Neutral Citation No: [2021] NICA 14 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **TRE11424** *ICOS No:* *Delivered:* **19/02/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

R

v

PATRICK CARTON

Richard Greene QC with Stephen Toal for the Applicant
Philip Mateer QC with Laura Ievers for the Crown

Before: Deeny LJ, Treacy LJ & Sir Paul Girvan

<u>TREACY LJ</u> *(Delivering the Judgment of the Court)*

Reporting Restrictions

[1] The complainants are all entitled to automatic lifetime anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1991, as amended.

Introduction

[2] The single judge, Horner J, refused leave to appeal against conviction on all grounds. The application for leave to appeal was renewed before us. We dismissed the appeal against conviction and our detailed reasons are set out below. The single judge granted leave to appeal against sentence. We allowed the appeal against sentence for the reasons contained in our earlier ruling.

[3] The application for leave to appeal the conviction is out of time, no satisfactory excuse is apparent and indeed the prescribed forms contain no application for an extension of time. The single judge noted in his decision that the excuse offered was that counsel was on leave for approximately three weeks after the trial ended and was engaged in other pressing criminal matters, namely an historic sexual abuse trial in Antrim from 16-28 April and a Court of Appeal case on

26 April. Horner J noted that this excuse was far from satisfactory. He correctly noted that it was counsel's responsibility to ensure that the application for leave was made within the period prescribed by the rules. He rejected as unacceptable the explanation that this was a lengthy and complex trial which required careful consideration.

Amended Grounds of Appeal

[4] Three of the grounds are entirely new and were sought to be introduced in an irregular fashion, not using the prescribed forms and with no proper application for an extension of time much less an explanation for the delay. The original trial counsel, Mr Barlow, not only did not raise these grounds in the original Notice of Appeal he specifically commented that the charge to the jury issued by the trial judge was:

> "… save for the legal issue that arises below, … extremely fair, balanced and the jury reminded of the key Prosecution and Defence points. In fairness to an independent listener, it may even be said that the charge was tailored to the Defence."

[5] Mr Barlow was entirely correct in our view to have made the observation set out at paragraph [4] above in light of the detailed and carefully crafted direction which the trial judge gave to the jury. The direction on indecent assault was the subject of discussion with counsel and his direction on the law relating to indecent assault was reduced to writing. We note:

(i) defence of reasonable chastisement was not raised in the defence skeleton;
(ii) it was not suggested for inclusion in the direction to the jury;
(iii) was not the subject of any requisition;
(iv) did not feature in the original grounds of appeal;
(v) has only recently sought to be introduced;
(vi) no application for extension of time; and
(vii) no reason given for the delay.

<u>R v Brownlee</u> – Principles Governing Extension of Time

[5] The grounds for extending time for leave to appeal are set out by the LCJ in <u>Brownlee</u> [2015] NICA 39:

> "[8] From this examination of the authorities we consider that the following principles governing the exercise of the discretion to extend time to apply for leave to appeal can be derived:

(i) Where the defendant misses the deadline by a narrow margin and there appears to be merit in the grounds of appeal an extension will usually be granted. This occurs most frequently when the application to extend time for a conviction appeal is lodged immediately after sentencing.

(ii) Where there has been considerable delay substantial grounds must be provided to explain the entire period. Where such an explanation is provided an extension will usually be granted if there appears to be merit in the grounds of appeal.

(iii) The fact that a person involved in the crime subsequently receives a more lenient sentence will generally not be a satisfactory explanation for any delay in an appeal against sentence. A defendant should take a view about his attitude to the sentence at the time that it is imposed.

(iv) A convicted defendant will usually get advice on any grounds for appeal from his legal representatives at the end of the trial. It will normally not be an adequate explanation for considerable delay that the defendant has sought further advice from alternative legal representatives.

(v) Where the application is based upon an application to introduce fresh evidence the court may extend time even where a considerable period has elapsed as long as the evidence has first emerged after the conviction, the circumstances in which the evidence emerged are satisfactorily explained, the applicant has moved expeditiously thereafter to pursue the appeal and the evidence is relevant and cogent.

(vi) Even where there has been considerable delay or a defendant had initially taken the decision not to appeal, an extension of time could well be granted where the merits of the appeal were such that it would probably succeed."

The explanation for the delay is unsatisfactory and wholly inadequate. Nevertheless, we have evaluated each of the grounds of appeal in order to decide

whether the merits of the appeal are such "that it would probably succeed" but do not consider that this is an appropriate case to extend time because the grounds advanced lack any merit for the reasons set out below.

