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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

DENNIS PATRICK McCALMONT

and

DERMOT JAMES WADE **Applicants**

Before: Higgins LJ, Girvan LJ and Coghlin LJ

HIGGINS LJ

[1] Both applicants sought leave to appeal against their convictions and sentence in a case involving allegations of sexual abuse of an historic nature. On 3 April 2009 it was announced that the applications for leave to appeal against the convictions were granted and the appeals allowed and the convictions of both applicants were quashed and that reasons would be given at a later stage. We now give those reasons.

[2] On 30th June 2004 Dennis Patrick McCalmont and Dermot James Wade (the applicants) were convicted of a series of offences against male and female persons after a trial lasting five weeks before His Honour Judge Smyth QC and a jury sitting at Antrim Crown Court. The trial commenced on 24 May 2004 after another jury was discharged several days earlier. Two other defendants were named in the indictment which contained 47 counts. They were M and W. They each faced two counts. M was found not guilty by direction of the trial judge of Count 44 (indecent assault on E) and guilty by the jury on count 45 (indecent assault on E on a different date). On 2 June 2004 W pleaded guilty to Counts 46 and 47 (both indecent assaults on F).

[3] The applicants faced the following charges –

Dennis Patrick McCalmont

Counts 1 to 5
Indecent assault on A between June 1975 and June 1977
Count 6
Indecent Assault on A between June 1977 and April 1979
Count 7
Indecent Assault on A between April 1979 and May 1980
Count 8
Indecent Assault on B between October 1977 and April 1979
Count 9
Gross Indecency with B between October 1977 and April 1979
Count 10
Indecent Assault on B between October 1977 and April 1979
Count 11
Indecent Assault on B between October 1977 and April 1979
Count 12
Buggery with a boy B between October 1977 and April 1979
Count 13
Buggery with a boy B between April 1979 and May 1980
Count 14
Attempted buggery with a boy B between April 1979 and April 1981
Count 15
Attempted Buggery with a boy B between April 1979 and April 1981
Count 16
Indecent Assault on B between October 1980 and April 1981
Count 18
Indecent Assault on C between March 1982 and March 1983

[4] Dennis Patrick McCalmont was found not guilty of counts 19, 20, 21 and 22 of Indecent Assault on E on dates unknown between October 1975 and October 1978.

Dermot James Wade

Count 23
Buggery with a boy A between June 1977 and July 1979
Count 24
Attempted Buggery with a boy B between April 1979 and April 1980
Count 25
Gross Indecency with a child B between June 1977 and July 1979
Count 27
Indecent Assault on D between September 1982 and September 1986
Count 28
Indecent Assault on D between September 1982 and September 1986
Count 29
Gross Indecency with a child D between September 1982 and September 1986
Count 30

Gross Indecency with a child D between September 1982 and September 1986
Counts 32, 33 and 34
Indecent Assault on E between October 1973 and October 1974
Count 41
Gross Indecency with a child F between August 1982 and July 1983
Count 42
Indecent Assault on F between August 1982 and September 1988
Count 43
Gross Indecency with a child F between July 1983 and September 1989

[5] Dermot James Wade was found not guilty of Count 26 (Buggery with a female C), Count 31 (Indecent Assault on D), Counts 35, 36, 37 and 38 (Rape), Counts 39 and 40 (Gross Indecency with E) alleged to have occurred on dates unknown between April 1974 and April 1976 except Count 31 which was alleged to have occurred between January and May 1995.

[6] The jury returned their majority verdicts (10 : 1) on 30 June 2004. The case was adjourned for pre – sentence reports. Both applicants were sentenced on 15 October 2004. Notice of appeal was not lodged until August 2005, though an application to extend time within which to lodge an appeal was granted on 25 November 2004. The applicants allege that they did not receive positive advice about the right of appeal. Later they became aware of an English organisation called the Historic Abuse Appeals Panel by whom they were referred to their present solicitors. Leave to appeal was refused by the single Judge on 29 August 2006.

