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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

B Z

Before: Morgan LCJ, Weir LJ and Stephens J

STEPHENS J (delivering the judgment of the court)

Reporting restriction, anonymization and introduction

[1] By section 1 of the Sexual Offences (Amendment) Act 1992, as amended by section 48 of, and Schedule 2 to the Youth Justice and Criminal Evidence Act 1999, anonymity is given to complainants in cases of, amongst others, indecent assault on a female, attempt to commit buggery, indecent assault on a male and indecent conduct towards a child. This is such a case. Accordingly no matter relating to the complainants shall, during their lifetimes, be included in any publication if it is likely to lead members of the public to identify any of them. Five of the complainants are related to the appellant. So if the appellant were to be identified then that would be information likely to lead members of the public to identify the complainants. As a consequence we have not only anonymised the names of the complainants but we have also anonymised the name of the appellant, using cyphers which are not their initials.

[2] On 9 June 2014 the appellant was convicted of 38 sexual offences. Notice of an application for leave to appeal against conviction is required to be given within 28 days from the date of the conviction, see section 16(1) of the Criminal Appeal (NI) Act 1980. The notice in this case was given on 21 January 2016, not 28 days, but rather some one year and seven months from the date of conviction. Pursuant to section 16(2) of the 1980 Act the appellant sought an extension of time to apply for leave, which application was refused by the single judge, Gillen LJ, applying the principles set out at paragraph [8] of the judgment of this court in *R v Brownlee* [2015] NICA 39. The appellant now applies to this court for an extension of time in which to lodge an application for leave to appeal against conviction. Various grounds were

provided to seek to explain the considerable delay, including the solicitor not having the transcription process carried expeditiously, junior counsel being out of the jurisdiction in New Zealand for some months, junior counsel being involved in another trial in Wales and delay on the part of junior counsel in forwarding proposed grounds of appeal. Mr O'Donoghue QC, who appeared on behalf of the appellant, correctly conceded that there were no substantial grounds to explain the entire period of delay (paragraph [8] (ii) of *Brownlee*) and so correctly accepted that in order to obtain an extension of time the merits of the appeal would have to be such that it would probably succeed (paragraph [8] (vi) of *Brownlee*).

The indictment

[3] The appellant was charged with 51 counts of sexual offences consisting of

a) 1 count of indecent assault on a female contrary to Section 52 of the Offences Against the Person Act 1861,

b) 31 counts of indecent assault on a male contrary to Section 62 of the Offences Against the Person Act 1861,

c) 16 counts of gross indecency with a child contrary to Section 22 of the Children and Young Persons Act (NI) 1968,

d) 1 count of attempted buggery of a male over 16 without consent contrary to Section 61 of the Offences Against the Person Act 1861 and Article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and

e) 2 counts of attempted buggery of a boy under 16 contrary to Section 62 of the Offences against the Person Act 1861.

Each of the counts named an individual complainant, of whom there were seven. Five of the complainants were siblings who were related to the appellant. The offending was alleged to have taken place over a period of some 19 years between 31 December 1986 and 1 January 2006, over which period the appellant would have been between 34 and 53 years of age. The complainants were all boys, except for one girl, in respect of whom there was one count (count 1) and they were all young at the time that the offences were alleged to have been committed, being then between some 5 and 15 years of age.

The trial and the sentence

[4] On Tuesday 27 May 2014 His Honour Judge Kerr QC empanelled a jury. On Wednesday 28 May 2014 Mr McMahon QC, on behalf of the prosecution, opened the case to the jury and on that day and over the following 5 working days proceeded to call evidence, including the 7 complainants. On Wednesday 4 June 2014 the prosecution case closed. The appellant then gave evidence. All the evidence on

behalf of the appellant was concluded on Thursday 5 June 2014, as were the speeches on behalf of the prosecution and the defence and the learned trial judge's charge. The jury retired to deliberate. On Monday 9 June 2014 the appellant was convicted on 38 counts.

[5] On 16 July 2014 various concurrent and consecutive sentences of imprisonment were imposed, with the overall effective sentence being one of eleven years imprisonment. A number of ancillary orders were made, including a sexual offences prevention order.

