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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

RD

Mr Brendan Kelly QC with Mr Mark Barlow (instructed by Higgins, Holywood, Deazley) for the Applicant
Mr Richard Weir QC with Mr Michael McAleer (instructed by the Public Prosecution Service)

Before: Keegan LCJ, Treacy LJ and Colton J

KEEGAN LCJ (delivering the judgment of the court)

Introduction and Reporting Restrictions

[1] The applicant was convicted of five sexual offences after a trial at Dungannon Crown Court which took place between 6 June 2017 and 21 June 2017 before His Honour Judge Neill Rafferty QC, the learned trial judge. This is his application for leave to extend time and appeal against conviction, leave having been refused by the Single Judge, O'Hara J.

[2] The applicant is the father of two children who are the complainants in this case. These two complainants are protected by section 1 of the Sexual Offences (Amendment) Act 1992. Therefore, no matter shall be published which might lead to their identification. Given the familial connection the applicant must not be identified either and so he is referred to by the initials given above. We shall refer to the complainants as X, who is a male child now aged 15, and Y, a female child now aged 12.

[3] The Bill of Indictment contained nine counts of sexual offences and two counts of threats to kill committed against X and Y. Counts 1, 2, 6 and 7 were rape of

a child under 13 and these related to X, the applicant's son. Counts 1, 6 and 7 were specific counts and count 2 was by agreement a specimen count which covered a course of conduct over a three year period. Count 8 was a charge of sexual assault of a child by penetration in relation to child Y and count 9 was an alternative count of sexual assault of a child, in this case under 13, namely the applicant's daughter Y.

[4] The jury was directed by the judge to find the applicant not guilty of counts 3-5 as these were wrapped up in the specimen count 2. The jury also decided that the applicant was not guilty on count 8 which is the count in relation to sexual assault by penetration of Y. In addition, the applicant was found not guilty of counts 10 and 11, namely threats to kill in relation to each child.

[5] The applicant was convicted of four offences of rape in relation to X and one offence of sexual assault in relation to Y as follows:

- Count 1 - rape of a child under 13 years committed during the period between 21 February 2009 and 21 February 2010 when the child X was between 3 and 4 years old.

- Count 2 - rape of a child under 13 years was committed between 21 February 2010 to 21 February 2014 when the child X was aged between 4 and 8, this was the specimen count.

- Count 3 - rape of a child under 13 years committed between 21 February 2014 to 5 April 2014 when the child X was 8.

- Count 4 - rape of a child under 13 years committed between 1 March 2014 and 5 April 2014 again when the child X was aged 8.

- Count 5 - rape of a child under 13 years committed between 21 February 2014 and 5 March 2014 when the child X was aged 8.

- Count 9 - sexual assault between 21 February 2014 and 5 March 2014 and intentional touching of a child under 13 years of age when child Y was 5 years of age.

[6] On the 21 October 2017 the applicant was sentenced for these offences to a 14 year custodial sentence made up of 7 years' imprisonment and 7 years on licence. He was also placed on the Sex Offenders Register indefinitely and he was made the subject of a Sexual Offences Prevention Order.

Grounds of Appeal

[7] The Notice of Appeal is dated 21 October 2019. This relates on the face of it, only to the rape convictions in relation to child X. However, in an accompanying

Form 3 the applicant also appeals against the conviction on count 9 in relation to child Y.

[8] The Form 3 contains background information which informs us as follows. The applicant was represented at trial by a different firm of solicitors. He instructed his current solicitors that immediately upon conviction he indicated to his previous lawyers he wanted to be advised on the merits of appeal. After his sentencing hearing, he was advised in negative terms regarding an appeal and thereafter he instructed fresh representation. On 27 November 2017 the applicant signed a form of authority to release his papers to his current solicitors.

[9] A chronology is also included in the Form 3 which reads as follows:

10 January 2018	Letter to LCJ Office requesting audio disc of judge's charge to jury.
14 February 2018	Certificate of conviction received. Forwarded to counsel.
11 July 2018	Legal aid granted re fee to release audio disc.
6 August 2018	Disc available for collection at Central Office.
4 September 2018	Request to stenography services for estimate of fee in relation to transcription of audio disc – three estimates required for legal aid purpose.
24 September 2018	Application to Legal Services Agency – green form authority to transcribe judge's charge.
3 October 2018	Request by Legal Services Agency for further estimate.
8 October 2018	Further estimate sent to Legal Services Agency.
11 October 2018	Legal aid authority granted for stenographer.
24 October 2018	Transcript of judge's charge received.
14 November 2018	Provisional brief sent to junior counsel for advices.
7 January 2019	Initial observations received from counsel with further directions.
11 January 2019	Registered intermediary report - child Y – received from PPS as per counsel's request.

29 January 2019	Further transcripts requested from court office (closing speeches) given delay legal aid will not be applied for.
11 March 2019	Stenography quotations obtained.
10 April 2019	Transcript of closing speeches obtained and forwarded to counsel.
3 May 2019	Further directions received from counsel requesting more detailed instructions. Client has indicated we need to speak with family members.
25 July 2019	Dated instruction was received from family member and forwarded to counsel for further consideration.
2 October 2019	Provisional grounds of appeal forwarded by counsel.
16 October 2019	Following amendments – final grounds of appeal received from counsel.

