**Neutral Citation No.: [2008] NICA 46** | *Ref:* **GIR7262**

*Judgment: approved by the Court for handing down* | *Delivered:* **26/9/08**

*(subject to editorial corrections)**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE QUEEN**

**-v-**

**Thomas Sloan**

**Before: Girvan LJ, Coghlin LJ and Weatherup J**

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**The Judgment of the Court**

[1] This is an application for leave to appeal against conviction and sentence, the single judge having refused leave to appeal on 15 March 2008. The applicant who pleaded not guilty on each count on the indictment was convicted on each count. On the first and fifth counts he was convicted of the attempted rape of the complainant A, contrary to Article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and common law and he was sentenced to 12 years on each count. He was convicted on the second, third, fourth, sixth and seventh counts of indecent assault contrary to Section 52 of the Offences Against the Person Act 1861 and he was sentenced to 6 years on each of those counts. All sentences were directed to run concurrently. A licence was imposed under Article 26 of the Criminal Justice (Northern Ireland) Order 1996 and he was required to remain on the Sex Offenders Register for life.

[2] Count 1 alleged that the applicant attempted to rape A in July 2003. At that time the complainant was aged 15. The complainant in her evidence stated that she was coming home from her father's home between 11.00 and 11.30 pm one evening in July 2003. The defendant, who was 39 years of age, asked to walk with her and while doing so pulled her into an alleyway and pulled her trousers down and attempted to have sexual intercourse with her against her will. The defendant was unable to insert his penis into A but he persisted in his assault and attempted to do so for some 30 minutes, digitally penetrating his victim. He threatened the complainant and told her to act as if nothing had happened. Count 2 alleged that the applicant indecently

assaulted A in October 2003 when the applicant and A were walking together to band practice at the Cosy Bar in Carlingford Street in the Woodstock area of Belfast. A alleged that the applicant forced her into an alleyway and forced her to have oral sex with him, the defendant ejaculating into her mouth making A physically sick. Counts 3 and 4 were specimen counts relating to ten or eleven incidents alleged to have occurred between October 2003 and March 2004. These occurred in similar circumstances to those in Count 2 and involved the applicant requiring A to commit acts of oral sex upon him. Count 5 related to an indecent assault which also involved acts of oral sex, which A alleged occurred in the kitchen of the Cosy Bar where band practice was taking place. Count 6 alleged a further attempted rape in the kitchen of the Cosy Bar, the defendant failing to achieve penetration of the complainant notwithstanding making concerted efforts to do so. The last count related to an alleged indecent assault which occurred in March 2004. Before that incident is alleged to have occurred A told her mother and her boyfriend what had been happening between her and the applicant. As a result of that it was stated by A and her mother that they had involved an unidentified "community worker" who advised them to effectively set up a form of trap which would expose the activities of the defendant. That involved A walking along with the applicant along the alleyway where the other assaults had occurred, it being A's understanding that the community worker would be close at hand. No such community worker in fact was present that evening but A's mother was in the vicinity of the alleyway according to her evidence and she stated that she witnessed A running out of the alleyway away from the applicant who she said was following and she observed him pulling up his trouser zip. The applicant on that occasion indecently assaulted the complainant but no act of oral sex occurred, A saying that she ran away from the defendant before such acts occurred.

[3] The applicant challenged the jury's verdict on two bases. Firstly, it was argued that the trial judge made two significant factual errors in his summing up which must have misled the jury and rendered the decision unsafe on all counts. Secondly, the applicant contended that the verdict was unsafe having regard to the unreliability of the evidence of A and her mother. Mr O'Donoghue QC on behalf of the applicant argued that the court had a residual discretion exercisable in limited circumstances and with caution to set aside a conviction if it feels that the verdict is unsafe or unfair. He contended that the court should entertain grave unease in relation to the convictions given the seriousness of the allegations; the length of the sentence to be served; the fact that there was a material misdirection on the facts relating to Count 7; the remarkable history of the complainant in relation to other complaints of sexual abuse by other males; and the existence of an intention to trap the appellant. The applicant sought, in particular, to rely on the evidence of a new witness Mrs Abbott who had not been called at the trial. Counsel argued that her evidence confirmed the truth of the applicant's version of events about the seventh count and showed that A's mother's

evidence of seeing the applicant pulling up his zip when coming out of the alleyway was wrong. Apart from the two factual errors in the summing up relied on by Mr O'Donoghue it was accepted that the summing up was otherwise impeccable and he pointed to no other irregularities in the trial process.

