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Judgment: approved by the Court for handing down | *Delivered:* **14/05/2013**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

TONDERAI CHAKWANE

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ (giving the judgment of the Court)

[1] This is an appeal by way of reference from the Criminal Cases Review Commission (CCRC) pursuant to the powers contained in Part II of the Criminal Appeal Act 1995 in respect of the applicant's conviction for rape allegedly committed on 18 July 2008. At the end of the oral hearing we allowed the appeal and reserved our reasons which we now give.

Background

[2] The complainant is a 23 year old woman who was living on her own in a small terraced house in the Donegall Road area of Belfast. She became acquainted with the applicant who was a good friend of her boyfriend, S, whom she had been seeing on a casual basis since September 2007.

[3] The applicant and complainant spent a day in each other's company before Christmas 2007. At the end of the night the complainant was drunk and the applicant drove her home. When she awoke the next morning they were in bed together. She was naked from the waist down and he was completely naked but wearing a condom on his penis. The complainant asked him if they had sex but he told her "no, you were too drunk". The complainant had subsequent conversations with the applicant and told him she was not interested in a relationship with him.

[4] The complainant did not see the applicant again until May 2008. On Sunday 13 July 2008 the applicant came to the complainant's home to assist S with his car. The applicant invited the complainant to come with him on a drive to the airport and then to a friend's house. The applicant drove the complainant home at 10pm. The complainant said that she told the applicant that she was in love with S and not interested in anyone else. The applicant suggested to her that he would like to have children with her but she said she was not interested. The applicant said he would ask S how he felt about the complainant.

[5] On Thursday 17 July 2008 the complainant returned to her home around 5.15pm with some friends and they were having a few drinks. The other friends left gradually until only the complainant and a female friend, CH, remained. The complainant drank 7 bottles of Stella Artois lager and a large vodka and 'red bull'. Her boyfriend, S, and the applicant arrived at her house around 1.00am. The complainant shared her second vodka and 'red bull' with the applicant and then sat with S. The complainant had no further recollection of what happened that night.

[6] CH stated that when the applicant arrived he was smoking a joint and he gave her 6-7 draws of it. She was not sure if the complainant had any of the joint or not. CH said that the complainant went upstairs around 2.00am and got into bed with her clothes on. The two men left and S said he would be coming back. CH went upstairs and chatted for a short time with the complainant. The complainant was coherent and "not out of it drunk". CH then left the house.

[7] The complainant woke at 9.55am on Friday 18th July. She found her mobile phone in pieces in the bed and when she put it together noticed a text message saying "you sleeping chick" from the applicant sent at 2.55am. She went to get out of bed and noticed she was naked from the waist down. She felt that her vagina and top of her legs were wet and sticky and smelt of semen. She saw dry semen on her skin and pubic hair. She had cramp like pain in her abdomen and when she went to the toilet saw semen mixed in with her urine.

[8] The applicant was arrested by police at 8.45pm on the 18 July. He agreed to give intimate samples and stated that he had slept with the complainant. The account given by the applicant was that S had driven him back to the complainant's house around 3.00am because he thought he had left his keys at her house. He knocked the door and eventually the complainant came to the door. He said that she was wearing a black top but no pants although she had a quilt draped round her. He told her he had left his keys in her house and she let him come in. She went back upstairs to her bedroom and he looked downstairs for his keys. As he could not find them he went upstairs and spoke to her about where the keys could be. He went downstairs again and then returned to the bedroom and told her he had brought another joint with him. He sat on the bed and rolled the joint. He said he was cold and asked her to "warm him up". He got into bed fully clothed and held her on her tummy and said "Can I have some?" meaning "Can I have sex?" She replied "you

will be like the rest of them". He said "No I won't" and started to caress her tummy. She caressed him back and he touched her on her private parts. He said he would wear a condom; he took off his shoes, trousers and underwear and he put the condom on. She was lying on her back and they were kissing and had sexual intercourse. Then he asked her to turn around and had sex from behind. He ejaculated and the condom burst. He got up and went to the bathroom. He told her the condom had burst. She said she was OK. She asked him to tell S to come up to see her. He said he would ask but he didn't think S would come. He left her in bed and left the house. S was waiting outside in the car. He had been in the house about 15 - 20 minutes. He did not tell S what had happened. His keys were not in the complainant's house but were found in S's house.

[9] The prosecution case was that the applicant had sexual intercourse with the complainant, that she did not consent to that intercourse and that the applicant knew that she was not consenting or recklessly proceeded. After his conviction he applied for leave to appeal. First he contended that there was no prima facie case to leave to the jury. Secondly he submitted that this was a case in which the second limb of R v Galbraith [1982] 2 All ER 1060 should be applied because the prosecution evidence was of such a tenuous character that it could not sustain a conviction. Thirdly the applicant complained that to leave the issue of the incapacity of the complainant to consent was not open on the evidence. This court refused leave on all grounds.

The new grounds

[10] The CCRC referred the case back to the Court of Appeal on the following grounds.

> "There is a real possibility that the Court of Appeal will consider the applicant's conviction is unsafe having regard to:
>
> (i) The argument that the evidence of some of the witnesses who gave evidence of recent complaint should not have been capable of being so classified; and/or
>
> (ii) The argument that the trial judge's direction as to the purpose and utility of the recent complaint evidence given was inadequate; and/or
>
> (iii) That trial judge's failure to direct the jury as to the relevance of the complainant's apparent distress; and/or

(iv) The argument that the alleged offender was deprived of a fair trial through the Crown's failure to disclose the complainant's first statement and his consequent inability to mount the argument that he should have been granted leave to cross-examine the complainant as to aspects of her sexual history."

