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Judgment: approved by the Court for handing down
*(subject to editorial corrections)** | *Delivered:* **07/05/2013**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

ML

Defendant/Appellant.

Before: Morgan LCJ, Higgins LJ and Girvan LJ

MORGAN LCJ (giving the judgment of the Court)

[1] This is an appeal against the appellant's conviction at Belfast Crown Court on 14 September 2012 on 9 counts of indecent assault, 2 counts of gross indecency and 1 count of buggery of a female child. The complainant was his sister. The offences allegedly occurred between August 1990 and December 1991 when the appellant, who was born in November 1976, was aged 13 to 15 years old. The complainant was born in March 1980 and was 10 or 11 years old at the time of the offences. The appellant appeals primarily on the ground the trial judge misdirected the jury in relation to the issue of doli incapax. Leave to appeal the convictions was granted by McCloskey J acting as the Single Judge. The appellant further appeals against sentence with leave on the ground that the 4 ½ year custody-probation imposed comprising 1½ years custody followed by 3 years' probation was manifestly excessive.

Background

[2] The complainant and the appellant were very close when they were growing up as children. When the complainant was approximately 10 years old she had a crush on a local boy. She gave evidence that when she told the appellant about this he informed her that she needed to practise how to kiss properly and that she should

practice on him. Counts 1, 2 and 3 were counts of indecent assault which were related to this kissing. The appellant was acquitted on count 1 but convicted on count 2, a specimen count which alleged kissing before he was 14 years old and count 3, a specimen count alleging kissing after his 14th birthday.

[3] Count 4 was an allegation of gross indecency which was alleged to have occurred between August 1990 and March 1991 when the appellant was 13 or 14 years old. On a day when they arrived home from school the appellant called his sister into his bedroom. He was naked and had a ring balanced on the edge of his penis. He removed the ring and proceeded to masturbate in front of the complainant until he ejaculated. All of the other counts were alleged to have occurred when the appellant had passed his 14th birthday.

[4] Counts 6 and 7 were incidents where the appellant encouraged his sister to perform oral sex on him. The complainant said the first time this occurred was in their parent's bedroom and the second time was at the kitchen door where the appellant wanted her to recreate a sex scene from the film Fatal Attraction.

[5] Counts 9 to 14 related to sessions where the complainant said the appellant showed her how to masturbate herself. He would perform oral sex on her (Counts 9 and 10). He would often have her kneel on all fours while he masturbated himself by rubbing his penis between her buttocks (Counts 11 and 12). On one occasion when masturbating this way he ejaculated over her naked back (Count 13) and on another occasion when doing this the appellant penetrated the complainant's anus with his penis (Count 14). During these sessions which took place when the parents were at work and the children had returned from school he would close the curtains. On occasions he asked her to allow him to put his penis in her vagina and on one occasion produced a condom.

[6] The complainant claims the offences stopped around the autumn of 1991 when the appellant started going out with a girlfriend. The appellant claimed he had no recollection of doing anything to his sister. When giving evidence he emphatically denied that anything sexual had happened between them.

[7] The complainant made her first disclosure of these alleged incidents around 2002 to a university friend. That disclosure followed a conversation they had in a public house, where the friend mentioned that her brother had abused her in childhood. It was this that triggered the complainant's memories of the matters that later became the subject of this trial. She did not disclose any details of the alleged abuse to her friend, just that her brother had also abused her.

[8] In 2003/2004 she raised the issue with her brother during one of their regular telephone calls. She mentioned her friend's abuse and told the appellant that she was not happy about some things that occurred between them during her childhood. His response was that he had no memories of any such incidents between them. He

subsequently told his partner about this conversation. They continued their contact and in around December 2009 they fell out over an unrelated issue. There were further calls where she raised the issue of the safety of the appellant's two young daughters.

[9] In January 2010 the complainant raised with the appellant the incident involving the condom and the buggery allegation. This ended their relationship and later that month she informed their parents. The appellant was invited around by the parents to discuss these matters. It was clear that the parents wanted him to do the right thing for his sister and that led to him writing a letter to her. This was exhibited in front of the jury. He denied that it was an admission of guilt. He told his parents that he had no recollection of anything like that happening. In addition to the letter there were text messages upon which the prosecution relied as evidence consistent with guilt. It was clear, and was accepted by the father in his evidence, that the parents had sided with their daughter.

The trial judge's charge

[10] Although Article 3 of the Criminal Justice (Northern Ireland) Order 1998 (the 1998 Order) abolished the rebuttable presumption that a child between the ages of 10 and 14 is incapable of committing an offence unless he knew that what he was doing was seriously wrong the Article came into force on 1 December 1998 and did not, therefore, apply in this case. The learned trial judge dealt with this issue in her charge in the following terms.