[7] Dennis Patrick McCalmont was born on 3 April 1962 and Dermot James Wade was born on 11 April 1960. The indictment spanned a period between 1974 and 1995. The charges against Dennis Patrick McCalmont were alleged to have occurred between 12 June 1975 and 23 March 1983 when he was between the ages of 13 years and 2 months and 20 years and 11 months. The charges against Dermot James Wade were alleged to have occurred between 19 October 1973 and 1 May 1995 when he was between the ages of 13 years and 6 months and 35 years. No specific date was alleged for any offence and all of them were framed as on a date unknown during a period that spanned at least 6 months and in most instances at least 12 months and in others longer. Extensive grounds of appeal were lodged as well as an application for leave to adduce fresh evidence. On 16 January 2009 leave was granted to adduce fresh evidence de bene esse. The grounds of appeal in each case were similar. The grounds of appeal may be summarised briefly as –

1. The direction of the learned trial judge to the jury on the issue of delay in an historic sex abuse case was inadequate;
2. The direction of the learned trial judge to the jury on the issue of good character was inadequate;

3. The learned trial judge failed to direct the jury on the effect of the pleas of guilty by W;
4. The learned trial judge failed to direct the jury on the issue of contamination in a case in which no reliance was placed on similar fact evidence;
5. The learned trial judge failed to direct the jury adequately on the onus of proof;
6. The learned trial judge failed to direct the jury that certain counts required proof, the onus of which lay on the prosecution, that the applicant committed the act alleged at a time when he knew that what he was doing was wrong (doli incapax).
7. That the evidence of Professor Martin Anthony Conway should be admitted in evidence. In a separate judgment of the court (Coghlin LJ) the court considered this evidence and for the reasons given decided not to admit it.

[8] Allegations were made against Dennis Patrick McCalmont by A, B and C. Allegations were made against Dermot James Wade by A, D, E and F. It is evident that the appellants and complainants were well known to each other.

[9] A was in his thirties when he gave evidence. In 2002 he made a complaint about being abused by the appellants and it appears that this complaint prompted an investigation which led to the charges preferred against all the defendants at the trial. According to the dates alleged in the counts in the indictment of which the appellants were convicted and the known dates of birth, the following summary is apparent. A complained of being abuse by Dennis Patrick McCalmont from when he was aged possibly 4 going on 5 until he was 10 years of age, at a time when Dennis Patrick McCalmont would have been between the ages of 13 and 18. He complained of being abused by Dermot James Wade at a time when he was between the ages of 6 and 8 years and when Dermot James Wade was between the ages of 17 and 19. B was also in his thirties at the time of the trial. He complained of being abused by Dennis Patrick McCalmont from when he was 4 years of age until he was 8 years of age, at a time when Dennis Patrick McCalmont was between the ages of 15 and 19. He complained of being abused by Dermot James Wade when he was between the ages of 6 and 7 at a time when Wade was 19 or 20 years of age. Dennis Patrick McCalmont was convicted of indecent assault on C when she was between the ages of 13 and 14. D complained of being abused by Dermot James Wade when she was between the ages of 5 and 9 and when he was between 22 and 26 years of age. E complained of being abused by Dermot James Wade when she was between the ages of 6 and almost 8 years and when he was between the ages of 13 years and 6 months and 14 years and 6 months. No specific reference was made to Counts 32 to 34 which disclose this. F complained of being abused when he was not quite 4 until he was 11 years of age.

Delay

[10] The earliest date on which an offence was alleged to have been committed and a conviction recorded as disclosed in the indictment, was October 1973 and the latest date was September 1989. The complaint to the police that prompted the investigation was made in 2002. This was clearly an historic sexual abuse case in which there had been considerable delay in making complaints. By the time of the trial the allegations dated back to events alleged to have occurred at least 15 years and as long ago as 31 years beforehand. In dealing with this aspect of the case the learned trial judge told the jury –

> "Now this is a case where the allegations stretch back in time. There is no statutory limitations in a criminal case. That is learner speak for the fact that cases can arise in our jurisdiction at any time. There is no cut off point. There is no suggestion that evidence has been lost in this case and indeed you might well think that while memories can fade over time the nature of these allegations by and large are such that they are either true or false. It is hard to imagine that they could be something that the memory would dim with the passing of time over. However, the allegation has been made that at least one of the complainants may be a fantasist – may be imagining things. How do you when allegations stretch back over time – how do you approach it? I think it's this really, at the end of the day you have honest regard to what is involved in a criminal trial and you ask the question 'Am I sure the accused is guilty on this evidence both for and against'."