[4] The first factual error in the judge's summing up referred to was a passage in which the judge incorrectly referred to the last incident of alleged indecent assault as including an act of oral sex. Earlier in his summing up the judge stated that he did not intend going into a lot of details of the offences apart from count 7. He referred to them briefly pointing out that the indecent assault counts alleged acts of oral sex. He dealt in greater length with the events surrounding count 7 in relation to the final incident. Having stated that on the night of that incident A was left unprotected in the absence of the community worker who was supposed to be turning up the judge said that oral sex again occurred. He went on to say that he wanted to read from the transcript of the details of the alleged incident which the jury had heard her say. He proceeded:

> "I just want to read from the transcript the details of that alleged incident that you heard her say, because I want to deal with the medical and forensic evidence. I am not going to read it all out, but just the actual physical assault that she alleged took place. 'He grabbed me by the hand and had pulled me down and I said, "Snowy, look I'm not taking this no more." He said "So" and he pulled me further on down the entry. We got down, there were two bins and he had pushed me up against these and started kissing me and fiddling with my breasts again. He shoved me further up the entry beside black pies (sic), I think it was against the wall again." She alleges that he kissed her and licked her left breast. Now, why I read out is first of all because it is the incident that everyone agrees there was some sort of altercation on that night between the parties. Also she was examined by a doctor some 3 or 4 hours later. She actually found no signs of injuries. She ends the report by saying 'This does not prove or disprove what she is saying'. That I'm afraid is up to you. But you have got to consider those allegations of assault and decide whether injury would have been found following those. Also forensic was evidence to try and see if there was any DNA. There was female DNA found on her lips and there was nothing on the breast. And that is the allegations of count 7."

[5] In her evidence about the incident giving rise to Count 7 A made clear that she was not alleging oral sex. The transcript records the following evidence given by her:

> "Normally any other night he would make me give him oral sex so he would, it was just that occasion he didn't get the chance to because I'd pushed him away that quick."

[6] The second factual error alleged by the applicant related to the judge's statement that everybody agreed that there was some sort of "altercation" on the night between the parties. It was contended that there was no altercation on that evening. What had happened was that A and A's mother had made noisy allegations which prompted the applicant to leave the scene.

[7] A misstatement or omission of fact in the course of a summing up may lead to the quashing of a conviction if the fact was of such importance that if it had been correctly stated the jury may not have reached the same verdict. In Wright [1979] 58 Crim App R 444 the Court of Appeal dismissed an appeal when the misdirection as to facts was not sufficiently central. Scarman LJ said:

> "At the end of the day, when the appellant's case is not that the judge erred in law but that the judge erred in his handling of the facts, the question must be, first of all, was there error and, secondly, if there was was it sufficient error which might have misled the jury? If this court has a lurking doubt it is its duty to quash the conviction as unsafe, but this court has reached the clear conclusion that this verdict was safe and satisfactory."

[8] It is unfortunate that the factual error which appeared in the judge's summing up was not brought to the attention of the judge by either the prosecution or the defence. In particular prosecuting counsel is under a duty to attend carefully to the summing up and draw any possible errors of fact and law to the judge's attention at the close of the summing up (see Donoghue [1987] 86 Crim App R 267) and the court is entitled to rely on such assistance (McVeigh (1988) Criminal Law Review 127). We have not been persuaded that the factual error renders the verdict unsafe or unsatisfactory. The summing must be read as a whole and judge went on to accurately state the factual basis of the indecent assault allegations in respect of count 7. A's evidence at this point clearly and explicitly negatived any allegation of oral sex on that occasion. The jury could not have been in doubt as to the factual basis of what she was alleging happened on that occasion. As to the

complaint about the judge's use of the word "altercation" we likewise conclude that the jury could not have been misled as to the evidence of what happened. An altercation is defined by the Shorter Oxford English Dictionary as "a noisy argument or disagreement". The evidence pointed to noise on the part of A and her mother and the defendant's reaction to the verbal abuse was to leave the scene in the face of those allegations. The import of the judge's summing up on that point must have been clear to the jury.

[9] Mr O'Donoghue submitted that in spite of the trial being otherwise regular this court should consider the safety of the convictions in the light of the known conduct of the complaint in relation to the appellant and other men. He pointed to what he argued were incredible inconsistencies in her story. Having been subjected to a brutal attempted rape in July 2003 within two months A was knocking at the applicant's door asking to join the flute band of which he was the chairman. By October 2003 she was walking along the alleyway where the initial abuse had occurred in company with the applicant on her way to buy cigarettes. She made a number of complaints of sexual abuse by other males including her natural father, DS, a lodger in her mother's house and JT another man. It was suggested that involving an unidentified community worker (with paramilitary connotations by implication) in setting up a trap pointed to her being ill-motivated against the applicant.