> "All that it means is that someone is incapable of criminal responsibility or of forming the guilty mindset or intention necessary as an element of the offence. The law applicable to allegations of events at the time is that a child under 14 could not be guilty of a criminal offence unless at the time of the alleged offence he knew that what he was doing was seriously wrong as distinct from an act of mere naughtiness or childish mischief. So if you are satisfied beyond a reasonable doubt that the defendant committed the acts alleged at counts one, two and four and any others that you consider may have happened before 4 November 1990, and you reach the conclusion that any of them occurred before 4 November 1990, then you must go on to ask yourselves in respect of any of those which you conclude occurred at that time whether you are satisfied beyond a reasonable doubt that the defendant knew that what he was doing was seriously wrong as distinct from an act of mere

naughtiness or childish mischief. And in relation to anything you find happened before 4 November 1990 it is only if you are satisfied beyond a reasonable doubt both that he did these things and that he knew what he was doing was seriously wrong that you can find him guilty.

Now in this context you should look at his age in terms of how close or otherwise you consider that he was to his 14th birthday, at the circumstances surrounding the offences, as opposed to the offences themselves, and I will come back to talk about circumstances because you heard quite a bit from counsel about that yesterday; the evidence in respect of his demeanour and behaviour and what you know about the defendant's maturity, his schooling, the sex education he received from his father, the sexual sophistication he demonstrated and what you heard about his early sexual experiences. Now, it's not the defence case that he did any of the acts, he's not putting forward a defence saying I did them but I was curious or I was just playing doctors and nurses. His case is that he didn't do any of them. Nonetheless if you conclude that he did do any or all of them and if you conclude that any occurred before 4 November 1990 then in respect of those counts on which you reach that conclusion you should look at the evidence of surrounding circumstance. Mr Ramsey put to him yesterday afternoon the drawn curtains. You might want to look at the indication that the complainant shouldn't tell and any other evidence which you accept as reliable and honest to the effect that they happened away from adult attention. Counsel has invited you to look at the evidence that the defendant claimed that all brothers and sisters did this, and the evidence which actually he told you yesterday that the complainant generally took the blame for many things he actually did. You might want to consider what you know about the balance of power in the siblingship, in this brother/sister relationship. These are matters which may or may not assist you with your assessment in respect of knowledge or awareness that these things were seriously wrong or a lack of that knowledge. ”

[11] In the course of their deliberations the jury asked what they should record if in respect of counts 1, 2 and 4 they found him guilty but believed that he was under age and did not know what he was doing was wrong. The learned trial discussed the issue with counsel and gave the following direction.

> "Even if you are satisfied beyond reasonable doubt that the defendant performed the act in question, if you are satisfied that it occurred before 4 November 1990, his birthday, and you have a doubt that when he did the act he may not have known what he was doing was seriously wrong then you must give the defendant the benefit of the doubt and must find him not guilty in respect of the count in question."

[12] It was submitted on behalf of the appellant that although the substance of the direction on doli incapax was correct the matters raised by the learned trial judge as evidence upon which the jury could rely to rebut the presumption were incapable of doing so. Some of those matters such as the talk the appellant had with his father on sexual matters and his early sexual experiences occurred after the events the subject of these charges. There was no evidence of school records or contemporaneous evidence of the appellant's development and the evidence of his demeanour and behaviour was given by the complainant who by that stage had all the sophistication and knowledge of an adult. Taken as a whole these did not amount to the clear positive evidence necessary to rebut the presumption.

[13] Alternatively the appellant contended that this was a case in which the residual discretion to set aside a conviction should be exercised because it was unfair to the appellant to allow it to stand. The delay in prosecution impacted on his ability to remember events from his childhood and in particular affected the jury's ability to consider the defence of doli incapax.

Discussion

[14] The applicable principles were set out in C a minor v DPP [1996] 1 AC 1 in which Lord Lowry gave the leading judgment. The principal argument advanced in that hearing was that doli incapax no longer had a place in the common law and the defence, therefore, should no longer be available. The House concluded that such a course could only be taken by the legislature and indeed the 1998 Order followed soon thereafter.

[15] In his speech, however, Lord Lowry set out the elements of the defence.