Background

[6] This is a renewed application for leave to appeal against conviction in relation to 29 counts of indecent assault perpetrated against 6 different complainants. At the time of the assaults the applicant was a private tutor engaged by the parents of the complainants to tutor them in maths. Of the 6 complainants, 5 were female and 1 was male. Three of the female complainants were sisters. Under section 1 of the Sexual Offences (Amendment) Act 1992, all the complainants are entitled to automatic lifetime anonymity in respect of these matters. Accordingly, we will refer to them by initials as follows: F, S1, S2, J, K and E.

[7] The applicant is a retired school teacher now in his late seventies. He is married with 5 children and 16 grandchildren ranging in age from 9 months to 19 years. He suffers from ischaemic heart disease, has breathing and hearing difficulties and has been diagnosed with a basal cell carcinoma affecting his face. Apart from a minor road traffic conviction many years ago he has no previous convictions. For many years he was a well-respected member of the community having taught maths in a well-known grammar school until his retirement at age 60. After his retirement he was engaged by various parents, some of whom were friends or acquaintances of his, to provide private maths tuition to their children, generally in the children's own homes but sometimes in other locations.

[8] The applicant was originally arraigned in relation to 24 counts which all related to indecent assaults on the first 3 complainants mentioned above who are sisters. He pleaded not guilty to all the charges. In response to publicity related to the case further complainants then came forward and the trial was adjourned to allow these to be investigated. The applicant was then further arraigned before Judge Sherrard in relation to 5 additional counts on 18 January 2018. These counts related to the last 3 complainants mentioned above.

[9] In 2018 the applicant was tried on 29 counts of indecent assault against 6 complainants, 5 female and 1 male. He was convicted unanimously on 28 of these charges and convicted by an 11 - 1 majority in relation to the final charge. Fourteen of the 29 counts related to spanking the complainants. All 6 complainants alleged a similar pattern of spanking. Generally the spanking was skin to skin on the bare bottom when the applicant had either placed the complainants over his knee or made them assume some other prone/vulnerable position such as lying on a bed with exposed buttocks. In the case of the last 3 complainants, all the indecent assaults related to this form of spanking. In all but one case the spanking was skin to skin and in one case the complainant refused to remove her clothing and she was assaulted over clothing.

[10] The 15 remaining counts all relate to the sisters who are the first 3 complainants listed above. These counts related to other forms of sexual abuse including digital penetration of the vagina, touching of exposed private parts of the complainants and/or causing the complainants to touch the private parts of the applicant. In one case there are specimen charges of kissing. In addition to these further forms of assault, all three sisters also suffered indecent assaults by spanking of the same kind as was alleged by each of the other complainants.

[11] The course of offending engaged in by the applicant spanned a total period of some 25 years. The first allegation was in or around 1983 and the latest was around 2007. The offending was not continuous throughout this time span. It occurred intermittently within the above time frame. The duration of the course of offending suffered in each case is as follows:

- F: 1.7.91 - 30.6.94
- S1: 30.8.91 - 30.6.96
- S2: 31.8.93 - 30.6.95
- J: 17.2.83 - 30.6.84
- K: 1.9.91 - 3.6.93
- E: 1.9.06 - 30.6.07.

Grounds of Appeal

Ground 1 - 'reasonable chastisement'

[12] The defence now claims that the prosecution was obliged to disprove the defence of 'reasonable chastisement', which it submits would have operated as a complete defence, when no such defence was ever raised in the Defence Statement, in its presentation of the defence case or in any requisition to the trial judge on his charge to the jury. As the prosecution notes: 'this ground of appeal is a late assertion - never made at trial'.

[13] Moreover, this proposed defence is inconsistent with the evidence given by the applicant himself in the course of his cross examination, for example, his statement to the jury: 'I don't use punishment: I hate punishment' - see p391 of Defence Book 2.

[14] We consider that the proposed introduction of an entirely new argument at the appeal stage of any case is unacceptable and all the more so when, as in this instance, it conflicts with the case actually made by the defence in the course of the trial. For these reasons we reject this ground of appeal.

Ground 2 - Counts not mutually supportive

[15] The defence claims that the trial judge was obliged to direct the jury in clear terms that the evidence in relation to each set of allegations must not be relied upon in support of any other allegation in the case. This is based on the authority of D [2004] 1 Cr App R 19 in which it is stated at para 26:

> "Where ... the Crown do not rely on similar fact and the charges are not severed, it is essential that the jury is directed in clear terms that the evidence on each set of allegations is to be treated separately and that the evidence in relation to an allegation in respect of one victim cannot be treated as proof of an allegation against the other victim. If such a warning in clear terms is not given there is a risk that the jury may wrongly regard the evidence as cross-admissible in respect of each separate set of allegations…"

[16] The jurisprudence in relation to this proposed direction was reviewed in the case of H [2012] 1 Cr App R 30 where it was stated:

> "We consider that in the light of this jurisprudence as a whole the suggested direction in D has not fared well as a ground of appeal. It has never been part of a standard JSB Direction. No complaint could be made about the giving of such a ...direction but we believe that Scott Baker L.J. was right to say it is **not required as a rule of law. Everything depends on the directions and facts of a particular case ..."**
> **[Emphasis added.]**

[17] In the current case the trial judge was required as a matter of law to give a 'separate treatment' direction and he did so, specifically, clearly and repeatedly in the course of his 2 day long direction to the jury. What is important in every case of this kind is whether the jury would understand clearly from the directions given by the judge that the evidence on the different counts was not mutually supportive. This 'sensible overview' approach is validated even in the D case itself where the court said at para 27:

> "We agree with the submissions made on behalf of the Crown that a sensible overview of the judge's directions must be taken, rather than a minute analysis capable of depriving the direction of its ordinary meaning. Were it not to be so there is a risk that the wood may be missed for the trees."

[18] We have reviewed the entire direction given by the trial judge and are satisfied on the basis of that review that he dealt appropriately with this matter. He carefully compartmentalised his review of the evidence in relation to each individual charge. We do not consider that the jury could have had any doubt at the end of his careful charge that it was their duty to consider each count separately in the light of the evidence related to that specific count alone. We therefore dismiss this ground of appeal.

Ground 3 – Failure to properly direct on possible collusion and contamination

[19] The defence complaint is that there was no judicial direction from the trial judge on either contamination or collusion. They assert that such a direction was necessary and ought to have come 'as a separate judicial direction from the bench.'

[20] Clearly in a case of this kind where there are overlapping complaints describing patterns of alleged offending with some common features and these complaints are made by 6 different complainants, 3 of whom are closely related to each other, the issues of possible collusion and contamination are real and do require to be addressed by the judge dealing with the case. Whether this requires a specific and separate judicial direction is a different question.

[21] The law in this area was reviewed in the case of R v McCalmont [2010] NICA 27, an historic sex case in which part of the defence case was that the allegations arose from a conspiracy between the complainants. That appeal succeeded, partly because the trial judge had not specifically dealt with the possibility of contamination. In reaching this decision the court quoted with approval the dictum of Nelson J in the case of D where he said:

> "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 ..."

[22] The court in McCalmont echoed this at paragraph 24 of its judgment where it said:

> "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 where there are several complainants."

[23] In McCalmont there was evidence of frequent conversations between the complainants about what they were alleging and there was marked similarity in the complaints made by two of the complainants. The facts of the present case are different. In this case, even among the complainants who were blood relatives, there

were specific and individual differences related to the forms of abuse they each alleged including differences in the nature, frequency and duration of the abuse alleged in each case. Overall, the allegations even of the three sisters cannot be said to be 'very similar'.

[24] Broadly similar allegations of spanking were made by all six complainants, several of whom were quite unknown to each other. However, in this case it is also a fact that the applicant's own evidence to the jury included a broad admission that spanking did happen during his tutoring sessions. In all the circumstances the presence of a similar allegation of spanking from all complainants is not an indicator that a specific and separate judicial direction on the risk of collusion and contamination is a legal requirement in the case.

[25] In the present case the potential for collusion and contamination was fully explored with each witness during their cross-examination by defence counsel. Also, in his charge to the jury the trial judge repeatedly cautioned them about the risk of potential contamination. He reminded them of the points made by counsel about this risk and told them it was up to them to bear this risk in mind when evaluating the evidence.

[26] On the facts of the present case we are satisfied that the trial judge's direction sufficiently covered the issues of potential collusion and contamination and that a separate judicial direction on this point was not necessary in this case.

Ground 4 – Material Irregularity

[27] This ground of appeal is founded on the contention that a particular document should have been disclosed during the trial. It was not in fact disclosed until the date of plea and sentence. The document consists of 2 pages extracted from a notebook held by JS who made a complaint against this applicant. She alleged that she was indecently assaulted by the applicant who was her maths tutor. JS was a tutee of the applicant's at a period prior to the female complainants on the indictment. She said that she was smacked on the bare bottom during lessons. On 14th August 2017 she handed to police a notebook which she had used. This notebook was in turn produced to the applicant when he was interviewed in the presence of his solicitor about her allegations 3 days later.

[28] The officer in charge of the overall investigation had been present during the "JS" interview as had a solicitor from the firm retained by the applicant for the trial. The file relating to the "JS" allegations had been submitted to the PPS for direction at the time the trial had commenced. The evidence of the notebook was therefore within the knowledge of a number of parties including the applicant himself. When the attention of the PPS directing officer was drawn to the document he considered that the document did not meet the test for disclosure but confirmed that it would be available for inspection on the date of the plea.

