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Judgment: approved by the Court for handing down | *Delivered:* **16/12/10**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

ALAN GREENE

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Before: Morgan LCJ, Higgins LJ and Girvan LJ

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MORGAN LCJ

[1] On 9th December 2009 the applicant was convicted of 2 counts of indecent assault. On 22nd January 2010 the Judge sentenced the applicant to a period of 3 years imprisonment on each count and imposed a Sexual Offenders Prevention Order. The Judge also made an Article 26 Order. The terms of the SOPO were that the applicant does not engage in any form of coaching or teaching or any supervisory activities with females under the age of 18. The single judge refused leave to appeal against conviction but granted leave to appeal against sentence. This case raises issues as to the admissibility of complaint evidence and the use to which the jury can put it as well as the appropriate directions in respect of delay and good character in historic sex cases. This judgment deals only with the appeal against conviction.

Background

[2] The complainant in this case was born in 1983. The indictment contained two specific counts of indecent assault alleged to have occurred when the complainant was aged between 8 and 10 years of age. The first incident occurred when the complainant visited the applicant's family home. The assault occurred in the living room where the applicant touched the complainant's vagina. The complainant believes that the applicant put his finger inside her vagina. The second incident occurred when the complainant was at her grandfather's farm house when the complainant together with other children were looking through a telescope and were being supervised by the applicant. The complainant was the last to look through the telescope

and at this time the applicant touched her vagina and inserted his finger into her vagina. Whilst it is not clear when exactly these incidents occurred, from the evidence it appears that these offences occurred when the complainant was 8 years old and the applicant was 16 years old. The applicant denied that these incidents ever occurred.

The complaint evidence

[3] At the start of the trial the prosecution sought the leave of the court to call hearsay evidence in the forms of complaints made by the complainant to her mother, sister, husband and Doctor Hunter. These were not recent complaints. That application was resisted by the applicant who in particular highlighted the issue as to how such evidence should be treated if admitted, namely whether it went to the truth of the assertion that the abuse happened, or whether it was simply other evidence in the case and went to the issue of credibility. The learned trial judge allowed the prosecution to call evidence from the mother, husband and Doctor Hunter. He refused the application in respect of the sister.

[4] The disclosure to the mother was made in the course of an argument between her and the complainant in 2000 about the complainant's application to her GCSE work. The evidence indicated that this was a very emotional confrontation in the course of which this disclosure emerged. The disclosure to the complainant's future husband occurred in July 2002 at a time when she and her boyfriend were getting serious. In January 2004 the complainant was being treated in relation to a genito-urinary medical condition and in the course of her history she made a complaint in respect of the alleged offence to the doctor treating her. The formal complaint to the PSNI was not made until December 2007.

[5] The admissibility of such complaints is now governed by article 24 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (the 2004 Order).

> "24. - …
> (4) A previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if-
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> (a) any of the following three conditions is satisfied, and
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> (b) while giving evidence the witness indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth.

(5) The first condition is that the statement identifies or describes a person, object or place.

(6) The second condition is that the statement was made by the witness when the matters stated were fresh in his memory but he does not remember them, and cannot reasonably be expected to remember them, well enough to give oral evidence of them in the proceedings.

(7) The third condition is that-

(a) the witness claims to be a person against whom an offence has been committed,

(b) the offence is one to which the proceedings relate,

(c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence,

(d) the complaint was made as soon as could reasonably be expected after the alleged conduct,

(e) the complaint was not made as a result of a threat or a promise, and

(f) before the statement is adduced the witness gives oral evidence in connection with its subject matter."

In this case the first two conditions demanded by article 24(4) were fulfilled and there was no controversy about them. The applicant argued that the complaints were not admissible as these were not recent complaints but it is clear that the provisions of the 2004 Order were designed to extend the circumstances in which such complaints could be admitted. We accept that there was ample material available to the trial judge to determine that the statutory test was satisfied in respect of each of these complaints and that they were admissible. Each of these complaints was made in circumstances where the learned trial judge was satisfied that the complaint to the individual concerned was made as soon as could reasonably be expected after the alleged conduct.

[6] A statement admitted pursuant to article 24(4) of the 2004 Order is asserted to be evidence of the truth of the matters stated. The equivalent English provision has been considered in R v O [2006] EWCA Crim 556 and R v AA [2007] EWCA Crim 1779 and the same conclusion inevitably reached. Although he did not take issue with the fact that the statutory provision had the effect set out above Mr Barlow for the appellant submitted that a different approach was required in historic sex cases which either required such statements not to be admitted or if admitted required the jury to be told that they could not be given weight as being relevant to the truth of what was said. He contended that a failure to do so would inevitably prejudice the jury if the prosecution were entitled to admit complaint upon complaint.

[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.

[8] In this case the learned trial judge heard submissions at the end of the evidence as a result of which the prosecution agreed that the jury would be advised that they should use the evidence of complaint solely for the purpose of assessing the reliability or credibility of the complainant. We have no reason to doubt that in the circumstances of this case that was a reasonable approach to adopt although we would not want it to be concluded that it was necessarily the only reasonable approach to adopt.

