Neutral Citation No. [2011] NICA 18

Ref: **HAR8191**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **7/6/2011**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

M

Morgan LCJ, Girvan LJ and Hart J.

HART J

[1] As the complainant in this case was a young child at the time the alleged offence occurred we will refer to her as E in order to protect her identity, and because she is the niece of the defendant we will also refer to him by an initial. Nothing must be reported which would reveal the identity of the defendant or the complainant.

[2] The appellant was convicted of indecent assault of E between 1997 and 1999 when she was six or seven. Leave to appeal was refused by the single judge, and the defendant renewed his application for leave to appeal. He was represented by Mr Brian Kennedy QC (who did not appear below) and Mr Taggart. Mr Reid appeared on behalf of the prosecution.

[3] The alleged indecent assault took two forms. First of all, the assailant touched E twice in the region of her vagina, and secondly touched her cheek with his penis. These events occurred when she was staying over at the house of the defendant who was her uncle by marriage. The defendant had two children, and E was very close to one of them. Both children were sleeping in the bedroom of the other child on the night in question, E and her companion sleeping in the double bed.

[4] E's evidence was that there were three separate episodes that night, occurring over a period of 1 to 1½ hours.

(1) Someone entered the room and touched her vagina.

(2) Later someone again entered the room and she felt something rubbing against her cheek, she felt hairs and she heard a zip coming down.

(3) Later the assailant again entered the room, she was touched on the vagina and cried out as it was very painful, and at this the man ran out of the room.

[5] E says that on the first and second occasions she "squinted" through partly closed eyes, and saw the silhouette of a man whom she recognised as the defendant. There was some evidence that a comfort light may have been on in the bedroom, although E was not too sure about that. The door in the bedroom was open, and a light was on in the hall, so some light was coming into the room. As well as the silhouette of the man she recognised as her uncle, she also saw some of his facial features.

[6] After the third occasion, E said that she thought it was 10-20 seconds later, although on reflection she accepted that it was probably not as long as 20 seconds, she heard the defendant's voice outside the room saying "Don't worry I will check them", and he immediately came in and hugged her, comforted her and asked what was wrong. By that stage she had clearly identified the defendant as the person in the room on each of the three occasions when she was indecently assaulted.

[7] The prosecution relied upon the defendant being outside the room within a few seconds of the third indecent assault as being significant, because there was evidence that the defendant was one of only two adult males in the house that night. Had it been the other male who entered the room on the earlier occasion, the interval between that male leaving after the third indecent assault, and the defendant entering, was so short that if the assailant had been the other man then the defendant would have confronted him on the stairs.

[8] A significant element in the prosecution case was the evidence of the defendant's now estranged wife who described how the defendant would rub or stroke his penis against her cheek. This behaviour was consensual. The defendant denied that he engaged in that particular form of sexual practice, and his evidence was that his estranged wife was making this up and using this opportunity to get at him.

[9] It appears to have been accepted at the trial that the defendant's wife's account of this form of sexual practice could not constitute bad character evidence because it was consensual. Although we do not have the benefit of a transcript of the trial judge's ruling on the application to admit the defendant's wife's evidence, an application heard in the absence of the jury, in his charge to the jury the judge said that if the jury felt her evidence was accurate:

> "then you may feel that this is a rather peculiar act."

And:

> "You may feel that it is significant evidence if you are satisfied that it is accurate."

[10] We understand that the application to admit the evidence at the trial was not made on the basis that it amounted to bad character evidence as the defendant's wife's account made it clear that this form of sexual practice which she alleged the defendant engaged upon with her was consensual, rather the prosecution made the case that it amounted to evidence of similar facts which was strikingly probative, and which should be therefore admitted as indicating that the complainant's account of what happened to her was more likely to be truthful.

