and the recent complaint by the complainant to Ms Green. We consider, therefore, that the learned trial judge was correct not to direct the jury on attempted rape as an alternative to the rape count.

Conclusion

[18] In our view the complainant's evidence was supported by her recent complaint, the forensic evidence in relation to the sperm heads and the inferences open to the jury as a result of the lies told by the applicant at interview. We have no sense of unease about the verdict. We refuse leave to add the grounds of appeal relating to an alternative verdict. For the reasons given we consider that the verdict is safe and the application for leave to appeal is refused.