[10] The above demonstrates that this application against conviction is well out of time coming as it does some two years and four months after conviction. The applicant must therefore apply for an extension of time in accordance with the principles set out in *R v Raymond Brownlee* [2015] NICA 39.

[11] In this regard, the applicant relies on paragraph 8(ii) and (vi) of *R v Brownlee* which reads as follows:

> "(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.
>
> …
>
> (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."

[12] Mr Kelly QC, representing the applicant, struggled to explain the delay. During the argument he frankly accepted that it was a case of substantial delay. That is self-evident from the chronology given. An application of this vintage requires substantial grounds to explain the entire period of delay which is not forthcoming and so the only basis upon which the court would consider an

extension of time is in accordance with paragraph 8(vi) of *R v Brownlee* that the merits of the appeal must be such that it would probably succeed.

[13] With this background in mind, we turn to the grounds of appeal against conviction. Regrettably, these were not well formulated in the notice of appeal or the original skeleton argument. After some necessary refinement in the final skeleton argument and at hearing, we are able to condense the appeal into six grounds all of which relate to criticism of the judge's charge to the jury. They are as follows:

(1) That evidence given by the mother in respect of X's behaviour and demeanour over a period of time should not have been admitted.

(2) That the judge's direction in relation to separate consideration of the complainants was inadequate.

(3) That there was no evidence to support the alternative count 9 in relation to child Y and the judge's direction was inadequate in relation to that.

(4) That the judge's direction was inadequate in relation to the mother's evidence in that he did not state that that evidence is not independent.

(5) That there was an improper direction given to by the judge to the jury regarding the standard of proof in relation to the defence medical expert.

(6) That the judge failed to give an adequate direction in relation to the dangers of contamination.

[14] The learned trial judge charged the jury for approximately two hours. It is common case that there were no requisitions from either the prosecution or the defence in relation to his charge. Both prosecution and defence had the benefit of senior and junior counsel during this trial.

[15] The obligations upon counsel and the judge are obvious and referenced in *Blackstone, Criminal Practice* at D 18.14 and D 18.23. *Archbold, Criminal Practice* at 4-417 also reads as follows:

> "It is incumbent on counsel and on the judge to consider, before speeches, whether there is, or may be, any doubt about the issues of fact to be left to the jury or the appropriate legal directions, and, if there is, to raise the matter so that submission may be made with a view to the elimination of misunderstanding, if not disagreement. When a case calls for directions of any complexity, the judge should discuss the appropriate directions with counsel before speeches; he will then have the benefit of

> the submissions of counsel and counsel will be able to address the jury knowing how they are to be directed."

[16] When dealing with this issue in the case of *R v Reynolds* [2019] EWCA Crim 2145 the Court of Appeal in England & Wales also stated:

> "If criticisms regarding the summing up are material, they should be taken at the time and place where they can be dealt with most conveniently, by the judge, who has heard the evidence and is familiar with the nature of the issues at trial, and so that the jury can consider them, if necessary. There is nothing necessarily inconsistent between defence counsel's duty to a client and acting in that interest so as to correct what may be mistakes in the summing up which may result in a conviction."

[17] The failure to raise requisitions is of course not determinative of the criticisms now raised by the applicant given the overriding interests of justice and the applicant's Article 6 rights under the European Convention on Human Rights. However, the fact that those involved in the trial did not feel it necessary to raise any issues with the judge's charge suggest that there was no contemporaneous concern that he erred in any way.

[18] The appellate test is as stated by Kerr LCJ in *R v Pollock* [2004] NICA 34. At paragraph 32 of that judgment he set out the following principles to be distilled from the authorities:

> "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.
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> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
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> 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."

We proceed to consider the case on that basis of this test.

Summary of the factual Background

[19] The applicant met his wife in and around 1998 and they married in 2002. They were both in their early twenties. The parties appear to have had a settled start to married life. The applicant comes from a farming background and the family lived in the country on a farm. In 2011 the applicant's father died in a farm accident. Thereafter, there is mention of some tensions in the relationship. In 2014 the father's younger brother also died. There were some periods of separation and it is evident that both children were witnesses to discord in their parents' relationship.

[20] The complaints made by the children of sexual abuse by the applicant arose in April 2014. Prior to this, the mother was concerned about the gait of the child X as his "feet were rolling in and he was walking strangely." Therefore, with the agreement of the applicant the mother attended at the General Practitioner with the child and was referred to a consultant. The consultant's appointment took place on 4 April 2014 at a local hospital. The child was examined there and referred for treatment.

[21] Immediately following the consultant's appointment the child is reported to have said to the mother "that was that daddy boy's fault." Thereafter, the mother spoke to the child when she got outside of the hospital and the child said to her "daddy was hurting me." He also said, "daddy was sticking willy John up [his] bum." He told the mother that child Y came into the room. Y then said to the mother that she went into the living room and saw X with his trousers down and pulled X's trousers up and said "bad daddy." Within the evidence there is reference to these events happening in various locations including the home, the cattle shed and the sheep shed, and at Granny B's house. The child is reported to have said that it happened 70/80 times. The child is also reported to have said that the applicant said that he would shoot him and Y if he told anyone.