[9] Mr Barlow submitted, however, that the learned trial judge's charge left the jury unsure as to how they should deal with this evidence and it was contended that in substance he had advised the jury that it should regard the evidence as evidence of the truth of what was said. We do not agree. In his charge to the jury on the issue of the complaint the learned judge first dealt with whether the evidence indicated that the complaint had been made. This issue had been raised by the applicant in his evidence. He reminded them of

the time that had elapsed before a complaint was made. He then reminded the jury of the circumstances in which it was alleged that the complaints were made and advised them to consider the complaints and the circumstances in terms of their effect upon the reliability of the complainant. This was particularly important in focussing the jury not on the fact of the complaint but on whether it was of assistance in the assessment of reliability. He instructed the jury that the complaints did not amount to a second witness supporting the complainant's account but could be relevant to reliability. He also touched on the absence of any motive to give a false account which the prosecution had relied upon. In our view these were appropriate directions to assist the jury on the assessment of the reliability and credibility of the complainant and properly guarded against the risk that the jury might be inappropriately influenced by the complaint evidence. We do not accept the submission that the reference to motive shifted the onus of proof and do not need to say anything further about the ground of appeal based on motive.

Delay

[10] The applicant submitted that although the learned trial judge gave a direction on delay it was inadequate for the purpose of ensuring that the jury paid conscientious regard to the burden and standard of proof. The JSB direction notes that whilst the Court of Appeal in England has cautioned against prescribing a particular formula in which juries are to be directed on the importance of delay, it remains the position that in many such cases, and in particular cases where very old allegations of sexual abuse are made, it is necessary to point out to the jury the possible prejudice to the defendant brought about by the passage of time. In R v M [2000] 1 Cr. App. R. 49 Rose LJ said:

> "In a case where there have been many years of delay between the alleged offences and trial, a clear warning will usually be desirable as to the impact which this may have had on the memories of witnesses and as to the difficulties which may have resulted for the defence. The precise terms of that warning and its relationship to the burden and standard or proof can be left to the good sense of trial judges with appropriate help and guidance from the Judicial Studies Board."

[11] In his direction on delay the learned trial judge started by expressing his approval of the proper way in which these matters had been brought to the jury's attention by defence counsel in his address. He directed the jury to examine why the allegations had not come to light for such a long period. He asked them to reflect on how that affected the complainant's reliability. He pointed out that memories fade. He raised with the jury the prejudice that the

applicant may have suffered in bringing forward an alibi because no specific date had been identified. Mr Barlow criticised the direction for not drawing to the jury's attention the fact that the complainant was now trying to draw on her memory for events that happened when she was a child. Although he did not specifically draw that to the attention of the jury he did raise the issue of the child's age in the context of why the matter was not reported earlier as an issue going to reliability. The other matter raised by Mr Barlow was the absence of any express reference to how this affected the jury's consideration of the burden and standard of proof. It was, however, accepted that the learned trial judge had given a clear direction to the jury on this issue at the start of his charge and the issues that he raised in this part of his charge clearly went towards those matters. We consider that the direction on delay was satisfactory.

Good character

[12] The applicant also submitted that the direction on good character failed to impress on the jury the importance of such good character in historic cases. This court has previously stressed the importance of good character in historic cases where there has been a long period of time after the alleged offences with no suggestion of any similar behaviour. In R v Paul Hughes [2008] NICA 17 this court set out how judges should direct juries.

> "This direction deals with the first and second limb of a good character direction, as they are sometimes described. In a case such as this where a considerable length of time has passed since the date of the alleged offences and there was no suggestion that any similar allegations had been made against the appellant the jury should have been told that he was entitled to ask them to give more than usual weight to his good character when deciding whether the prosecution had satisfied them of his guilt. In the passage of the summing up which preceded the reference to good character the judge gave the normal direction on the burden and standard of proof. In a case of delay such as this we consider that more was required along the lines that we have indicated."

[13] It is common case that the learned trial judge gave a good character direction. After dealing with the two limbs of the direction he went on to tell the jury that the propensity element was particularly significant in a historic case such as this where there had been another 15 years since the alleged offences and no evidence of arrest, charge, conviction or anything since then. We do not accept that this direction failed to convey the importance of the applicant's good character to the jury in this case.

[14] The final point made by Mr Barlow related to a portion of the direction in which the learned trial judge correctly directed the jury that they should examine each count separately. He criticised a portion of this direction where the learned trial judge advised the jury that they were entitled to look at all of the evidence in considering the allegations on the individual counts. We do not accept that there was any error in this direction. The jury were plainly entitled to examine any evidence that was relevant to any count whether or not it was relevant to the other count. The direction meant no more than that.

[15] We do not consider that this conviction is unsafe and do not harbour any lurking doubt about its safety. The appeal against conviction must be dismissed.