[11] Mr Kennedy sought leave to abandon the other grounds of appeal, and the only issue on the appeal was whether the learned trial judge, His Honour Judge McFarland, was correct to admit the defendant's wife's evidence as to this consensual sexual practice as similar fact evidence. Mr Kennedy did not dispute that the evidence of the defendant's wife could be admissible as similar fact evidence because it was capable of being regarded as strikingly similar to the allegation made by the complainant, his principal submission being that the evidence should not have been admitted because it had not been shown to be sufficiently probative, and we will deal with this latter point in due course.

[12] We are satisfied that Mr Kennedy was correct to concede that this evidence was capable of being regarded as similar fact evidence. There is clear authority that acts relied upon as constituting a similar fact do not have to include evidence of the commission of offences in the sense of offences similar to those with which the appellant is charged. See Dunn LJ in R v Barrington (1981) 72 Cr. App. R. 280 at page 290:

> "The various facts recited by the judge in this case as constituting similar facts were so similar to the facts of the surrounding circumstances in the evidence of the complainants that they can properly be described as 'striking'. That they did not include evidence of the commission of offences similar to those with which the appellant was charged does not mean that they are not logically probative in determining the guilt of the appellant. Indeed we are of opinion that taken as a whole they are inexplicable on the basis of coincidence and that they are of positive probative value in assisting to determine the truth of the charges against the appellant, in that they tended to

show that he was guilty of the offences with which he was charged.

In deciding whether or not to admit similar fact evidence the judge will always assess whether the prejudice caused outweighs the probative value of the evidence. In this appeal counsel has not suggested that if the evidence is admissible it should be excluded on the ground that it is prejudicial."

[13] In R v Butler (1987) 84 Cr. App. R. 12 the court followed the decision in Barrington, at p. 17 rejecting the argument that consensual acts could not be strikingly similar, and in R v Downey (1995) 1 Cr. App. R. at 551 Evans LJ stated that "the similar fact rule may be evidence admissible of facts which do not themselves constitute another offence". In Butler the court summarised the effect of the various authorities, and stated the principles applying to the admission of similar facts as follows.

"1. Evidence of similar facts may be admissible in evidence, whether or not they tend to show the commission of other offences. This evidence may be admitted:

(a) if it tends to show that the accused has committed the particular crime of which he is charged,

(b) to support the identification of the accused as the man who committed a particular crime and, in appropriate cases, in order to rebut a defence of alibi, or

(c) to negative a defence of accident or innocent conduct.

2. Admissibility is a question of law for the judge to decide. He must, in the analysis of the proffered evidence, be satisfied that:

(a) the nature and quality of the similar facts show a striking similarity or what Scarman LJ in Scarrott (1977) 65 Cr. App. R. 125 describes as being of 'positive probative value', and

> (b) the evidence of a similar act goes well beyond a propensity to act in a particular fashion.
>
> 3. Notwithstanding an established admissibility in law the judge in the exercise of discretion may refuse to admit the evidence if its prejudicial effect outweighs its probative value."

[14] The authorities therefore establish that the acts relied upon as similar fact evidence need to be so similar that the similarity can be described as "striking", and can be admitted provided that they are of positive probative value in that they tend to show that the defendant was guilty of the offence charged. Furthermore, provided the act in question can be regarded as being strikingly similar and as having positive probative value, it is admissible even though the facts relied upon as similar facts do not themselves constitute another offence, and indeed may have involved consensual activity between the witness and the defendant.

[15] The court also has to consider whether the prejudice that might be caused by the admission of the disputed evidence outweighs the probative value of the incident, and if the judge considers that the prejudice caused by the admission of such evidence would outweigh the probative value of the incident relied upon, the evidence should be excluded. It was in relation to this that Mr Kennedy mounted part of his argument. It has to be remembered, as Kerr LCJ pointed out in R v William McCluskey [2005] NICA 22 at paragraph [20], that:

> "… the mere fact that an item of evidence is prejudicial to a defendant on matters extraneous to the issues that arise in the trial will not, without more, suffice to render it inadmissible. A judgment must be made not only on the potential of the evidence to damage the defendant's case but also on the effect that the exclusion of the evidence might have on the case for the prosecution."