[22] After the appointment and what followed the mother returned home and phoned her sister and brother-in-law. Her brother-in-law, who is police officer, gave some advice and assistance. Thereafter the mother left the home to live in a Women's Aid refuge and she never returned to the family home.

[23] The next day X attended for medical examination at hospital by Dr Alison Livingstone, consultant paediatrician. Dr Livingstone subsequently gave evidence about the presence of a healing scar in the anus area. Similar evidence was given by two other doctors on behalf of the prosecution, a Dr Buckley, a forensic medical officer, who examined the child alongside Dr Livingstone and Dr McMillan, a consultant dermatologist. Therefore, the three prosecution experts gave evidence which was consistent with X's allegations.

[24] Expert medical evidence was also called on behalf of the defence by Dr Cantor who opined that the colouration on the child's anus was a genetic condition called diastasis ani rather than a healing scar.

[25] On 8 April 2014 Y was spoken to by a social worker. On this occasion she made a disclosure that her daddy "put a bottle, a green one, into [her] private parts." Y was also examined by Dr Livingstone on 25 April 2014. There was no report on any injury or concerning medical sign and ultimately no medical evidence was called at the trial in relation to Y.

[26] Both children attended for an Achieving Best Evidence "ABE" interview during which they both made disclosures of sexual assault by the applicant. Child X was 8 at the time of his ABE interview and child Y was 5 at the date of ABE interview.

[27] In his interview child X said that Y had observed what was happening as follows:

> "She walked in when he was doing it to me and she pulled up my trousers and he just got up, got over and grabbed her by the throat and said 'don't youse tell mummy or I will shoot youse all.'"

X also said that the defendant said, "I'll not let you get on the tractor and I'll shoot youse all at the end." X was asked about what had happened to him and he said "it was when I was three hey, I was playing in the toy room and he just came down and trailed me to mummy's side of the bed and pulled down my trousers and did the thing, touched me." In the ABE X said when asked what did he do "well, most of the time he put his willy up my bum." X referred to this being sore, really sore. The child also referred to this occurring in various venues including the family home and repeated that the applicant was "putting his willy up my bum." X also referred to the fact that his mother and father were arguing.

[28] In the ABE interview given by child Y she refers to "daddy had a bottle and he put it in here" pointing to her vaginal area. Then she said "he threw it at the dog." She was asked where this occurred and she said in her mother's bedroom and she was sitting on the bed. In this interview child Y also said that "daddy was touching X's bum, that X's trousers were down but I pulled X's trousers up. He was running after us then. Daddy was touching X's bum."

[29] The applicant denied that these events occurred. The defence case was presented in very simple terms. It was to the effect that the mother encouraged and schooled the children to give false evidence.

The evidence at trial and the judge's charge

[30] At trial the ABE interviews of the children were played and the children were cross-examined. At the date of trial the children were aged 11 and 8 respectively. They had the assistance of a registered intermediary and at a ground rules hearing it was agreed between counsel that the primary defence case of the mother having encouraged and schooled the children would be put to the mother rather than to the children. Therefore, the mother gave evidence and was cross-examined in relation to this and it was put to her that she had concocted the allegations.

[31] During her evidence the mother also described how the allegations were made to her and the aftermath. In relation to X she also said that in 2013 he had had been soiling himself at night, and as a result he had to wear pull ups and he had wrapped himself in a towel.

[32] The applicant gave evidence at the trial during which he reiterated his case that the mother wanted to destroy him. In this regard he maintained that during July, November and December of 2013 the mother accused him of interfering with his son, however there was no intervention or no further evidence in relation to that.

[33] Evidence was also called from the social worker to whom child Y had made a disclosure.

[34] In addition, substantial evidence was provided by the medical professionals involved in this case. The focus of this was whether some coloration to X's anus was a congenital condition known as disatasis ani or a healing scar. There was consensus among the medical experts that a finding of injury to the anus is rare because the anus dilates to accommodate penetration and it heals quite quickly. Dr Livingstone, who carried out the initial examination with Dr Buckley, gave evidence that during this examination she observed a lightness at 6 o'clock on X's anus which she thought was a healing scar. She said that she was aware of a genetic condition known as diastasis ani and so she reviewed the child three months later because if this was an injury she would have expected some healing or resolution to take place. Therefore, a second examination was arranged. At that examination it was Dr Livingstone's view that there had been a resolution of colour, which was the whiteness she previously observed. When asked by counsel whether what she found on examination was diastasis ani Dr Livingstone replied "the appearance of diastasis ani would not be the same as I observed on X." In Dr Livingstone's opinion this was a healing scar as a result of injury to the anus.

[35] Dr Buckley, who also examined the child, gave evidence which corresponded with that given by Dr Livingstone. Dr McMillan who is a dermatologist was brought in to exclude any other type of skin condition causing whiteness and he excluded that and noted a pale, a slightly white area at 6 o'clock. He was asked about diastasis ani. In answer to this question he said "I am not an expert but if it is

a congenital issue the appearance would be fixed, it would not change from one period to the next" and "if it has changed I do not consider it to be diastasis ani."

