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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v.

ANTHONY WEST

Before: Girvan LJ, Coghlin LJ and Weir J

GIRVAN LJ (delivering the judgment of the court)

[1] This is an appeal by Anthony West ("the appellant") against his conviction on one count of rape, leave on all grounds having been granted by Treacy J on 19 May 2009. He also appeals against the sentence imposed by the court.

[2] The appellant was arraigned on 16 April 2008 and pleaded not guilty to the charge of rape. He was tried before Judge Rodgers ("the trial judge") and a jury at Belfast Crown Court between 10 June and 19 June 2008. He was sentenced to 11 years imprisonment on 28 August 2008 and placed on the Sex Offenders Register for life. The trial judge also made an order under Article 26 of the Criminal Justice (Northern Ireland) Order 1996.

[3] The evidence at the trial established that on Friday 23 November 2008 the complainant CB, then aged 19, held a party at her home in East Belfast with a number of friends. The appellant was not at the party. At around 6.00 am CB was at home alone and in pyjamas when she was alerted by a knock at the window by the appellant with whom she was acquainted. She let him into the house but she said that she made it clear that she did not want him to be there. She alleged in police interviews that she wanted him to leave. She said that she called three taxi firms and persuaded one to send a taxi in which he left. She alleged that he tried to kiss her while he was in the house. The taxi driver at the trial gave evidence that as the appellant left the house he saw the appellant and CB kissing in what he called a clinch. The appellant left saying he was going to another party. The taxi driver said that he was talking about sexual matters in the taxi and said he was looking for girls. He returned to CB's house within 20 minutes. In interview he told the police that he was looking for his brother and a friend. When he returned he climbed

over the back wall and gate of the house thereby gaining access to a yard and thence to the back door where he entered. His evidence was that the back door was unlocked. However the complainant asserted that she had locked the door and checked that it was locked before she went to bed. If she was correct the appellant must have taken the keys from the house before he left on the first occasion. If that was correct it pointed to the formation of a plan to return to the premises. When the police attended the premises following CB's complaint of rape the full set of house keys was located in the inside lock of the door. If the appellant had removed the keys and used them to gain access he must also have put them into the inside lock of the door. No forensic tests were done by the police on the back door keys although during interviews with the police the appellant and his solicitor asked for the keys to be forensically examined, it being alleged that that would have helped the appellant to establish his truth of the version of events in relation to his entry to the house.

[4] The version of subsequent events was hotly contested in the trial. It was the complainant's case that she had gone to bed and had fallen asleep. When she awoke she found that her lower clothing had been removed and that the appellant was on top of her having sexual intercourse. She alleged that she made it clear that she did not consent to this. The appellant's case was that he had entered the bedroom, that the complainant was awake and that she responded favourably to his suggestion that they should "get it on" and turned in the bed in a manner indicating her willingness to participate in sexual intercourse. He alleged that she was a willing participant throughout the intercourse which was accordingly fully consensual.

The appellant's grounds of appeal

[5] The appellant relied on a number of grounds of appeal to support his case that the verdict was unsafe. Mr Charles MacCreanor who appeared with Mr McConkey on behalf of the appellant presented the grounds of the appeal in a different sequence from that followed in the notice of appeal. Firstly and primarily he contended that junior Crown counsel's closing speech was so unfair and prejudicial to the appellant that it undermined the safety of the conviction and rendered the verdict unsafe. The trial judge, he contended, failed to deal adequately or at all with the serious irregularity brought about by the closing speech. Secondly, the police had failed in their duty to forensically examine the complainant's back door keys. It was argued that this was a serious omission on the part of the prosecution which worked unfairness to the appellant. The trial judge had failed to deal adequately with the police failure in his directions to the jury and he failed to draw properly to the jury's attention the defence case in relation to that omission. The third ground which Mr MacCreanor put forward but did not seriously pursue was that the trial judge should have acceded to the defence application for a direction at the close of the prosecution case. While counsel properly did not