The issues at trial

[6] It is not necessary to describe in detail all the evidence upon which the 38 convictions were based but rather we illustrate the nature of the issues which had to be determined by the jury by reference to two of the complainants, whom we refer to by the cyphers "TG" and "CT."

TG's evidence

[7] TG gave evidence that he was related to the appellant and that he was abused between the ages of 11 and 14½. The appellant was a volunteer leader in a charitable organisation dedicated to the teaching and practice of first aid. TG stated that he joined that organisation after he started secondary school and that he participated in meetings in a recreation centre, after which it was common practice that he and the appellant would go back to the appellant's house. The first incident which TG described occurred in the appellant's house after such a meeting. TG stated that he was asked by the appellant to go to his bedroom, where the appellant demonstrated how to take a pulse at the wrist. TG stated that the appellant commented that a pulse could also be found in other parts of the body, demonstrating this by taking down his trousers, feeling around and playing with his penis, leading to masturbation (count 29 gross indecency). TG stated that he was told by the appellant not to tell anyone else.

[8] TG stated that subsequently the incidents which occurred at the defendant's house developed into oral sex performed on him by the appellant and by him on the appellant. He stated that this occurred up to 50 times over a 3½ year period.

[9] TG also described an incident in a house which belonged to a relation who had died some time previously and which was empty. TG, who was then 13, stated that he and the appellant were upstairs in a bedroom and that both of them were naked and the appellant was playing with his penis. TG stated that the appellant said "do you want to try anything?" to which he shrugged his shoulders. That he then lay down on his belly on the bed. He said that he recalled, as he described it, the appellant playing with his own penis, which was around TG's backside and the appellant being on top of him. TG said that the appellant was slowly adjusting his penis in and after a few seconds TG said it was sore. The appellant then stopped

straight away (count 30 attempted buggery). Thereafter the appellant asked him to do the same to him. TG also said that he then masturbated the appellant until he ejaculated.

[10] The appellant denied that anything inappropriate occurred between him and TG. The appellant did not make the case that there was some accidental or unintentional touching. If the jury was sure that the incidents involving TG occurred, as described by him, then they were plainly intentional.

CT's evidence

[11] Another complainant, CT, described an incident in a swimming pool at a caravan park in which the appellant, during a swimming lesson given by him, touched CT's penis outside his swimming trunks (count 6) and then on a second occasion touched his penis inside his swimming trunks (count 7). He also gave evidence that this occurred on two further occasions (counts 8 and 9). The appellant's response at interview was that it never happened because he could not swim. The appellant gave evidence at trial denying that any touching of the CT's penis had occurred, whether over or inside his swimming trunks and furthermore that the appellant was only ever present in the swimming pool area on one occasion with CT and on that occasion CT's father would have been present in the pool area at the same time. It can be seen that the appellant did not make the case that there might have been some accidental unintentional touching, but rather his case was that the incidents did not occur and were unlikely to have occurred given the presence of CT's father on the one occasion, that he was in the area of the pool with CT and that the appellant could not swim.

Disclosure, the report to the police, the appellant's response at interview and his defence at trial

[12] At the time of the incidents, the last of which is alleged to have occurred by 1 January 2006, none of the complainants made any disclosure and there were no contemporaneous reports to the police.

[13] In 2011 TG's sister travelled abroad to visit him, as by that stage he had emigrated. He disclosed to her that he had been sexually abused as a child by the appellant. She asked him what happened and he said everything. Evidence was given that he was crying at the time and that his sister then told him that the appellant had also "tried it on with her." The evidence was that there were long periods of silence during this conversation and that his sister also started to cry. That she said that she felt guilty bearing in mind that she was a good bit older than TG and what happened to her preceded what happened to him by a good number of years. She blamed herself for not speaking up after what happened to her and she said that if she had it might not have happened to TG. She returned to Northern Ireland and informed her mother of what she had been told by TG. He also told his mother and this resulted in the mother speaking to her other children, each of whom

then made allegations of sexual abuse against the appellant and each of whom broke down when doing so. It was at this stage that reports were made to the police.