[36] The defence called Dr Cantor, an American paediatric expert. She gave evidence during which she said that there was no doubt in her opinion that this was a classic presentation of diastasis ani and that the chid did not have a scar. Therefore, there was conflicting medical evidence before the jury.

[37] After the close of the evidence senior counsel for the prosecution and senior counsel for the defence made closing speeches to the jury. In his closing speech Mr Weir QC on behalf of the prosecution summarised the case. He made reference to the fact that the applicant had said that the mother had three times in 2013 said that he was sexually interfering with his son but that nothing was done about that. He said that the applicant was trying to paint a picture of a wife who is a monster given that the defence case was that the mother had really encouraged and schooled the children. He also referred to child Y who was a witness to what had happened to child X. He then referred to the medical evidence. In relation to child Y he said that:

> "Child X is supported by what Y says, if you accept that this is not a made up story, members of the jury, then X is supported by Y because she describes the father interfering, with his trousers down, and you have heard all the evidence in relation to that, and that is in my respectful submission very powerful. These two pieces of evidence can be very powerful."

[38] Mr Rodgers QC, on behalf of the defence, summed up the defence case to the jury and in the course of that he says:

> "Now, the central issue in this case, the core of the defendant's case is that in 2013 the mother made allegations against him of abusing X, told him she would destroy him and leave him a bitter old man. And my learned friend quite rightly focussed in on that and he said sure that's a nonsense, absolute unadulterated nonsense because you have heard this lady give evidence, she is very protective of these children, if those allegations had been made she would have been the first one down at the police station."

[39] In his closing speech Mr Rodgers went on to refer to the evidence and the mother's motivation during what he said was a very unhappy marriage. He then pointed out some inconsistencies in the evidence and he highlighted the differences of view of the medical experts. He referred to the defendant's good character.

Overall he maintained that there were inconsistencies in the mother's evidence which made out the defence case.

[40] In this appeal there is no issue taken with the judge's summing up of the evidence. However, a number of legal points are raised and so we replicate some relevant parts of the judge's charge which relate to the grounds of appeal as follows.

[41] At the beginning of the charge the judge deals with the separate counts and directs the jury as follows:

> "I remind you that each count should be considered separately and the evidence relating to that count should be examined and looked at separately. For example, it is perfectly possible for you to be satisfied on the evidence of one count but not satisfied by the evidence on another count, or indeed, vice versa. It is often explained thus: each count is separate and each count requires to be examined separately, they are not to be treated as a job lot."
>
> (Relevant to ground 2 of the appeal)

[42] In relation to the evidence of the social worker the judge provided this direction:

> "And when you hear evidence about a disclosure, well, I warn you this way: you should understand that evidence that somebody tells someone originates with the same source, so the evidence that Y told S, that still originates with Y."
>
> (Relevant to ground 4 of the appeal)

[43] When dealing with the expert evidence the judge directed as follows:

> "In this case there are experts which you may think have given conflicting evidence, it is for you to decide whose evidence and whose opinions you accept, if any. Equally, if having considered the evidence you are not satisfied that you are sure whether based upon that expert evidence this was a healing scar or diastasis ani, then simply put it out of your consideration of the other evidence. You must remember that this evidence relates only to part of the case and whilst it may be of assistance in reaching a verdict you must reach a verdict considering the evidence as a whole."

(Relevant to ground 5 of the appeal)

[44] In relation to child X the judge also referred to the mother's evidence that X said to her, that in 2013 he started to soil himself at night and wanted to wear pull-ups. The judge did not provide any specific direction on this. He simply set out the factual background and in doing so he described the context as follows:

> "Of course he was eight at this stage and when she took the pull-ups off he wrapped himself in a towel. Around about 2013 she told you that she had noticed that he had started to walk strangely and that he was wearing his shoes and she got a consultant's appointment out of that."

(Relevant to ground 1 of the appeal)

Consideration of the Grounds of Appeal

Ground 1 - The judge erred in admitting evidence given by the mother regarding X's behaviour and demeanour

[45] The argument made by the applicant in relation to this first ground of appeal relates to the mother's evidence that X was soiling at night before the allegations were made. This evidence was admitted and as a result of this the applicant makes the argument that it could have distorted the view of the jury as there was a live issue about injury to the child's anus. The point made by the applicant is that it is atypical for an 8 year old to soil themselves and in this case there was evidence of anal damage which was itself the subject of conflicting expert evidence. Therefore, the argument is advanced that the judge should have given a clear direction to the jury that they ought not make any link between the two and that they could not rely upon evidence of soiling in support of child X's allegations.

[46] In support of this argument the applicant relied on three cases: *R v Paul Hughes* [2008] NICA 17; *R v BZ* [2017] NICA 2 and *R v O'Hara* [2019] NICA. These cases all refer to this type of argument under the umbrella of the demeanour of complainants when making allegations in sexual abuse cases.

[47] In *R v BZ* [2017] NICA 2 at paragraph [43] the court dealt with issues of demeanour as follows:

> "[43] Given that the weight of evidence as to distress will vary according to the circumstances of the case we consider that whether the evidence is admissible and if so whether a direction is needed and, if it is needed, then in what terms, depends much on the particular circumstances in any given case. In giving consideration

> to those questions a distinction can be drawn between the complainant's own evidence of distress and evidence from a witness, who may be independent, as to the distress of the complainant. A distinction can also be drawn between evidence of distress at the time or shortly after the alleged offence and distress displayed years later when making a complaint."