press that ground of appeal he did rely on the arguments which he presented in support of the point to demonstrate that there were serious weaknesses in the Crown case which underlined the judge's duty to deal with the unfairness to the trial process engendered by Crown counsel's closing speech. The final ground relied on was that the trial judge had been wrong in his decision not to permit cross examination of the complainant about previous sexual history and sexual attitudes. The appellant initially focused on two matters in that context. Firstly he alleged that he should have been permitted to cross examine the complainant about her having had sexual intercourse with the appellant's brother since this was necessary to properly understand the contents of a text message which the complainant had sent describing the defendant as "a dirty bastard" someone who was always trying it on and being as bad as his brother. The Crown relied on that text message as showing the unlikelihood of the complainant consensually agreeing to sexual intercourse with the appellant whereas the appellant argued that she had been willing to have sexual intercourse with his brother notwithstanding that she apparently viewed him in as negative a way as she viewed the appellant. Mr MacCreanor also initially argued that the trial judge should have permitted the appellant to cross examine the complainant about the fact that she had had sexual intercourse the night before the alleged rape with a person with whom she was not in a relationship. Mr MacCreanor, however, very properly did not pursue that latter point. In the light of Article 28 of the Criminal Evidence (Northern Ireland) Order 1999 he was clearly right to abandon that aspect of the appeal.

The Crown's closing speech

[6] Mr MacCreanor argued that the Crown's closing speech by junior speech was so unfair and improper in its tone and contents that it was liable to engender real prejudice to the appellant. It was likely to excite motion and inflame the minds of the jury. Counsel sought to persuade the jurors to put themselves in the position of the complainant and try to feel what she allegedly felt. She put matters before the jury which went beyond the evidence and she distorted some of the key matters of evidence. She relied heavily on the text message referring to the appellant as "a dirty bastard" to persuade the jury to conclude that she would not have freely consented to sexual intercourse with such a person when the Crown knew that evidence which could have put a different gloss on the text had been excluded by the court on the Crown's application.

[7] Counsel drew attention to various passages in the transcript of the closing speech which he contended were objectionable. The court having read the closing speech in its entirety considers that Mr MacCreanor's complaints were in the main made out. Serious criticism can be made of a number of aspects of the speech including the following:-

(a) Counsel repeatedly sought to place the jurors in the position of being raped, attacked and burgled. For example she described the complainant as waking up in a horrific situation and the jury was asked "What do you do and how do you react? You realise too late . . . well, it was too late for the complainant." She posed the question as to what the jurors thought was going through the complainant's mind, what they would do if they woke up to a nightmare like that, how they would react and how they would expect the complainant to react.

(b) In the context of the manner of the appellant's entry to the house counsel framed the allegations of a break in as something that the jurors might think left a very unsavoury taste in their mouth. She focused the jurors' minds strongly on the sense of violation they would experience if subjected to a person entering their house and how much more damning it is to have one's bedroom and person invaded without permission.

(c) In relation to the question of the appellant climbing in over the back wall counsel invited the jury to consider the photographs and "have a look at the paint and see whether you think it looks like there was (sic) 16 million people scuffling over that wall, always climbing over it." No evidence had been called as to the state of the wall and the reference to 16 million people was an exaggerated distortion of the appellant's case.

(d) Counsel's handling in her speech of the question of police interviews was unfair and inaccurate and liable to have seriously misled the jury. She incorrectly attacked the appellant in respect of his account to the police suggesting that he seriously delayed making points to the police which he later relied on. The police evidence at the trial accepted that the appellant was fully co-operative and was anxious at an early stage to make all his points whereas the police wanted to conduct their interview in a different way gradually building up a picture of the background and the events. Counsel's frequent and dismissive references to the appellant purporting to "rack his brain" to think of everything and produce an exculpatory version late in the day was not a fair portrayal of what actually transpired at the interviews.

(e) Counsel did not accurately or fairly set out the evidence relating to the defendant's departure from the complainant's house on the first occasion. She repeatedly described it as a form of expulsion ("forced out", "chased out", "thrown out"). She failed to properly address the jury as to the potential significance of the taxi driver's evidence that he saw them kissing and in a clinch.

(f) Counsel referred to "the girls at Snugville Street" not letting the defendant in on the morning in question. This was a reference to the premises to which the appellant went following his departure from the complainant's house on the first occasion. There was no evidence that there was anyone at Snugville Street and no evidence that there were girls there, much less that they had refused him entry. This was a prejudicial remark with no evidential basis.