[11] Later when dealing with the evidence of B and Dennis Patrick McCalmont he said –

> "Cast your mind back to the evidence given by both of them [B and Dennis McCalmont]. Obviously it is not going to be so easy for a person who says just simply these things didn't happen". P 161

[12] Counsel on behalf of both appellants submitted that this is a wholly inadequate direction in an historic sexual abuse case. Counsel for the appellants relied on R v Percival 97/6746/X4 (19 June 1998), R v Smolinski 2004 EWCA Crim 1270, R v Mayberry 2003 EWCA Crim 782, R v Bell 2004 EWCA Crim 319 and R v Hughes 2008 NICA 17. The issue of delay is more often considered in the context of an application for a stay of the proceedings

on the ground of abuse of process. R v Percival was a case of historic sexual abuse in which an application for a stay based on delay was rejected and the appellant was convicted. At his appeal the focus was on the Judge's summing up to the jury and it was alleged that it was inadequate to mitigate the prejudice occasioned to the appellant's case by the delay, so that the convictions were rendered unsafe. The Court of Appeal upheld the trial judge's ruling on the application for a stay but went on to consider the summing up in view of the submission that it was inadequate, even though it contained a direction to the jury that they should make allowance for the fact that from the Defendant's point of view, the longer the time since an alleged incident, the more difficult it maybe for him to answer it. After referring to passages of the summing up Holland J, in giving the judgment of the court, said –

> "Delay of up to 32 years must threaten the fairness of any criminal trial, not least when the Crown case depends on late complaint and oral testimony, see R v Telford Justices ex p. Badhan (1991) 93 Cr. App. R. 171 at 179. True, a developing concern with and, understanding of sexual abuse is reflected in a growing experience of cases featuring delays that at one time would have been regarded as intolerable. That experience and the underlying problem of unreported abuse has served to encourage experienced judges to be more liberal in their concept of what is possible by way of a fair trial in the face of delay, but, as we think there is a price, namely safeguarding the defendant from unacceptable resultant prejudice by a 'pro active' approach in terms of directions. Before a conviction following such a trial can appear to be safe, it is necessary to be satisfied that the judge has confronted the jury with the fact of delay and its potential impact on the formulation and conduct of the defence and on the Prosecution's fulfilment of the burden of proof. Turning back to the instant case and the Appellant's submissions, we are satisfied that the judge's directions fell short of such which would have served to counter the prejudice occasioned to the Defence by reason of the delay, and thus deprived the Appellant of the fair trial that the judge rightly regarded as possible…….
>
> We have to form a view about the summing up as a whole and its efficacy in securing a fair trial. For the reasons set out we cannot be satisfied that it achieved

> that which was required. If long delayed cases are to go before juries, judges have to have a prominent role in ensuring that any convictions reflect a full appreciation of the problem, delay, and the solution, the burden and standard of proof."

[13] Counsel on behalf of the Crown submitted that it was not every case in which there had been delay that a specific direction from the trial judge was required. He referred to R v Henry 1998 2 CAR, a case of historic sexual abuse in which the court conducted a review of a number of cases in which applications for a stay of proceedings had been made on grounds of delay. This case was heard on 10 October 1997 and predated R v Percival. In R v Henry, Potter LJ, in the course of giving the judgment of the court, said –

> "We consider it is plain upon the state of the authorities to which we have referred that it is desirable in cases of substantial delay that some direction should be given to the jury on possible difficulties with which the defence may have been faced as a result of such delay. Nonetheless, such a direction is not to be regarded as invariably required except in cases where some significant difficulty or aspect of prejudice is aired or otherwise becomes apparent to the judge in the course of the trial. Equally, such a direction should be given in any case where it is necessary for the purposes of being even-handed as between complainant and defendant."

[14] R v Percival was considered in R v M (Brian) 2000 1 CAR 49. In giving the judgment of the court Rose LJ said that the judgment in R v Percival was directed towards the summing-up in that case and laid down no principles of general application as to how judges should sum up in cases of delay. It decried the growing practice in cases involving delay of relying on delay " as affording some sort of blueprint for summings-up in cases involving delay". Rose LJ went on to comment at page 57 -

> "Trial judges should tailor their directions to the circumstances of the particular case. In the case where there have been many years of delay between the alleged offence and trial, a clear warning will usually be desirable as to the impact which this may have had on the memories of witnesses and as to the difficulties which may have resulted for the defence. The precise terms of that warning and its relationship to the burden and standard of proof can be left to the good sense of trial judges with appropriate help and

> guidance from the Judicial Studies Board. In some cases, however such a warning may be unnecessary and its absence, where the evidence is cogent, will not necessarily render a conviction unsafe, particularly when counsel's submissions at trial have not highlighted any specific risk of prejudice."

[15] In R v Mayberry 2003 EWCA 782 Latham LJ identified three mechanisms which could be employed to ensure that cases involving multiple allegations of historic sexual abuse could be tried fairly. The first related to the number of counts in the indictment, the second to the power to stay proceedings as an abuse of process and the third the summing up. In relation to the latter he said –

> "…the third is by ensuring that the jury is directed as to the way in which the defendant may be prejudiced generally, and how he may be prejudiced in relation to particular allegations, ensuring that the defendant's case in respect of individual complainants is adequately presented to the jury. This requires a judge to be scrupulous about putting the defendant's case in his summing up."