[10] Mr O'Donoghue sought to call Mrs Abbott to give evidence before this court. There was some question as to the basis on which she was giving evidence. It was argued by the applicant that an earlier differently constituted Court of Appeal had ruled that she should give evidence under Section 25 of the Criminal Appeal (Northern Ireland) Act 1980 although the Crown contended that her evidence was to be treated as evidence received *de bene esse*. We heard the evidence of Mrs Abbott which had been anticipated by an affidavit sworn by her. The purport of her evidence was that she could vouch for the fact that on the evening of the incident giving rise to count 7 the applicant was wearing trousers which had button flies not a zip. The significance of this from the defence point of view was that this showed that the evidence of A's mother allegedly seeing the applicant pulling up his trousers zip could not have been correct. According to Mrs Abbott when she was in the applicant's house after the incident she persuaded the applicant to change out of his trousers and tee-shirt while waiting for the police to arrive and she placed them in a black bag which she then kept in her own house. According to her affidavit it was she who told the applicant that forensic evidence could be sought from the trousers. She asked him to give her the trousers so that he might not be accused of washing them. In her affidavit she said that he took off his underpants though in her oral testimony she was not sure about that. In her affidavit she said she was convinced that he never did what he had been accused of but in her oral evidence she said that the

reason she told him to give her the trousers was to satisfy herself that he was an innocent man because she was concerned about the safety of her own granddaughters. She made no mention of that in her affidavit. It is to be noted that according to the affidavit the applicant said that A's mother had said she saw him pulling his zip up and that he explained that his trousers had no zip but buttons. There was no other evidence that A's mother ever said in the presence of the applicant that she had seen him pulling up his zip. Mrs Abbott stated that she had told the applicant's original solicitor what had happened about the trousers. She accepted that she was readily available to give evidence at the trial but she had not been called and she did not attend the trial although she said she did attend the verdict.

[11] Since, according to Mrs Abbott, she had told the applicant's solicitor what happened and that she was readily available for the trial her evidence could not be regarded as new or fresh evidence not readily available at the trial. We found her evidence wholly unconvincing and lacking in credibility. A major difficulty facing the applicant in relation to his reliance on her version of events lies in the fact that the applicant himself during police interviews made no reference to passing the trousers to Mrs Abbott and he stated that the clothes were at his home. He told the police that he was wearing the exact clothes that he had been wearing on the date of the alleged incident and he stated:

> "I kept them in the house for the police to come and they didn't come so I went to the police station with my solicitor."

His version is thus inconsistent with Mrs Abbott's version. He made no reference to removing his clothes for Mrs Abbott to preserve; to the fact that the clothes were allegedly kept in her house; or to the fact that he put them on in her house at her insistence before he went to the police station. When asked why he had not brought the clothes to the police station in a plastic bag he said:

> "I could have brought them in a plastic bag but I didn't think."

The reference to a plastic bag would have given the applicant a clear opportunity to explain how the clothes had in fact been kept in a plastic bag and why they had been taken out of such a bag and put on by him before he went to the police station.

[12] The judge's summing up as Mr O'Donoghue accepted drew to the jury's attention the conflicts between the Crown and the defence case and properly left it to the jury to decide which case they preferred. In a case such as this it is for the jury to reach a conclusion on which witnesses and evidence

they believed. This court in R v Pollock [2004] NICA 34 distilled the relevant principles to apply in determining whether a conviction was unsafe. This court must be persuaded that the verdict is unsafe and that it should have a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence. The applicant has failed to persuade us that the verdict was unsafe. The evidence of Mrs Abbott has done nothing to induce a significant sense of unease about the correctness of the verdict and her evidence simply gives added weight to the view that the defendant was lying about his version of events. Nor have any of the other matters called in aid by the applicant induced such a sense of unease, bearing in mind that the jury was properly directed and that it was entirely open to the jury so directed to reach the conclusion which they did. Accordingly, we refuse the applicant leave to appeal.

[13] In relation to the sentence imposed by the court a significant error crept into the judge's thinking in relation to the appropriate convictions on the counts of attempted rape. The judge appeared to conclude in relation to both counts that the applicant had attempted to penetrate the applicant both vaginally and anally. The evidence in fact negatives any attempt in respect of anal penetration. Anal penetration is an aggravating feature in relation to a charge of rape or attempted rape.

[14] Having regard to the guideline case of the Attorney General's Reference (No. 3 of 2006) (Gilbert) the relevant starting point on a conviction for rape is eight years. This reflects aggravating features including breach of trust and youth on the part of the victim. Both of these are relevant in the present case. Regard also must be had to the mental consequences to the victim (which in this instance was of some significance) and to any further degradation of the victim such as subjecting her to oral sex. We consider, however, that the judge's error resulted in him imposing a sentence which was somewhat too high in respect of the attempted rape charges and we consider that the proper sentence should have been 10 years on each count. The other sentences could not be considered as in any way excessive in the circumstances.

[15] We accordingly grant leave to the applicant to appeal against sentence and we allow the appeal to the extent of substituting a sentence of 10 years on Counts 1 and 5. All the sentences will continue to run concurrently and we do not interfere with the other aspects of the sentence.