(g) Without an evidential basis counsel sought to portray the plaintiff to the jury in such a way as to elicit sympathy as compared to the way they should view the appellant. She described her as a young girl who was not answerable to anybody, the implication being that she would have no reason to make up a story of rape. She may or may not have been answerable to someone whether in a relationship with her or otherwise. There was simply no evidential basis for such a statement. Counsel said that there was no suggestion that she was "a woman of wild abandon". There was no evidence on the subject of the complainant's life. The restraints on the defence in cross examining the complainant in relation to her sexual conduct or attitudes made it all the more important that the Crown did not seek by the back door to imply unimpeachable sexual conduct when there was no evidence to that effect. In this case the Crown was aware that the defendant had sought to rely on evidence that might have painted a different picture had it been admitted.

(h) Having regard to the failure by the prosecution to forensically examine the keys of the back door which might have assisted the defence case it was wrong for Crown counsel to state that forensic evidence took the case no where.

(i) Counsel played down the evidence of the taxi driver which was evidence not consistent with the complainant's version of events. While it is entirely proper for Crown counsel to put pieces of contradictory evidence in their proper evidential context counsel was wrong to describe the driver's evidence as merely "a suggestion" and the product of a glance.

(j) On occasions in her speech counsel interjected her own personal viewpoint. For example "What I think is one of the most telling things about Anthony West's attitude to this whole case is 'that's her word against mine.' That is where he thinks it lies, ladies and gentlemen, that is why he is not worried and he is not feeling sorry for himself …" The personal view of counsel has no place in submissions and has no place in a speech to the jury. The personal opinion of counsel is wholly irrelevant. The proffering of such an opinion betrays an inappropriate identification of counsel with the case she is presenting. It is not consistent with proper professional detachment.

[7] Mr Kerr QC on behalf of the Crown who had not appeared at the trial very properly accepted that there were valid criticisms to be made of the speech. On occasions junior counsel had invited the jurors to consider their own feelings. This was not a proper approach. On occasions counsel had misrepresented the facts. She had, for example, attributed to the defendant an attitude at his police interviews without dealing properly with the defence points about his attitude at those interviews. On occasion counsel had wrongly expressed personal opinions. In relation to this last criticism Mr Kerr argued that it was not so serious since the judge had properly told the jury that it was for the jury to decide the facts. Mr Kerr argued that where prosecuting counsel's speech contains errors or unacceptable material the position may be rectified by the defence in their closing submission and by the judge in his directions to the jury. Mr Kerr accepted that the trial judge should have told the jury to disregard personal opinions and excluded emotions and he should have made sure that the jury were not misled by factual inaccuracies in the Crown closing. Senior counsel very properly accepted that the court might consider that insufficient had been done in the trial process to correct false factual and emotional impressions potentially engendered by the closing speech and that, in consequence, the conviction was unsafe.

The duties of prosecuting counsel

[8] In Boucher v. R [1954] 110 CCC 263 it was stated:-

> "It is the duty of Crown counsel to be impartial and exclude any notion of winning or losing. He violates that duty where he uses inflammatory and vindictive language against the accused and where he expresses a personal opinion that the accused is guilty."

The court in R v. Gonez [1999] All ER (D) 674 succinctly set out the proper approaches to be adopted by prosecuting counsel thus:-

> "Counsel's submission, which we accept, is that it is the role of prosecuting counsel throughout a trial as indeed before it to act as a minister of justice. It is incumbent upon him or her not to be betrayed by personal feelings in relation to the prosecution. It is incumbent on counsel prosecuting not to seek to excite the emotions of a jury. It is for prosecuting counsel not to inflame the minds of a jury . . . A final speech should as a matter of form, as it seems to us, be a calm exposition of the relevant evidence, so far as it is relevant to give such an exposition and an equally calm invitation to draw appropriate inferences from that evidence."

In Randal v. R [2002] 1 WLR 2237 Lord Bingham stated that:-

> "A reference should never be made to matters which may be prejudicial to a defendant but are not before the jury."

In Ramdhanie v. Trinidad and Tobago [2006] 1 WLR 796 the Privy Council held that prosecuting counsel's closing speech created a material irregularity and unfairness rendering the verdict unsafe. Prosecuting counsel's final speech had included passages that in effect told the jury or strongly implied that there was incriminating material about the accused that not been put before them. The speech contained emotive and unjustified comments.

[9] The nature of prosecuting counsel's role is succinctly stated in the Code of Conduct for the Bar of Northern Ireland at paragraph 1701:-

> "It is not the duty of prosecuting Counsel to obtain a conviction by all means at Counsel's command but rather to lay before the court fairly and impartially the whole of the facts which comprise the case for the prosecution and to should assist the court in all matters of law applicable to the case."

