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Judgment: approved by the Court for handing down | *Delivered:* **11/05/05**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

S M

Before Kerr LCJ, Nicholson LJ and Campbell LJ

Ex tempore judgment delivered on 11 May 2005

KERR LCJ

[1] We have concluded that it is not necessary for us to deal with the application made by Mr Treacy on behalf of the appellant that an additional ground be incorporated into the Notice of Appeal for we have concluded that the conviction must be quashed for reasons that we will give presently. We have concluded that a re-trial of this appellant will be required and the only observation that we will make in relation to the additional ground of appeal is that the trial judge on the re-trial of the appellant should pay close attention to the guidance given by this Court in the recently decided case of *R v Gallagher.*

[2] This is an appeal by S M against his conviction on various counts of sexual abuse of his daughters and various assaults on his wife. Two principal grounds were advanced on his behalf by Mr Treacy QC. The first of these was that the learned trial judge failed to put the appellant's case sufficiently to the jury. The second was that the appellant was entitled to a good character direction. The appellant had been convicted of offences before his trial but Mr Treacy submitted that since these postdate the offences with which he has

been charged he was entitled to a good character direction. We will return to that argument presently.

[3] It is incumbent on a judge of trial to put not only the prosecution case but that advanced on the behalf of the defence. Whether that elementary obligation has been fulfilled will depend on an analysis of the particular circumstances of the specific case and the consideration of the charge given. The principle is so well established as to be entrenched in our law that the judge must put the defence case and he may not rely on the exposition of that case by counsel for the defence. In the present case Mr Philip Mooney QC, who appeared for the appellant on trial, rehearsed in a commendably comprehensive way the various issues that had been canvassed on behalf of the appellant in the course of the trial but we are satisfied that the trial judge failed to put those issues before the jury and in these circumstances we cannot be satisfied that the verdict of the jury convicting the appellant is safe.

[4] The reasons for the principle that the trial judge must put the case to the defence are not difficult to define. The authority with which a jury will invest various controversial issues will obviously depend, at least to some extent, upon their endorsement by the trial judge. Where the judge fails conspicuously to raise issues that had been canvassed on behalf of the defence there is at least a significant danger that the jury will tend to disregard those issues. It is not necessary to rehearse the various matters canvassed by Mr Treacy which he says were omitted from the trial judge's charge we choose but a few by way of illustrative example.

[5] In the first instance Mr Treacy submitted that one of the critical and central issues in this case was the motive, or the lack of motive, on the part of the complainants to make what the appellant has claimed was a mendacious case against him. Significant evidence was given on this topic. The appellant had left the matrimonial home in 1998. No complaint had been made to anyone in authority by any of the complainants before that date. The complainants went together to the police in December 2002. The daughters of the appellant were then aged 24, 22 and 20. The coincidence of the making of the complaint with the issue of a Civil Bill by the appellant nine days before the complaint was made was, Mr Treacy submits, a central issue in the case and one which deserved some mention at least by the trial judge. Some of the remarks to which Mr McMahon QC has drawn our attention may be taken to touch, albeit obliquely, on this issue. In our judgment this was a matter which required to be dealt with explicitly and that the judge should have told the jury explicitly that the defendant had raised the issue of motive and he should have outlined the evidence relevant to that issue.

[6] Secondly, Mr Treacy has drawn our attention to the absence of medical evidence about physical abuse. He has submitted that it was critical to the jury's evaluation of the veracity of Mrs M that there was no medical evidence

whatever to support her claim that she had suffered two miscarriages because of violence on the part of the appellant. Although there was some tangential reference in the judge's charge to the absence of medical evidence, he failed to relate that to the miscarriages which Mrs M claimed to have suffered as a result of her husband's physical abuse. Nor was there any attempt to examine the possible nexus between the absence of that evidence and the withdrawal of two counts by the prosecution. Likewise there was no correlation of those circumstances to the issue of the credibility of Mrs M.

[7] Mr Treacy has also drawn our attention to the conflict of evidence between one of the daughters and Mrs M in relation to the incident where she claimed that she had threatened to telephone the police after discovering her children had been sexually abused by the appellant. There is, as Mr Treacy has been able to demonstrate, a direct conflict between O and her mother as to the circumstances of that particular incident. It may well be that an innocuous explanation is available for that and it may have transpired that the jury, if this matter had been drawn to their attention, would not have considered it to be of substantial moment but it was an issue which was sufficiently prominent in the defence of the appellant as to warrant mention by the learned trial judge.