The disclosure issue

[11] The complainant made a statement dated 19 July 2008 setting out her recollection of the events of the night in question. That statement was not disclosed to the defence or prosecuting counsel. A statement of 8 December 2008 was disclosed. That statement contained the same content as the earlier statement but one line was omitted. In both statements the complainant stated, "My relationship with S is on a casual basis." In the earlier statement, however, that comment was followed by "… and I also had relationships with some of his friends which were very brief and ended up with me having sex with them."

[12] The Crown's case was presented on the basis that the complainant was interested only in S and that she would not have considered consenting to intercourse with the appellant because of her commitment to S. During the opening of the case prosecution counsel stated "..the complainant made it clear to the accused that she was not interested in any physical relationship with him. She subsequently told the accused that she was falling in love with S and was not interested in being with any other man." When she gave evidence the complainant asserted that she told the applicant that she wasn't interested in a relationship with anybody else and hadn't been for a while at that time. That passage was rehearsed by the trial judge in his charge.

[13] It is accepted by prosecuting counsel in this appeal that if disclosure had been made to counsel dealing with the original trial the contents of the statement would unquestionably have led to further enquiries to establish the incidents to which the remarks referred. That may have resulted in the prosecution presenting the case in a somewhat different way. It was accepted that in light of the way in which the prosecution had conducted the case it would have been open to the applicant to have pursued an application under Article 28 (5) of the Criminal Evidence (Northern Ireland) Order 1999 to introduce by way of rebuttal the contents of the statement as evidence. It is common case between the parties that in light of the way in which the prosecution was conducted the contents of the statement would have been admissible and would have been material evidence in relation to the question of whether or not the complainant was consenting.

[14] The prosecution did not contend in this appeal that the conviction was safe and in our view the failure to disclose a statement materially bearing on the issue of consent rendered the conviction unsafe.

The evidence of complaint and distress

[15] As a result of discussions between senior counsel for the alleged offender and the prosecution at the original trial oral evidence was given by four people who saw and spoke to the complainant on 18 July 2008 and statements were introduced from two others. The oral evidence and the statements contained descriptions of complaints made by the complainant and her apparent distress. It is unclear on what basis those statements and the evidence was admitted. By virtue of article 18(1)(c) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (the 2004 Order) hearsay evidence may be admitted by agreement to prove the truth of its contents. Recent complaint evidence is admissible under article 24(4) of the 2004 Order. In order to be admissible under that provision the complainant must indicate to the best of her belief that the statement is true and must give oral evidence in connection with the statement. That did not occur in this case. Alternatively by virtue of article 24(2) of the 2004 Order a statement of complaint may be admissible as evidence to rebut the suggestion that the complainant's oral evidence has been fabricated. That would have been a proper basis for admission in this case. The appellant contended that the evidence was wrongly admitted as a result of the failure to comply with Article 24(4) of the 2004 Order. We consider, however, that in light of the fact that the evidence was admitted by agreement it cannot be said that the failure to comply with the conditions set out in Article 24(4) rendered the material inadmissible.

[16] This court has previously given guidance on the need for a careful direction in relation to the use the jury can properly make of recent complaint evidence. We dealt with this in R v Alan Greene [2010] NICA 47 at paragraph 7.

> "[7] Evidence of recent complaint has always been admissible at common law on the issue of the credibility of the complainant. Similarly evidence of complaint admitted under the provisions of article 24(4) of the 2004 Order is admissible on the issue of credibility. In assessing the weight to be given to the evidence on that issue it is important that the jury are directed to pay particular regard to the circumstances of any disclosure and the period of time that may have elapsed between the alleged offence and the complaint. Of course as appears from the preceding paragraph the evidence is also admissible for the purpose of proving the truth of what has been said. In any case it is important for the judge to direct the jury that they should be cautious about the weight that

> they should give to such evidence since it is coming from the same source as the complainant. It is not independent evidence supporting the complainant's case. In a case such as this where there is a conflict between the complainant and the alleged offender and little or no independent evidence it is particularly important that the jury should be directed about the manner in which such evidence should be considered by them."

In that case the learned trial judge decided to direct the jury that the recent complaint evidence should only be used in relation to the issue of the reliability or credibility of the complainant and we indicated that such an approach was appropriate in some cases.

[17] The trial judge did not draw to the jury's attention that the recent complaint evidence was not independent evidence of the truth of the allegations made by the complainant, did not direct the jury on the circumstances, including any passage of time, relating to the disclosures nor was the jury directed on the caution they should exercise in giving weight to those disclosures.

[18] In addition to the evidence of complaint there was also evidence of the complainant's distress. We addressed this issue in R v WM [2012] at paragraph 23 where we indicated that distress at the time of making a complaint can be taken into account by a jury in determining the weight that should be given to an injured party's evidence but the court must be careful to alert the jury to any circumstance which may suggest that the distress was feigned (see R v Romeo [2003] EWCW Crim 2844). If the undisclosed statement had been available that would have provided material to the appellant's advisers to test whether the evidence of distress was genuine.

Conclusion

[19] For all of these reasons we considered that the conviction was unsafe and allowed the appeal.