[48] At paragraph [45] of *BZ* the court also stated:

> "In our judgment this is not a case in which the evidence of distress assumed unusual importance or particular prominence."

[49] In *R v O'Hara*, it was conceded by the respondent that a direction as to demeanour ought to have been given and the Court of Appeal then considered whether the verdicts were unsafe. At paragraph [23] of that judgment, the Court of Appeal stated that the evidence of distress in *R v BZ* did not assume unusual importance or particular prominence, however in *R v O'Hara* it did and was described as 'powerful and central evidence.' Therefore, the Court of Appeal stated that in any case where demeanour evidence is powerful and central evidence a direction should be given.

[50] The circumstances where evidence of this nature can be admitted was examined in *R v Hughes*. In paragraph [18] of the judgment in that case Campbell LJ said that before evidence of demeanour was admitted it was necessary to establish a link between the behaviour exhibited and the abuse alleged. This link was referred to in a subsequent case of *R v Cyril Warnock* [2013] NICA 34. In that case there was evidence by the complainant's father that the complainant left the room when the accused visited. Although this evidence was mentioned by the trial judge there was no specific direction given to the jury as to how to deal with it. In *Warnock* the Court of Appeal distinguished the case from other cases as the evidence was no more than a passing remark made by the father. Also the Court of Appeal in that case found that the absence of a specific direction on the demeanour of the complainant did not render the conviction unsafe.

[51] In this appeal it is important to consider what the demeanour evidence actually is, whether or not this is truly demeanour evidence linked to the allegations, whether or not a specific direction should have been made, and whether or not the safety of the conviction is thereby affected.

[52] In answering the questions raised by this ground of appeal we have considered the evidence at issue. This is the evidence of the mother that the child soiled at night, wore pull ups and wrapped himself in a towel. Having considered the relevant transcript we agree with the prosecution submission that the evidence given by the mother to the effect that X started to soil himself at night was a

statement of fact to explain the background to her observation regarding the child wrapping himself in a towel. It is also correct to say that this was never a proposition that the prosecution or the judge put as supportive of the allegations made by child X.

[53] In our view the actual evidence at issue in this case was background evidence unrelated to the allegations. We are not convinced that this was prejudicial or that it would have distorted the view of the jury. We are not convinced that this ground of appeal bears much relationship to the facts of this case unlike the scenarios which appear in the cases to which we have been referred. We are not satisfied that this was demeanour evidence at all, but even if it was this evidence was not central or powerful evidence linked to the allegations and the absence of a specific direction does not lead us to question the safety of the conviction. In our view, this evidence really had no bearing at all on the allegations made and was not of such a nature as to confuse the jury in any way. Therefore, this ground of appeal has no prospect of success.

Ground 2 - The judge's charge was inadequate in how it dealt with separate consideration of the complainants

[54] In mounting this aspect of the appeal Mr Kelly opened only two cases to us, namely *R v Paul Hughes* [2008] NICA 17 and *N (H) v R* [2011] EWCA Crim 730. We have referred to the judge's charge in the section above and it is accepted by all that the judge referred to the fact that there were separate complaints and that each charge should be dealt with separately. This is commonly referred to as a "standard direction." The point is whether he should have gone further in this case and warned that one complainant's evidence could not be used to establish guilt in relation to another complainant's evidence. This is commonly referred to as "a second limb warning."

[55] In *R v Hughes* the judge's direction as to separate consideration was wholly inadequate given the nature of the case and the allegations being made by two sisters. In reaching this view the Court of Appeal relied on extracts from the judgment of Nelson J *R v D* in [2004] 1 Crim App R 19 in paragraph [20] as follows:

> "Where however 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 the risk that the jury may wrongly regard the evidence as cross admissible in respect of each separate set of allegations, and may, as a consequence,

> rely upon what amounts to no more than the evidence of propensity as evidence of guilt.
>
> 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."

[56] In *R v Hughes,* when dealing with the facts of the case, the Court of Appeal also pointed out at paragraph [21] that:

> "There was no independent evidence to support the version of events given by A or B and we consider that it was important that the judge directed the jury not only on the need to treat each of the allegations separately, as he did, but also that the allegations in respect of one sister could not be treated as proof of an allegation in respect of the other sister."

[57] The prosecution makes reference to the issue of bad character and cross admissibility in its skeleton argument. The prosecution say that it was a considered decision not to pursue a bad character cross admissibility application given all of the circumstances but particularly because the complainants were siblings. The prosecution state that "it was clearly not a classic cross admissibility situation such as two or more strangers making complaints against the same person. In such circumstances the prosecution closing inevitably will reference the complaints made by both complainants."

[58] The prosecution closing was relatively brief in relation to this issue. At no stage within the closing was the jury encouraged to cross reference the testimony of the two complainants. This also applies to the judge's charge as the evidence relating to the complaints made by each complainant was dealt with separately. In addition to this, as we have said, there is no objection taken to the nature of the judge's charge in general or his summation of the facts. This is not a case where the judge misdirected the jury in relation to this issue. Rather this case comes down to a question of omission in that a separate specific direction was not given to the jury to warn them not to use one complainant's evidence to support the allegations of the other.