[16] Mr Kennedy's argument, presented with commendable succinctness, was that no reasonable judge would have admitted the evidence of the defendant's wife relating to his practice of placing his penis against her cheek in the course of consensual sexual activity because the evidence of the complainant that a penis had been placed against her cheek was insufficiently credible. He developed this by saying that the trial judge had to be satisfied beyond reasonable doubt that the episode described by the complainant had in fact occurred before he could admit the evidence, and referred to various

parts of the evidence of the complainant which he submitted showed that the evidence fell far short of being proved beyond reasonable doubt. He pointed out that in the course of her police interview she had not made any reference to the zip, and when asked whether the object she felt against her face could have been a finger and not a penis she replied "Maybe".

[17] We consider that it is contrary to principle to require the trial judge to be satisfied beyond reasonable doubt of the occurrence of the facts which are relied upon as constituting similar fact evidence before that evidence can be admitted before the jury. Only in cases where statute requires the judge to be satisfied beyond reasonable doubt, as under Article 73(2) of the Police and Criminal Evidence (Northern Ireland) Order 1989 in relation to the admissibility of confessions, is such a stringent standard required. Absent any such statutory requirement, matters of disputed fact are for the jury to consider, subject to the judge being satisfied that the evidence has reached a minimum standard of credibility. Thus in the analogous cases of bad character evidence it is clear that where the facts relied upon as constituting bad character are not agreed then they have to be proved beyond reasonable doubt before the jury can rely on them. This was made clear in R v Humphris [2005] EWCA Crim. 2030, and again in R v Ainscough [2006] EWCA Crim. 694 as can be seen from R v Kordasinksi [2007] Cr. App. R. 27 at page 248, and most recently by this court in R v Morrin [2011] NICA 14 where it was stated that:

> "A further consideration that has to be borne in mind when considering unproved allegations is that, in the absence of agreement between the prosecution and the defence as to the facts of such allegations, it will be necessary for the allegations to be proved by the complainant and other witnesses being called, or for their evidence to be admitted as hearsay evidence if for some reason the witnesses are unwilling, or unavailable, to give evidence."

[18] Whilst we accept that a jury has to be satisfied beyond reasonable doubt of disputed facts before relying upon them, when a trial judge is considering whether to admit disputed evidence as to whether the actions of the defendant on an occasion other than that which is the subject of the charge is capable of constituting similar fact evidence, we consider that the judge should approach the evidence applying the well-known principles set out in R v Galbraith 73 Cr. App. R. 142, and in particular the guidance given at 2(b), namely:

> "Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters

> which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[19] If the judge were required to impose a higher standard when considering whether to admit similar fact evidence that would be to usurp the function of the jury. We do not consider that there is any authority for such an approach, and consider it to be wrong in principle.

[20] It is correct that there were discrepancies in E's accounts of what happened, notably that she did not mention the zip until the trial, and, as already stated, that she replied "maybe" when asked whether a finger could have been placed against her cheek. However, to single out the answer "maybe" is to ignore her evidence that she felt hairs when she felt the object against her face, and to leave out of account the evidence about the zip.

[21] In the present case we consider that there was sufficient evidence from E to justify the allegation made by the defendant's wife being left to the jury. The trial judge gave a comprehensive and fair charge in which he reminded the jury of the discrepancies in the complainant's accounts, and gave them appropriate directions, warning them to have regard to the risk that the defendant's wife was motivated by malice in her evidence, and of the need to be satisfied beyond reasonable doubt that the complainant's recollection and description of events was accurate and reliable. We consider that there was sufficient evidence upon which the jury could properly come to the conclusion that a penis had been placed against her cheek, that the evidence of the defendant's wife was of positive probative value, amounted to evidence of striking similarity, and was therefore capable of constituting similar fact evidence because of the highly unusual nature of this sexual practice. Whilst the evidence was undoubtedly prejudicial to the defendant in its effect, nevertheless its probative value was very considerable.

[22] We are satisfied that the evidence was properly admitted and that the conviction is safe, and we refuse leave to appeal. The appeal is accordingly dismissed.