> "A long and uncontradicted line of authority makes two propositions clear. The first is that the prosecution must prove that the child defendant did

> the act charged and that when doing that act he knew that it was a wrong act as distinct from an act of mere naughtiness or childish mischief. The criminal standard of proof applies. What is required has been variously expressed, as in Blackstone, 'strong and clear beyond all doubt or contradiction,' or, in Rex v. Gorrie (1918) 83 J.P. 136, 'very clear and complete evidence' or, in B. v. R. (1958) 44 Cr.App.R. 1, 3 per Lord Parker C.J., 'It has often been put in this way, that . . . 'guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt.'' No doubt, the emphatic tone of some of the directions was due to the court's anxiety to prevent merely naughty children from being convicted of crimes and in a sterner age to protect them from the draconian consequences of conviction.
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> The second clearly established proposition is that evidence to prove the defendant's guilty knowledge, as defined above, must not be the mere proof of the doing of the act charged, however horrifying or obviously wrong that act may be."

[16] We consider that the learned trial judge's charge correctly captured these requirements. Indeed in directing the jury as to the distinction between acts that were wrong as distinct from mere naughtiness or childish mischief the learned trial judge emphasised that distinction by inviting the jury to consider whether the appellant knew that what he was doing was seriously wrong. That was to the advantage of the appellant. The learned trial judge also instructed the jury that the standard of proof was the criminal standard. Mr Barlow submitted that the evidence required clear positive proof. Insofar as this was intended to suggest that the standard of proof was more rigorous than the criminal standard we do not accept that submission. Lord Lowry makes it clear that it is the criminal standard that applies.

[17] Lord Lowry also looked at the methods by which guilty knowledge might be proved.

> "The cases seem to show, logically enough, that the older the defendant is and the more obviously wrong the act, the easier it will generally be to prove guilty knowledge. The surrounding circumstances are of course relevant and what the defendant said or did before or after the act may go to prove his guilty mind. Running away is usually equivocal…

> In order to obtain that kind of evidence, apart from anything the defendant may have said or done, the prosecution has to rely on interviewing the suspect or having him psychiatrically examined (two methods which depend on receiving co-operation) or on evidence from someone who knows the defendant well, such as a teacher, the involvement of whom adversely to the child is unattractive."

[18] The appellant submitted that there was no contemporaneous evidence of school performance or developmental maturity which would have provided independent evidence to assist the jury in determining the state of mind of the appellant at the time. We do not accept, however, that such evidence is needed in order to establish that a child knew that his actions were wrong even in a historic case. Lord Lowry laid particular emphasis on the surrounding circumstances and it is only if the presumption cannot be rebutted by the available evidence that one might need to look for evidence of school performance or developmental maturity.

[19] In this case the attention of the jury was drawn to the appellant's demeanour and behaviour at the time, his schooling, the sex education he received from his father, the sexual sophistication he demonstrated including the production of the condom and his early sexual experiences with his girlfriend. It was objected that some of these matters post-dated the events but the House of Lords specifically approved reliance on things said or done before or after the event. Plainly the maturity and sophistication of the appellant shortly after these events is material to an assessment of the degree of understanding he had at the time of the allegations.

[20] In addition to these factors the learned trial judge invited the jury to consider evidence that the appellant drew the curtains when carrying out these activities and sought to prevent any disclosure to the parents. Of itself that may not assist greatly in distinguishing between wrong conduct and naughty conduct but it can be put with the other features to assist in the assessment. The appellant also criticised the reference to the balance of power in the sibling relationship but we consider that his was a material factor as a potential indicator of sustained grooming by the appellant indicating a degree of guilty knowledge.

[21] A further matter which arose at the hearing concerns the direction of the learned trial judge to consider whether any of the counts other than counts 2 and 4 may have been committed when the appellant was not yet 14 years old. Although that involved an invitation to the jury to consider that the offences were committed on dates other than those set out in the indictment a variance between the indictment and the evidence as to date is not material (see R v Dossi 13 Cr App R 158 and the commentary thereon in Archbold at 1-204). The invitation to consider doli

incapax in respect of these counts could only have been to the benefit of the appellant.

[22] The final matter submitted on behalf of the appellant was that this was one of those exceptional cases where despite the fact that the trial process cannot be faulted the conviction should none the less be considered unsafe. R v Bell [2003] EWCA Crim 319 was such a case. It was a historic sex case where the court concluded that the appellant had been placed in an impossible position in defending himself. This case is different. There are undoubtedly aspects of this case which depended on the view the jury took of the assertion by the complainant that the events occurred and the denial by the appellant that any of these things happened but there was other material such as the text messages passing between the appellant and the complainant and the letter written by the appellant to the complainant upon which the prosecution relied as evidence of admission.

[23] We consider for the reason set out that this conviction is safe and the appeal against conviction must therefore be dismissed. We will hear counsel on the appeal against sentence.