[59] As we have said, the absence of a requisition is not necessarily fatal to an appeal. However, in our view, it is remarkable that collectively a non-direction now said to be so serious as to render the verdicts unsafe was missed.

[60] Whilst Mr Kelly focussed on *R v Hughes* there are a number of other authorities in this area which were not provided to us but which we must discuss. The law in this area is summarised in the current edition of *Rook on Sexual Offences Law and Practice* 6th edition at paragraph 20.158-20.160. There, reference is made to

the case of *R v H* [2011] EWCA Crim 2344 (in which Mr Barlow appeared) in which an appeal on this ground was unsuccessful. In that case the Court of Appeal in England and Wales observed that the absence of the suggested direction in *R v D* namely the second limb warning to the jury referred to above has "not fared well as a ground of appeal."

[61] *Rook* also states that "no complaint could be made about the giving of such a direction, but it is not required as a rule of law." Drawing on the authorities, the authors state that:

> "Everything depends on the facts of the particular case, and the danger that the jury might seek to use the evidence of one complainant as evidence of a defendant's guilt when concerned only with another complaint."

[62] In addition to observing that each case depends on its own facts we note that the authors of *Rook* also state at paragraph 20.159 that:

> "Nevertheless, we suggest that a standard direction to the effect that the jury" must give each count entirely separate consideration" will often be insufficient, and the better course is to address the point in direct and clear terms."

[63] We are aware that since the decision in *R v H* another Court of Appeal in England and Wales has examined this area in the case of *R v Adams [2019] EWCA Crim 1363*. That Court of Appeal decided that the absence of a specific direction in relation to cross admissibility did render the conviction unsafe and it was therefore quashed. It is also fair to say that in paragraph [20] of the judgment the court raised a question about the reasoning in *R v H* however it expressly agreed with the observation in the judgment at paragraph [31] that "everything depends on the facts of a particular case, and the danger that the jury might seek to use the evidence of one complainant as evidence of his guilt on counts concerned only with another complainant." We proceed on the basis that this statement remains good law in this area and that each case depend on its own facts.

[64] The factual context of *R v Adams* is quite different from the present case. In that case there were two teenage complainants, one female, one male, who when young were members of a brass band of which the appellant was also a member. He was between 24-27 years older than the complainants, married with children. Both complaints made allegations, the elder female, on a regular basis, the younger male on two occasions. These complaints took place over different timescales and at different venues over the course of the complainants' involvement in the brass band. The complainants were not family members but had been friendly and kept in touch. The judge gave a standard direction to the jury in relation to the separate counts and this resulted in the Court of Appeal quashing the conviction. It is apparent from paragraph [23] of the decision in *Adams* that it was not just the simple failure to give

the direction but "moreover, it was a case in which, as we see it, the question whether the evidence of each complainant was admissible in relation to the allegations made by the other was potentially of great significance to the jurors' decisions."

[65] We are also aware of another decision of the Court of Appeal in this jurisdiction *R v SD* (unreported of 30 January 2020). In that case there were three complainants who were teenagers when allegedly abused. The principal complainant was a step-daughter of the accused, the other two complainants in relation to a single offence were her friends. Cross admissibility was a live issue in that case. A specific ground of appeal was based upon omission and positive material misdirection in relation to the separate counts of the complainants. This Court of Appeal considered the authority of *R v Drake* [2002] NI 144 and the case we have also referred to *R v Adams* [2019] EWCA Crim 1363. Ultimately, in *SD* the Court of Appeal determined that there was reason to quash the conviction relying on *R v Adams*, as follows (paragraph [58]):

> "In *R v Adams* the prosecution did not seek to put its case at the trial on the basis that evidence relating to any of the accounts on the indictment was admissible in relation to the issue of whether the appellant was guilty on any other count. The Court of Appeal stated that as that was the position adopted by the Crown the jury ought to have been directed that, in considering each count, they should have regard only to the evidence which was directly relevant to that count and should ignore evidence relating to the other count."

[66] In *R v SD* the Court of Appeal went on to observe first that the judge did not give any direction to the jury at all with regard to whether, and if so, how, they could take account of evidence relating to one count when considering other counts, and in particular, whether they could take account of either complainants' evidence when considering the allegations made by the other. Also, the Court of Appeal observed that the only direction which the court gave about how the jury should approach the different counts was a standard direction to say that they should consider the case against and for the defendant on each count separately and that this "did not tell the jury whether they could, or could not, when considering the evidence against the defendant on a particular account have regard to evidence relating to other counts and on other occasions." The Court of Appeal reiterated the legal principle stated in *R v Adams* that "everything depends on the directions and facts of a particular case, and the danger that the jury might seek to use the evidence of one complainant as evidence of his guilt and counts concerned only with another complainant."