[16] In R v Hughes 2008 NICA 17 this court considered an appeal in a similar case. Again criticism was made of the summing-up. In that case Campbell LJ said at paragraph 10 –

> "While the judge made sure that the jury appreciated the difficulty that a defendant faces so far as remembering where he was at a time in the distant past and therefore in producing alibi evidence he did not ask the jury to reflect on whether delay served to cast any room for doubt as to the complainants' reliability. We consider that the jury should have had it drawn to their attention that because of the delay the evidence had to be examined with particular care before they could be satisfied of the guilt of the appellant on any of the counts on the indictment. However, we would not have regarded this omission, in itself, as providing a reason for setting aside the convictions."

[17] It has long been recognised that allegations of historic sexual abuse present a trial judge with difficulties not encountered in a trial in which there is a recorded and verifiable crime and a prompt complaint and inquiry. In the absence of independent corroborative evidence the historic sexual abuse case

usually comes down to one person's word against another, in which the complainant is remembering events that are alleged to have occurred many years ago. The frailty of human memory over time afflicts everyone though the ability to recall accurately unpleasant or distressing experiences is equally well-known. These cases present considerable difficulties for an accused who denies the offence, particularly where the event is alleged to have occurred many years previously on a date unknown during a period spanning many months or longer. An accused who denies an offence alleged to have been committed on a particular day might be able to produce an alibi for that date. Not so an accused in a historic sexual abuse case where no specific date is alleged. These are only some of the difficulties which such cases can produce. A trial judge faced with such a case has an unenviable task but ultimately he has a responsibility to ensure that the accused has a fair trial. The means to secure a fair trial for an accused faced with historic allegations lie in careful directions to the jury which expose the difficulties created for accused persons and at the same time to remind the jury of the frailty of human memory in the context of the particular allegations made and the time frame concerned. Both prosecuting and defending counsel have a role to play in ensuring that proper directions are given to the jury. Counsel on behalf of the appellants, who did not appear at the trial, submitted that the direction quoted above provided the jury with no assistance on the difficulties created for a defendant in this type of case nor how the jury might approach the issues raised particularly with regard to the onus and standard of proof.

[18] The summing up in the present case contains no references to the difficulties faced by the defence arising from the delay in making the complaints, though it was considered that counsel who then appeared on behalf of the appellants would have raised those issues with the jury. There is no reference to the difficulty of producing alibi evidence nor were the jury asked to reflect on the effect of the passage of time on the reliability of the evidence of any of the witnesses. While this was a case involving several complainants each giving roughly similar accounts of sexual assaults by the appellants the jury nonetheless had to consider the evidence of each individual complainant and the case against each appellant separately. Even where counsel for the defence may not raise any specific difficulty or prejudice, there is a responsibility on the trial judge to do so, where such difficulty or prejudice becomes apparent to him or where it is necessary to ensure even-handedness between the complainant and the defendant. The principle underlying this is the right of the defendant to have a fair trial of criminal acts alleged to have occurred a long time before. The learned trial judge identified correctly that it was difficult to imagine that memories of such assaults would dim over time however he did not remind the jury that this was not universally so and that they had to examine the evidence of each complainant carefully with that in mind. Furthermore nowhere did he allude to the difficulties created for the appellants in countering such allegations alleged to have occurred many years before. Crucially he did not refer to the

further difficulty for the applicants that the exact date was unknown and that the events were alleged to have occurred between dates spanning many months or longer. The defence put forward was that the allegations were deliberately concocted to obtain money. Nonetheless after rejecting that defence, as they clearly did, the jury required to consider all the allegations made after the passage of considerable time and the difficulty for the defence in countering them for example through alibi evidence. If anything, the nature of the defence put forward highlighted the difficulties for the appellants in putting forward a credible rebuttal of the allegations. The learned trial judge should have made some reference to the difficulties that allegations of sexual abuse many years in the past can create for defendants. In cases of this nature it is not necessary to follow any particular formula provided the jury are made aware of the difficulties such allegations create for defendants, as well as for the complainants. While the learned trial judge referred to the likelihood that such abuse experiences would not dim in the memory over a substantial period of time, he made no reference to the difficulty that the lapse of such a period of time would create for those complained against. The summing up on the passage of time was not balanced as between the complainants and the defendants. The way the matter was left with the jury was that either the allegations were true or false. While in one sense that was correct, it overlooked the question whether the recollections of the complainants (particularly in relation to those events alleged to have occurred over the longest period of time) were accurate and reliable. In some instances the complainants were quite young at the time the abuse was alleged to have occurred. These were issues about which the jury were entitled to some direction from the trial judge, that is, how to deal with those issues if they rejected the defence put forward that the allegations arose from a conspiracy between the complainants. To adopt the words of Holland J in R v Percival it was necessary for the judge to confront the jury with the fact of delay and its potential impact on the formulation and conduct of the defence and on the prosecution fulfilment of the burden of proof.