[8] There was no reference to the apparent failure on the part of Mrs M to recollect circumstances relating to an attack on D when it was alleged the appellant had chocked her so that her face turned blue. This was an incident which, according to the defence, Mrs M failed entirely to register. That had again, it was submitted, a direct impact on her overall credibility and the failure of the trial judge to make reference to it was, it was submitted, and we accept, an omission.

[9] There was no reference in the judge's charge to the evidence given by the defendant as to the exchanges between him and his wife in relation to the ownership of the house. In particular the defendant had given evidence of threats by his wife to do whatever was required to make sure that he did not receive any part of the proceeds of the sale of the house or would not be able to vindicate any claim to ownership of the house. Again this was a matter which in our judgment sounded directly on the question of the motive of the complainant to make a case against the appellant which was untrue. Whether it would have been efficacious to achieve his objective in raising a doubt as to the credibility of Mrs M is not the question. The issue is whether the learned trial judge should have adverted to this in his charge. In our judgment he ought to have referred to it.

[10] Likewise the issue as whether one of the daughters might have been motivated to make a lying case against her father in order to promote a claim to compensation under the Criminal Injury legislation was a matter canvassed by the defence in the course of the trial. Again we consider that this is a

matter which should have featured in the judge's charge. Mr McMahon on behalf of the Crown has robustly submitted that it was not incumbent on the trial judge to rehearse every jot and tittle of the evidence called on behalf of the defence nor to refer extensively to the various arguments which had so recently been put in such a comprehensive fashion on his behalf. We accept those submissions unreservedly but we consider that this was not an instance of the learned trial judge putting the essence of the case of the defence without descending to unnecessary detail. We consider that it this particular instance the gist and essence of the defendant's case was not put by the judge to the jury. In those circumstances, as I have said, we cannot be satisfied as the safety of the conviction and on that account and indeed on that account alone the conviction must be quashed.

[11] In light of that decision it is strictly speaking unnecessary for us reach a final conclusion on the second principal argument advanced on behalf of the appellant, namely, that he was entitled to a good character evidence. We nevertheless take the opportunity to express our view that this argument could not avail the appellant in the present circumstances. Firstly, no evidence of good character was put before the jury in the manner required to raise that issue and we are satisfied on the authority of *Thompson v The Queen* that there was no duty on the learned trial judge to raise this issue. Mr Treacy had relied upon a chance reply by the appellant to cross-examination by Mr Mateer for the Crown that he had never been in trouble in his life as warranting the giving of a good character direction. We do not consider that the giving of that evidence in this manner was sufficient to raise the issue distinctly and directly as is required and as was made clear in the case of *Thompson* and of the later Privy Council case of *Teeluck*.

[12] Mr Treacy argues, however, that whether or not the appellant's good character was properly introduced in evidence, given that if it had been the appellant would have been entitled to a good character direction the conviction cannot be regarded as safe. We also reject that submission. We accept the argument put forward on behalf of the prosecution that as at the time of the trial Mr M did not have a good character. On appeal from the Magistrates' Court he had been convicted at Omagh County Court on 26 August 1999 of the offences of aggravated assault, that is an assault upon his wife who was of course a complainant in the present case. He was fined £200 for that offence. He was convicted at the same court of the offence of breach of a protection order by molesting his wife and received a sentence of three months' imprisonment which was ordered to be suspended for a period of three years. He was also convicted at Omagh Magistrates' Court on 14 November 2000 for breach of a Non-Molestation Order, again in respect of his wife, and received a conditional discharge for a period of twelve months. These convictions were, in our view, directly relevant to the case that was presented against him before his Honour Judge Foote QC and we consider that it would not have been open to the appellant to seek to persuade the

judge that he should, notwithstanding those convictions, be entitled to good character direction. We do not accept that the circumstance that the convictions post-dated the offences for which he was charged in the present case was a basis on which a good character direction should have been given. In these circumstances we are firmly of the view that (a) the judge is not to be faulted for not having given a good character direction since the matter was not raised in the fashion that was required to prompt such a direction; and (b) the good character direction would have not been appropriate in any event.

[13] We take the opportunity to make a further statement about the retrial in this case. One of the matters that the trial judge will have to direct the jury on is that they should assess the evidence in relation to each of the offences independently. It will be necessary for him or her to direct the jury that each count must be considered on its own merits and that evidence on one charge should not taken into account in considering the other. We commend to the consideration of the judge on the retrial the decision of this Court delivered on 25 January 2002 in the case *R v Anthony Patrick Drake*.

[14] We have concluded on the first principal ground advanced by the appellant that the conviction cannot be regarded as safe and on that ground only we quash the conviction and order that a retrial take place. We shall be in contact with the judge for the district in which the trial should take place and will seek to do what we can to ensure that it takes place expeditiously.