[67] The core reasoning of the Court of Appeal in *SD* is found at paragraph [31]. There, the court refers to the fact that the judge simply gave a standard direction to

consider the separate counts however he also went further in that he said "there might be of course something in the evidence relating to one count that assists you in reaching a verdict on the other counts." In our view this feature distinguishes *SD* from the present appeal. We also note that this was a retrial at which no applications were made to admit bad character evidence in contrast to a number of applications which were made at the original trial. In any event counsel argued that this was a positive material misdirection and the Court of Appeal agreed. The court considered that the manner in which the judge addressed the jury went further by positively permitting the jury to take inadmissible evidence into account affected their reasoning.

[68] Paragraph [21] of the judgment in *R v Hughes* also highlights the fact that there was no independent evidence in that case to support the version of events given by A or B. That is also quite unlike the present case where there was independent medical evidence and Y was a witness as well as a complainant. Further, in paragraph [22] of *R v Hughes* the court expressly noted that:

> "[22] In view of the other shortcomings to which we have referred we could not regard the convictions as being safe. It is clear that there were other shortcomings in this case including inadequate direction on good character which is set out at paragraphs 11 and 12 and the failure to exclude evidence of the complainant's demeanour from the jury's consideration which is set out at paragraph 17 and 18."

[69] Therefore the *R v Hughes* case is also distinguishable from the case that we are dealing with. As the authority of *R v Adams* reiterates the question of whether any defects are fatal will fall to be determined on the facts of each case. In the present appeal the defence was very simply made that the defendant had never sexually assaulted either complainant and that they were making false allegations which were inextricably linked and in furtherance of a malicious conspiracy hatched by their mother. That context was fully explored during the trial and reiterated by counsel in closing and plainly rejected by the jury. Once the jury were satisfied that one or both of the complainants had been sexually assaulted this defence was essentially knocked out of play.

[70] During the appeal hearing counsel for the prosecution accepted that it would have been better to include along with a standard direction on the separate counts a direction that evidence in relation to one count was not admissible as evidence of guilt in relation to another count. That, it seems to us, was a correct concession to make by counsel. This also corresponds with guidance found in Northern Ireland Bench Book.

[71] We have examined the effect of any non-direction in this case. In doing so we have been assisted by the case of *R v B* [2019] 1 WLR 2550 which expresses the test at paragraph [41] in the following way:

> "The issue is whether the judge's directions risked distorting the direction of the jury's deliberations to such an extent as to render the verdicts unsafe."

[72] This statement of law correlates with the submission made by Mr Weir that in fact what the court should do is look at the case in the round and notwithstanding that there may be some omission, the entirety of the judge's charge must be considered in the context of the facts of this case. The facts of this case are important to highlight in a number of aspects.

[73] First, this was a case where the child Y was a witness to the allegations made by child X. Second, in this case there was medical evidence which had to be assessed by the jury. These factors are not present in this combination in any of the other cases that we have considered. Third, in this case, the jury could not have been in any doubt about the defence case which was simply that these allegations were concocted. There is no suggestion that the jury were in any doubt of this and therefore the need for a warning is diluted. Fourth, there is no criticism of the judge's summary of the evidence and arguments of both sides. There is no criticism of the trial judge's charge on the ingredients of the various offences charged. Fifth, it is clear that this jury was capable of sorting one allegation from another, of distinguishing stronger evidence and weaker evidence. This is demonstrated by the fact that this jury acquitted on a number of charges, namely counts 10 and 11 and also decided that count 8 was not made out in relation to penetration with a bottle but rather count 9 was appropriate. The outcome points to the fact that this was clearly a careful jury who analysed all of the evidence in reaching the result that they did.

[74] Having examined the evidence and the arguments, we accept that there was a valid legal argument to make in relation to the adequacy of the charge. However, the outworking of this does not lead to any unease on our part in terms of the safety of this conviction for the reasons we have given. We have reached this conclusion on the particular facts of the case.

Ground 3 – The judge erred in the way that he dealt with alternative count 9

[75] The argument made by the applicant is that if the jury was unsure as to the ingredients of the offence on count 8 they could not possibly have convicted on count 9 due to the paucity of the evidence. In assessing this ground of appeal we have looked at the judge's charge in relation to the ninth count. Having done so, we consider that this was a very proper and neutral direction which would allow a jury to make a choice. In addition we note that the judge properly highlighted inconsistencies in Y's account in relation to the issue of the bottle and how the bottle

was present. Overall, we cannot see that there is any material failing here on the part of the judge and so we find no merit in this ground of appeal.

Ground 4 – The judge did not direct the jury regarding the independence of the mother's evidence in relation to the complaint made by X

[76] In relation to this ground of appeal it is correct that the judge did direct the jury in relation to the species of evidence regarding the social worker which we have outlined above. He did this by directing the jury that this evidence was not independent. In relation to the mother's evidence the judge did not provide the same warning. Therefore, this appeal point focusses on the contrast in the judge's approach to the two different sources of evidence from the mother and the social worker.

[77] In assessing this appeal point we have examined the judge's charge as a whole. Having done so we do consider, particularly in the context of this case, that the judge would have been better to give the same warning in relation to the independence of each source of evidence. However, the judge's charge was neutral and there was no misdirection or risk of the jury getting a distorted view on the basis of what was put to them. Therefore, we consider that it would have been better for the judge to have given a warning in relation to the independence or otherwise of the source of the complaint in the overall assessment of the case. However, this omission does not lead us to a position where we have any reservations about the safety of the conviction having looked at the case as a whole.