Good character

[19] In his summing up the learned trial judge directed the jury about the significance of good character. In doing so he told the jury (page 14 of the summing-up)–

> "Now before I go any further there is one other matter of general importance. How do you go about assessing matter of good character? You have heard that Mr Wade has no record. He is a family man who, despite a poor beginning, got to the stage that he was selling sites, building getting quotes. He is obviously reasonably well off. He is also a family man. He was in the UDR from which he was medically discharged.

> You heard Dennis McCalmont (inaudible) no insurance matters. A small fine, I think for possession of a petrol bomb when he was very young and a few other minor matters some time ago, a long time ago. He has got a discharge from the Army. He had a short career in the Royal Irish with an exemplary discharge. Now you take that into account in two ways. The first is that you take everything that you know about a witness into account when you are deciding 'Do I believe what that witness tells me or do I reject it. Secondly you are entitled to put their character, the character of an accused in the equation when you are weighing up the evidence and whether you believe it is more or less likely that he would do the things alleged against him, so it is two-fold."

[20] Later (at page 82 of the summing-up) he reminded the jury that they should also take into account Mr Wade's clear record when deciding whom they believed. Counsel on behalf of the appellants submitted that this direction is inadequate in two respects. Firstly, the trial judge failed to follow the accepted direction on good character and secondly he failed to mention, in the context of a historic sexual abuse case, the likelihood of a man of the appellant's character having committed the type of offence with which he is charged. In any case in which a defendant gives evidence his good character is relevant to the issue of his credibility. It is also relevant to whether he would commit the type of offence with which he has been charged. It is not necessary that a trial judge uses a particular form of words or a standard form of words in directing a jury on the question of good character provided he deals with these two issues in the context of the allegations made. The appellant Wade was of good character having no previous convictions. The appellant McCalmont did have previous convictions. In the passage quoted above the learned trial judge dealt with the issue of character of both appellants together rather than separating them. The appellant Wade was entitled to a full direction relating to his character, whereas his co-accused was not. The judge mentioned the good character of Wade and then the convictions of McCalmont with his exemplary Army discharge and then stated -'You take that into account in two ways'. He then said you take everything into account that you know about a witness when deciding whether you believe him or not. He then said you are entitled to put character in the equation when weighing up the evidence and whether you believe it more or less likely he would commit the offences alleged against him. That direction had the effect of weakening the significance of the relevance of good character to credibility and to the likelihood of a man of the appellants' character committing the offence with which he was charged. That was particularly so in the case of Wade who was entitled to rely on his good character. While McCalmont had some previous convictions when he was

younger he was relying on his exemplary Army discharge as a more recent indication of his character. Each was entitled to a specific direction on character tailored to their individual circumstances but more particularly a direction as to the likelihood of persons with their individual characters committing the offences with which they were charged always remembering that it was their characters over a long period of time that the jury were considering.