[14] The appellant was interviewed by the police after caution on 25 and 26 July 2011 and on 4 April 2012. At interview he denied that any of the incidents had occurred. The appellant also gave evidence at trial during which he denied that any of the incidents had occurred. At no stage did he suggest that there was any accidental contact which was misinterpreted. In addition the appellant gave evidence of his good character, of his employment record and of serving his community by his work for the charitable body and a community organisation.

The grounds of appeal

[15] In addressing the issue as to whether an extension of time could be granted we have considered the five grounds of appeal both individually and cumulatively to determine whether the merits of the appeal are such that it would probably succeed.

Ground 1 – Direction to the jury as to the ingredients of the offence of indecent assault

[16] The appellant contends that in his charge the learned trial judge directed the jury that an assault involves touching and that it is indecent if they, as right thinking members of the public, consider it to be indecent, but failed to direct the jury in relation to the mental element of the offence, namely intention to touch and intention to touch in way that was capable of being considered by right-minded people as indecent. The appellant illustrates the impact of the failure to direct the jury as to intention by reference to count 6, which was the allegation of touching CT's penis over his swimming trunks during a swimming lesson. In the appellant's skeleton argument it was submitted that:

> "it may not amount to an indecent assault on the face of the evidence however it may amount to one if the intention of the applicant was a deliberate touching *for his own sexual gratification*" (emphasis added).

Having illustrated the impact of this non-direction in relation to just one count, the appellant contended, without any further illustration, that it rendered unsafe all of his convictions on 23 counts of indecent assault.

[17] The prosecution accept that the learned trial judge failed to direct the jury in relation to the mental element of indecent assault but contend that at trial there was no issue as to intention. The prosecution contend that on the evidence the sole issue for the jury's determination, on each of the charges of indecent assault, was whether the prosecution had discharged the burden of establishing beyond reasonable doubt that the particular incident had occurred. Thereafter if the jury was sure that the incident had occurred then there could be no reasonable doubt that it was

intentional. The prosecution also submitted that an indecent *motive* on the part of the appellant for an assault was not an essential ingredient of the mental element of the offence.

[18] In *Director of Public Prosecutions v Hart* [1991] Lexis Citation 2213 Woolf LJ delivering the judgment of the Court of Appeal analysed the decision of the House of Lords in the case of *R v Court* [1989] 1 AC 28. From that analysis he stated that in order to find a defendant guilty of "indecent" assault it is necessary to establish.

> "1. That there was an assault in circumstances right-thinking people would regard as indecent.
>
> 2. That it was the defendant's intention to commit such an assault, ie, an assault which right-thinking people would regard as being indecent.
>
> 3. That it is not essential, although it may be helpful, to prove in addition that the defendant's motive for committing the assault was an indecent one.
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> 4. That the defendant's motive for committing the assault may be helpful for two purposes; first, to show that what would otherwise be regarded as an assault which was indecent was not an indecent assault or, as the case may be, an assault which might not be indecent was indecent."

We agree with that analysis from which it can be seen that it is not necessary for the prosecution to establish that the defendant had an indecent motive for committing the assault. The necessary intent is to do that *which the jury find sexually indecent*. However, the motive of the defendant for doing what he did, can help to determine whether the assault was an assault which right-minded persons would think was indecent. For instance in *R v Court* the defendant slapped a young girl of 12 on the buttocks, that being the assault which was alleged to be indecent. He had indicated when faced with the accusation and asked for his explanation: "I do not know, buttock fetish." The defendant's admission of "buttock fetish" was evidence of motivation admissible to establish that an assault which might not have been indecent was indecent.