The role of prosecuting counsel is also dealt with in the Public Prosecution Service Code paragraph 5.1.5 of which reads:-

> "A prosecutor must not advance any proposition of fact that is not an accurate and fair interpretation of the evidence or knowingly advance any proposition of law that does not accurately represent the law. If there is contrary authority to the propositions of law being put to the court by the prosecutor of which the prosecutor is aware that authority must be brought to the court's attention."

[10] While the closing speech in Ramdhanie contained egregiously objectionable material, junior Crown counsel's closing speech in the present case fell well below the acceptable standards of propriety. Unless the trial process adequately dissipated the clear dangers that it created of the jury being emotionally swayed in favour of a conviction and misled as to key pieces of evidence the speech created a material irregularity rendering the verdict unsafe.

[11] The defence endeavoured to meet the problem created by the improper content of the speech by dealing with the points in the defence closing speech as best it could. In such a situation the proper course would have been to raise the issues with the trial judge in the absence of the jury before the defence speech began. This would have provided everybody with a proper identification of the issues and problems raised and would have focussed the judge's attention on the need to decide how to deal with the serious risk of the speech resulting in procedural unfairness. Depending on the circumstances, in such a situation the trial judge will have to decide whether the damage done can be rectified or whether the jury should be discharged in the interests of justice. If the judge is satisfied that the situation is capable of being rectified he must then give the appropriate directions which may involve requiring Crown counsel in the presence of the jury to withdraw improper comments (including personal opinions), to rectify factual errors and to explain properly matters of evidence which had been misleading or inaccurately stated. The fact that the Crown may be required to do so and to do it in the presence of the jury may weaken the effect of Crown case but that is an unavoidable consequence of the prosecution's conduct.

[12] Unfortunately this course was not followed. This however did not detract from the trial judge's obligation to deal with the risk of prejudice to the jury's deliberations. The trial judge did not identify the risk of unfairness and prejudice to the accused and did not give the jury directions sufficient to deal with the problem. In his summing up he said:-

> "Counsel set out in detail for you their view of the facts. I am going to mention the facts of this case soon as well."

Later in his summing up he stated:-

> "These are not necessarily all the facts but you have heard the facts in some detail this morning and I do not want to go back over them again unnecessarily."

His direction may have unwittingly reinforced the inaccurate statements of fact and the improper addition of material contained in the prosecution counsel's speech. The trial judge's direction to the jury accordingly failed to rectify the irregularity in the trial brought about by Counsel's inappropriate closing. On that ground we must quash the verdict.

The forensic evidence

[13] We accept as valid Mr MacCreanor's complaint that the trial judge failed to adequately deal with the defence points relating to the failure of the prosecution to forensically examine the keys. Where there has been a failure in the investigation process the omission has the potential to work unfairness to the accused. It is for this reason that this court in R v. McNally and McManus [2009] NICA 3 said:-

> "Where shortcomings in the investigation of a crime or in the presentation of a prosecution are identified which give rise to potential unfairness, the emphasis should be on a careful examination by the judge of the steps that might be taken in the context of the trial itself to ensure that unfairness to the defendant is avoided."

[14] The trial judge in his summing up referred very briefly to the absence of forensic evidence saying simply:-

> "Surprisingly enough the keys were not checked for finger prints so that is information that simply is not available to us now despite the fact that there was clearly an issue at the beginning of the investigation."

He did not deal with the potential prejudice to the defence because of the omission nor did he draw to the jury's attention the key points that the defence had made on that issue namely that the appellant had invited the police to check the keys, his solicitor had called for a forensic analysis and the police had assured them that the keys would be looked at.

Prior sexual behaviour

[15] In relation to the appellant's argument that he should have been permitted to cross examine the appellant on her sexual relations with his brother in the context of the contents of the text message Mr Kerr conceded that the text message should not have been admitted in evidence. There is some force in Mr MacCreanor's proposition that if the text message was permitted to enter the trial as evidence then the complainant in fairness should have been open to cross examination. However it is not necessary to reach a final conclusion on that question in view of the Crown's present attitude to the admission of the text as evidence in the first place. There is little doubt that it was evidence which could have had a significant influence on the jury in their consideration of the case against the appellant particularly because junior Crown counsel in her closing speech emphasised the importance and significance of the contents of the text message evidence, which the Crown now accepts should not have been before the jury.

[16] Having quashed the verdict we will hear submissions from counsel on whether a retrial should be ordered.