The Guilty Pleas of W

[21] The trial commenced on 25 May 2004. On 2 June 2004 W pleaded guilty in the presence of the jury to Counts 46 and 47 and was found guilty by confession by the jury. Count 46 related to an indecent assault of F between 1 August 1999 and 1 January 2000 and Count 47 to an indecent assault of F between 31 December 1999 and 1 July 2000. The next witness to given evidence was E whose evidence took the remainder of 2 June and all of 3 June. F was then called to give his evidence on 4 June 2004. The applicant Wade faced three counts in which F was the alleged victim. Count 41 alleged gross indecency with or towards F on a date unknown between 1 August 1982 and 1 July 1983; Count 42 alleged indecent assault on F on a date unknown between 1 August 1982 and 12 September 1988 and Count 43 alleged Gross Indecency with or towards F between 1 July 1983 and 12 day of September 1989. Between 1982 and 1989 F would have been aged between almost three years of age and 11 years of age. No direction was given by the learned trial judge about the relevance of those pleas either at the time the pleas were entered or in his summing-up to the jury. It was submitted by counsel on behalf of the applicant Wade that in the absence of a firm direction by the learned trial judge to ignore these pleas when considering the counts in which F alleged offences by the applicant Wade, there was a real danger that the jury would use those pleas to support or enhance the credibility of F in their consideration of the counts against the applicant Wade. It was accepted by the prosecution that the learned trial judge did not refer to these pleas specifically in the course of his summing-up. However prosecuting counsel submitted that at various times the judge did direct the jury about what they could take into account when considering the various counts in the indictment. Whether to direct a jury about pleas of guilty which occur during the trial is very much a matter for the discretion of the trial judge. It is not every case that demands a specific direction. In some cases it may be otiose as it is so obvious. In other cases it may be counter productive. Much will depend on the timing of the pleas and the nature of the cases. While the judge did direct the jury correctly about what they could take into account, in this instance the pleas of guilty by W to indecent assault of F between the dates alleged and their timing shortly before the evidence of F, called for a specific direction by the learned trial judge about the effect of these pleas of guilty and more particularly that they could have no bearing on the veracity of F in his complaints against the applicant Wade.

The danger of contamination

[22] The complainants were well-known to each other. There was clear evidence that two of the complainants had spoken amongst themselves on many occasions about what they alleged had occurred. There were similarities in the allegations which they made though, given the nature of the cases on a general level, that is not surprising. However in some instances the allegations were as the learned trial judge observed 'very similar'. It is not disputed that the judge told the jury to consider each count and the evidence about it separately. Equally he reminded the jury that the similarities between the evidence of two of the complainants provided no mutual support of their allegations. The defence case was that the allegations arose from a conspiracy between the complainants. It was submitted that in view of the undoubted fact that they had spoken many times about the alleged abuse there was a danger of contamination of the evidence and that this called for a specific direction from the judge on this issue. Reliance was placed on R v Paul 2002 EWCA Crim 2168 and R v D (CR) 2004 1 Cr App R 19. In the former case the appellant was convicted of 7 counts of sexual abuse of two male children (referred to as MH and BT). Four counts related to one child and three counts to the other. The allegations were eleven years apart. An application for severance was rejected on the basis that the jury would be directed to consider the allegations separately, which the trial judge did. The issue in the appeal was whether the counts should have been tried together. The case was not presented as one of similar fact though there were some similarities in the factual allegations that were made. In the course of his judgment allowing the appeal Laws LJ said –

> "12. ……. In the result then there was of course no direction, as would be required if this were a case of similar fact or mutual corroboration, that the jury should be alert to see whether there was any question of collaboration between the complainant witnesses or innocent contamination of the evidence of one by the other. Nor was there, we should add, any direction at all as to the effects of the quality or the prosecution evidence, and the opportunities of the defendant to defend himself, created by the passage of time since the alleged offences against MH; and it is to be remembered that the offences in his case consisted of two specific incidents which the defendant no doubt in the ordinary way would have wished to test and probe."

Later at paragraph 20 he said –

> "20. We have been greatly concerned as to the overall picture here and the form of the summing-up. The mutual admissibility of the evidence on each set of allegations in proof of the other is in this case at the margin. Had the case been treated as one to which DPP v P applied there would at least have been the safeguards of appropriate directions as to how the jury should treat the relationship between the two sets of evidence, including a direction as to the risk of collaboration or innocent contamination. As we have said, absent legitimate mutual evidential support between the charges, these offences should not have been tried together. The risk of the jury's view of one set of counts affecting their view on the other was very real. Indeed we consider that even if this were not a DPP v P case, the defence was at least entitled to a direction in relation to innocent contamination concerning the BT charges, having regard to the defence of accident put forward in relation to them and the possibility that BT knew something of the MH case when he first described what he said had happened to him."

[23] In R v D a stepfather was convicted of rape and other sexual offences against his two stepdaughters. The charges were tried together and no reliance was placed on similar fact. The appellant appealed on the ground that the judge failed in his summing-up to deal adequately with how the jury should approach the fact that they were considering cases involving two complainants in the same indictment. In allowing the appeal it was held hat the counts were properly joined. However in the circumstances it was essential for the jury to be directed in clear terms that the evidence on each set of allegations was to be treated separately and that the evidence in relation to an allegation in respect of one complainant could not be treated as proof of an allegation relating to the other complainant. The directions given by the trial judge did not make this sufficiently clear and the risk arose that the jury had not given the required separate consideration to the evidence of the complainants. Therefore the convictions were unsafe. Counsel on behalf of the appellant submitted that even though the case was not one of similar fact nonetheless, relying on R v Paul, the judge should have given a collusion or contamination warning to the jury. In rejecting that submission Nelson J in the course of the judgment of the court observed -

> "28. In so far as collusion or contamination is concerned, much will depend upon the facts of the individual case as to whether or not a warning as to the risk of collusion or contamination must be given

> even where similar fact does not arise in joint trials. Such a warning was necessary on the particular facts of Paul. Here, however, a reminder that one of the complainants may have simply been trying to back up her older sister's account was in fact given and we consider that that was sufficient in the circumstances."