[29] This document was said to be relevant to the applicant's case about his use of the "star system" as part of his tutoring. JS's original maths workbook was produced by the officer in charge and it is claimed that it contained material that went to support what the applicant had been saying. The applicant states that a copy of the two back pages of JS's workbook was taken which show mathematical formulae and where common mistakes can be. There are said to be stars on the left side of each page representing the star or points system which the applicant says he used as part of his teaching method and the number of stars represented whether the pupil would be smacked over clothing, under clothing, over underwear or on the bare bottom. It is contended that this exhibit independently supported the applicant's case and that it should have been disclosed. Under cross-examination F and her sister both denied any conversation with the applicant about the point/star system. The applicant maintains that these copy pages together with all the material in regard to JS's should have been disclosed as the notebook would have meant defence counsel could have cross-examined the sisters in detail as to the existence of "notebooks" and the recording of the system in them and this would have assisted the defence case and undermined the Crown's case. This failure of disclosure is said to represent a material irregularity impacting on the fairness of the trial and therefore the safety of the conviction. We do not agree with these submissions which are decidedly threadbare.

[30] The real issue before the jury in this case was not whether the applicant operated some sort of formalised spanking system but whether he was gratifying his sexual urges and desires by taking the opportunity presented to indecently assault these victims. Plainly the jury were satisfied beyond reasonable doubt that each of the young victims was indecently assaulted. The jury heard and observed the evidence of the complainants, other prosecution witnesses and the evidence of the applicant himself – including about the so-called "star system." The jury were given an extremely fair and balanced charge by the trial judge which defence trial counsel observed "may even …. be tailored to the defence."

[31] Had the notebook been deployed by the defence in this trial, the prosecution would have given consideration to calling JS to explain what correlation there was between the notebook entries, the applicant's assertion as to what they meant in her case; and whether in practice, the experience of JS was such as to confirm or refute the applicant's claims. We agree that this is unlikely to have been appealing to the defence and the deployment of the notebook in evidence before the jury is more of a theoretical than realistic possibility.

[32] A failure on the part of the prosecution to make proper disclosure may, in serious cases, provide a basis for appeal. As for the approach to failures in disclosure undermining the safety of a conviction, these are referenced at paragraph D9.28 of <u>Blackstone</u> (2021). As <u>Blackstone</u> therein observes, a conviction will not be considered unsafe if the undisclosed material can be said to be insignificant to any real issue in the trial. The courts have repeatedly emphasised the distinction to be drawn between material which ought to have been disclosed by the prosecution and

the consequences of that failure. It is only in cases where it can be considered that the failure of disclosure renders the conviction unsafe that an appeal will succeed. In considering this ground the Court of Appeal is required to consider whether the material in question should have been disclosed and, if so, whether the failure to disclose it renders the conviction unsafe. As stated in R v Hadley [2006] EWCA Crim 2544 "it does not necessarily follow that because the first question is answered in the affirmative the second question must also be answered in the same way…"

[33] In Hadley the court said:

> "[27] The question we have to consider is whether the convictions are unsafe. We accept Mr. Morris's submission, therefore, that we should approach the matter by asking ourselves, first, whether the material in question should have been disclosed, and if so, whether the failure to disclose it renders the convictions unsafe. It does not necessarily follow that because the first question is answered in the affirmative the second must also be answered in the same way, as the decision in *Craven* demonstrates. *Craven* was an unusual case in that additional evidence of a compelling nature which supported the conviction had become available by the time of the appeal. Nonetheless, we recognise that there may be other cases in which the nature and degree of the assistance capable of being derived from the undisclosed material will be insignificant in the context of the other evidence before the jury and that as a result the court is left in no doubt that it would not have affected the outcome. Thus, in *R v Alibhai* [2004] EWCA Crim 681 the court recognised in paragraph 57 that
>
> > "even where there has been a failure on the part of the prosecution to make disclosure, this court will not regard a conviction as unsafe if the non-disclosure can properly be said to be of "insignificance in regard to any real issue": see *R v Maguire*, (1992) 94 Cr App Rep 133 at page 148." (see also R v SC (2018) NICA 39)

[34] We are satisfied that the JS notebook was insignificant to any real issue in the trial and we do not consider that the failure to disclose it renders the convictions unsafe.

Ground 5 – Lurking doubt

[35] The defence asserts broadly and without supporting evidence that there is a 'lurking doubt' - 'a significant sense of unease about the correctness of these verdicts when a reasoned analysis of the evidence and directions provided is considered.'

[36] We see no basis for this assertion. The trial judge gave a fair charge to the jury. The jury was entitled to reach the view that it did on the evidence it heard. On 28 of the 29 charges the jury was unanimous in deciding that the applicant was guilty. On one charge he was convicted by an 11 - 1 majority of the jury. We consider that there was no lurking doubt in the minds of these jurors and we see no material that causes us to have any doubt about the safety of these convictions.

[37] For all these reasons we dismiss this appeal.