Ground 5 – The judge gave an improper direction regarding the medical evidence

[78] The appeal point raised is that the judge by virtue of the charge he gave on this issue effectively reversed the burden in relation to the defence medical evidence by using the phrase that the jury had to be "sure." We do not agree that on a fair reading of the charge as a whole that the jury were given an improper direction regarding the standard of proof in relation to the defence medical expert. It may have been expressed clumsily however, we have had to look at the charge in the round. Having done so we do not consider that this would have led the jury to any place of risk or distorted their view of the case. On the contrary the judge with conspicuous care set out all of the medical evidence from both the prosecution and defence and the jury were particularly well placed to assess that evidence. Overall, we do not consider that there is any point of substance in this ground of appeal and certainly not one which causes us to doubt the safety of the conviction.

Ground 6 – The judge failed to give a contamination warning

[79] We have considered the arguments made by the applicant in relation to this appeal point which we can deal with relatively briefly. Counsel referred to the case of *R v N (H)* and, in particular paragraph 40 where it is stated:

> "If on the contrary, the jury has been instructed that the evidence of each complainant must be judged separately then the evidence of each complainant must be considered solely upon on its own merits, unsupported by the coincidence of another complainant. The occasion for a warning as to risk of contamination will not on that account have arisen because the prosecution is not seeking to derive support from other evidence which derives its probative value from the similarity of a separate complaint and the independence of those complaints. That is not to say that evidence of the circumstances may not reveal the real possibility of contamination. Contamination (deliberate or innocent) if it has or may have occurred, may render unreliable the evidence of one or more complainants whether or not the jury is invited to consider whether that evidence is mutually supportive. Where such a real possibility is revealed by the evidence we accept that there will be an obligation upon the trial judge to draw the jury's attention to the risk. Whether there is an obligation upon the trial judge to address the jury upon the risk of collusion or of innocent contamination or both must, we think, depend upon the development of the evidence in the trial."

[80] This authority must be applied to the facts of any case. The reality in this case is that a contamination argument was never part and parcel of the defence case. Therefore, this ground of appeal is totally divorced from the reality of the case that was put before the court. There is no merit in this ground of appeal.

Overall conclusion

[81] This application has, as we have said, been brought significantly out of time. Section 16 of the Criminal Appeal (Northern Ireland) Act 1980 provides that notice of application for appeal shall be given within 28 days of conviction, however under section 16(2) the time may be extended at any time by the court. The principles governing extension of time are set out in the *R v Brownlee* decision which we refer to above. What the interests of justice require and whether time should be extended in a given case will depend on the facts of each case.

[82] We are greatly concerned that this appeal has been brought two years after a conviction in June 2017 and is in effect an extremely belated criticism of the judge's charge. However, we have considered the substance of each and every aspect of the appeal points now raised. Having done so, it will be apparent that we find no merit in most of the points raised some of which cannot even be related to the facts of this case.

[83] There was some merit in the argument made in relation to cross admissibility. In our view the better course would have been for the judge to give a specific warning on cross admissibility in accordance with good practice. Also, we consider that the judge's charge in relation to the independence of the mother's evidence could have been improved. However, having examined this case in detail and having applied the appellate test found in *R v Pollock* to the facts of this case we do not have any sense of unease about the safety of this conviction. Whilst we can see that in other cases deficits of this nature may result in a different outcome, this is not one of those cases on its facts for the reasons we set out at paragraph [73] above.

[84] Nonetheless, there are some important lessons to be taken from this case. These flow from the obvious fact that issues can arise in relation to cross admissibility in the absence of a formal bad character application which is open to the prosecution to make pursuant to the Criminal Justice (Evidence) (Northern Ireland) Order 2004. This statutory scheme is now well embedded in our jurisdiction and provides all of the necessary checks and balances when dealing with numerous complaints. The cases we have examined highlight the fact that particular difficulties may arise when no such application is made.

[85] In that context we wish to reiterate the fact that judges need to be alive to the issues that may arise from potential cross admissibility when there are multiple complainants in sexual offence cases. In addition, it should be the established practice for counsel in accordance with obligations and duties to discuss matters such as this with the judge prior to the charge to the jury. We repeat the point that if errors or omissions are apparent in the judge's charge counsel must exercise their right to requisition rather than wait until the end of the trial and then appeal. We understand that legal teams may change and mistakes may then be exposed however we consider that this eventuality should be rare if experienced counsel were originally instructed.

[86] It is also worth remembering that mistakes may have a serious impact both for an accused who may have a valid complaint in relation to fairness but also for a complainant in a serious sexual offence cases who may not be able to face a retrial. Either way, there is the real potential that the interests of justice are not served. This appeal has exposed a very unsatisfactory situation which we hope is not repeated given the potential effects upon the criminal justice system and upon public funds if convictions are quashed and cases have to be reconsidered years after conviction and sentence.

Disposal

[87] Accordingly, we find that this case is substantially out of time, that the reasons for the delay are not adequately explained, that the conduct of this appeal is concerning in a number of respects, and in any event, that none of the arguments raised would result in a successful appeal. We refuse leave to extend time and this appeal will be dismissed.