[24] We agree that much will depend on the facts of an individual case whether a warning about the danger of collusion or contamination should be given. It is clearly not necessary in every case in which there are several complainants. It was accepted that the learned trial judge did direct the jury about the need to consider each count separately and also about the applicants defence that the complainants conspired to make false allegations against them. The latter dealt adequately with the issue of collusion. Counsel on behalf of the applicants submitted that the judge did not deal with the possibility of contamination either innocently or deliberately. It was suggested that he should have warned the jury to consider whether the complainants may have been consciously or subconsciously influenced through talking to one another about their alleged experiences, either to make a complaint or in the detail of the allegations which they made. It is clear as prosecuting counsel demonstrated that on numerous occasions in the course of his summing-up the learned trial judge was at pains to impress upon the jury the need to consider each count separately and to avoid using the evidence of one complainant to bolster or support the evidence of another. Given the regularity of contact between the complainants, understandable due to their residences and relationships, and the frequency of their conversations about what they were alleging and in particular the similarity in the complaints made by two of the complainants, this was a case which required some reference to the possibility of contamination either innocent or deliberate, conscious or subconscious.

Onus and Standard of Proof

[25] It was submitted that in the course of that part of his summing-up dealing with the defence case the learned trial judge did not direct the jury that the burden of proof, to the appropriate standard, rested with the prosecution throughout the trial and that it was not for the defence to prove their innocence or to provide any explanation why the complaints had been made against them. No complaint is made of the way in which the judge dealt with the detail of the applicants' defence. Prosecuting counsel submitted that the learned trial judge had directed the jury properly about both the onus and standard of proof. He referred to several passages in the summing up. At page 3 the judge said –

> "The burden remains with the prosecution throughout. The prosecution has to proved the accused guilty and the standard is best expressed by the words you will have heard before 'beyond reasonable doubt'."

Earlier he told them that –

> "If there exists in your mind at the end of the day a reasonable possibility that an accusation is false, having considered all the evidence for and against on that particular accusation then you will give the benefit of the doubt to the individual accused."

[26] Later on page 3 he reminded them if they were not sure or had a reasonable doubt that they should acquit. At page 22 he dealt with the defence case generally. He stated –

> "The defence case is – and again I emphasise that I will be asking you to look at each allegation individually – the thrust of the Defence case has been perhaps understandably to deny the allegation and perhaps understandably to seek to explain why false allegations are made. As I have said, although the allegations cannot be taken as supportive of each other its only a matter of commonsense that the Defence should seek a common reason as to why it says that false claims are made, and I am going to go into this in some detail."

[27] The standard direction on the onus and standard of proof involves telling the jury that before they can convict an accused they must be satisfied beyond reasonable doubt of his guilt and that proof that he is possibly guilty or probably guilty is insufficient. It also involves telling the jury that the onus of proving the guilt of an accused lies on the prosecution case throughout the trial and that there is no onus on the accused to prove his innocence or any fact from which his innocence may be inferred. In this case the applicants' case was that the allegations made against them were false and that they were the result of a conspiracy between the complainants. In view of the number of complainants and allegations it was incumbent on the learned trial judge to direct the jury that not only was there no onus on the applicants to prove their innocence but specifically there was no onus on them to explain why so many complaints were made against them and by a number of complainants. In the passage quoted above from page 22 of the summing-up the judge referred to it being only commonsense that the "Defence should seek a common reason as it why it says that false claims are made". That passage suggests that it was

for the applicants to provide a reason why the allegations were made against them. Combined with an absence of a clear direction that the onus lay on the prosecution throughout and that there was no onus on the applicants to prove their innocence or to provide any explanation for the numerous allegations made against them there is a real risk that the jury may have been left with the impression that there was some onus on the applicants and that it was for them to provide some explanation for all the allegations made against them. The applicants did put forward an explanation, namely the conspiracy, nonetheless it remained necessary for the learned trial judge to make clear to the jury that there was no onus on them to do so. The passage above may well have left them with the impression that there was.

Doli Incapax

[28] The applicant McCalmont was born on 3 April 1962. He was convicted of four counts of indecent assault on A on dates unknown between 12 June 1975 and 14 June 1977. Count 1 was a specific count but on a date unknown and Counts 2, 3 and 4 were specimen counts. McCalmont did not attain the age of 14 years until 3 April 1976. In the absence of a specific date any one of these four offences could have been committed before he attained the age of 14 years. The applicant Wade was born on 11 April 1960. He was convicted of three counts of indecent assault on E on dates unknown between 19 October 1973 and 21 October 1974. Counts 32 and 33 were specific counts alleged to have occurred on the same occasion. Count 34 was alleged to have occurred a few weeks later. While the charge was indecent assault the physical act alleged was rape. He was under the age of 14 years at the time and thus presumed to be incapable of rape and was indicted for indecent assault and not for rape. During the dates alleged in these counts Wade was aged between 13 years and 6 months and 14 years and 6 months. In the absence of a specific date any one of these three counts could have been committed (if committed) before he attained the age of 14 years.

[29] Prior to December 1998 the concept or doctrine of doli incapax was applicable in our criminal law as a presumption. This doctrine presumed that a child under seven years of age was incapable of mischief whereas a child over 7 and under 14 years was incapable of a crime unless it was shown affirmatively that such a person had sufficient capacity to know that the act which he had committed was wrong (see Stephens Digest of the Criminal Law Article 25). Blackstone in his Commentaries on the Laws of England Fourth Book Chapter 2 put it this way –

> "During the first stage of infancy and the next half stage of childhood, infantiae proxima, they were not punishable for any crime. During the other half stage of childhood, approaching to puberty from 10½ to 14, they were indeed punishable, if found to be doli

> capaces, or capable of mischief; but with many mitigations and not with the utmost rigour of the law. During the last stage (or the age of puberty, and afterwards) minors were liable to be punished, as well capitally, as otherwise."

[30] This common law rule was in effect abolished by Article 3 of the Criminal Justice (Children) (Northern Ireland) Order 1998 which provided that –

> "Age of responsibility
>
> 3. It shall be conclusively presumed that no child under the age of 10 can be guilty of an offence."

[31] This Article does not apply retrospectively and consequently offences committed prior to December 1998 are subject to the common law doctrine which is rebuttable by evidence that the accused knew that what he was alleged to have done was wrong; in other words that at the relevant time he was doli capaces. The onus is on the prosecution to do so and no such evidence was called in this case. It is possible for the doctrine to be satisfied by circumstances relating to the commission of the offence for example something said or done by the accused at the time. However nothing was said or done in this instance to satisfy the test. The prosecution did not seek to resist the submissions made by counsel on behalf of the applicants on this issue.

[32] The application for the admission of the evidence of Dr Conway as fresh evidence under Section 25 of the Criminal Appeal (Northern Ireland) Act 1980 has been dealt with in the judgment of Coghlin LJ. Quite apart from that it is clear that the complainants in some instances were giving evidence about events alleged to have taken place many years ago when they were quite young. This raised two matters. First their understanding, given their age, of what they alleged took place and the reliability of it and secondly their ability to recall the events many years later. Some direction to the jury about the need for caution when dealing with the evidence of witnesses recalling alleged events when they were quite young and which allegedly took place a long time before was necessary. This was a difficult trial not least for the reasons set out in this judgment but also because of the tensions which arose both inside and outside the courtroom during the trial.

[33] Section 2 (1) of the Criminal Appeal (Northern Ireland) Act 1980 provides that the Court of Appeal shall allow an appeal against conviction if it thinks that the conviction is unsafe and shall dismiss such an appeal in any other case. Until 1995 this section provided that an appeal lay on grounds: (a) that the verdict was unsafe or unsatisfactory; (b) a wrong decision had been

reached on a question of law; or (c) there had been a material irregularity in the course of trial; with the proviso that an appeal might be dismissed if no substantial miscarriage of justice has occurred. These various grounds were replaced by the simple formula that the Court of Appeal should allow the appeal "if it thinks that the conviction is unsafe". In R v Pollock this court identified the principles to be applied when considering whether a conviction is unsafe within the meaning of Section 2(1). In that case Sir Brian Kerr Lord Chief Justice after considering various cases said -

> [32] The following principles may be distilled from these materials: -
>
> 1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.
>
> 2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
>
> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
>
> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[34] Applying those principles to these appeals we concluded, for the reasons set out in this judgment on the various issues raised, that the convictions of the applicants could not be regarded as safe and consequently allowed the appeals.