[19] The Crown Court Bench Book Northern Ireland under the heading "Indecent Assault" and relying on *R v Court* provides a specimen direction, which includes a direction in relation to the mental element of the offence. We would encourage Crown Court judges to use that direction and if it is thought to require any elaboration or alteration to consider with counsel, in advance of closing speeches, the proposed amendments. The aim of any charge is to identify the real issues for the jury's determination, whilst leaving all the issues for their determination. In relation to issues about which there is no dispute that is done by identifying the particular

issue and by stating that, whilst it is for them, there is only one sensible conclusion to which they could come, on the evidence, in relation to that issue. In that way the real issues for the jury's determination are identified. That was the direction correctly given by the learned trial judge in this case in relation to whether right thinking people would consider the assaults indecent. A similar direction ought to have been, but was not given, in relation to intention. In this case by adopting that technique, the learned trial judge would have identified that the jury might consider that the sole issue on each of the charges of indecent assault for their determination was whether the prosecution had discharged the burden of establishing beyond reasonable doubt that the particular incident had occurred.

[20] Despite the lack of any direction as to intent in relation to the charges of indecent assault there was no requisition by defence counsel on this aspect of the charge at its conclusion. In *R v Hunter* [2015] EWCA Crim. 631; [2016] 2 All ER 1021 at paragraph 98 in relation to a misdirection or non-direction in relation to character, Hallett LJ said:

> "We should also add that if defence advocates do not take a point on the character directions at trial and or if they agree with the judge's proposed directions which are then given, these are good indications that nothing was amiss. The trial was considered fair by those who were present and understood the dynamics. In those cases this court should be slow to grant extensions of time and leave to appeal."

The lack of a requisition is not conclusive but it is a good indication that nothing was amiss.

[21] The sole statutory test for the Court of Appeal is one of safety of the convictions; see section 2 (1) of the Criminal Appeal (Northern Ireland) Act 1980 and *R v Pollock* [2004] NICA 34. There is no fixed rule or principle that a failure to give a direction or misdirection is necessarily or usually fatal. It must depend on the facts of the individual case; see *R v AB* [2015] NICA 70 at paragraph [22] and *R v Hunter* at paragraphs [89] to [92]. We have given careful consideration to each of the counts of indecent assault. The only count in relation to which there could have been an issue as to intention, but on the evidence there was not, was count 6 involving touching CT's penis over his swimming trunks. We consider that it is clear that if the jury were sure that each of the incidents occurred, then that each of them was intentional. On the facts of this case the failure to give a direction as to the mental element of the offence of indecent assault does not give rise to any concern about the safety of the convictions.

Ground 2 – Offence not known in law

[22] Count 3 charged the appellant with the offence of gross indecency with a child (whom we shall refer to by the cypher "DB") contrary to Section 22 of the

Children and Young Persons Act (Northern Ireland) 1968. The statement of the offence alleged:

> "Gross indecency with a child, contrary to Section 22 of the Children and Young Persons Act (Northern Ireland) 1968"

The particulars of offence alleged that the appellant

> "on a date unknown between *31 day of December 1987* and *1 day of January 1994*, … committed an act of gross indecency with or towards a child, namely (DB)"(emphasis added).

Section 180(1) of the 1968 Act provides that for the purposes of Section 22 a child "means a person under the age of 14." At the start of the period specified in the particulars of the offence DB was nine years of age. However he was no longer "under the age of 14" on a date in May 1992 and at the end of the period he was some 15 years and 7 months of age. The appellant contends that age is an ingredient of the offence and that the "indictment particulars if accurate, makes the time period past the fourteenth birthday." On that basis the appellant contends that he was convicted of an offence of which he could not in law be guilty.

[23] The relevant provisions governing indictments are to be found in the Indictments Act (Northern Ireland) 1945 and in the Crown Court Rules (Northern Ireland) 1979 SR (NI) 1979/90. Section 3 of the 1945 Act provides that "every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge." Rule 22 of the 1979 Rules, after requiring that a count of an indictment shall commence with a statement of the offence charged, goes on to provide that the "statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and, if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence." In relation to the particulars of the offence Rule 22 (4) provides that "after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: …." It can be seen from both the 1945 Act and from the Rules that the purpose of the particulars of the offence is to give reasonable information as to the nature of the charge.

[24] The power to amend an indictment is contained in section 5 of the 1945 Act which, in so far as relevant, provides that "where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court may make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice."

[25] The statement of offence described the offence with complete accuracy and that offence is "known to the law." The particulars of offence were inaccurate in that they ought to have, but failed to specify the date of the offence as having occurred before DB's 14th birthday. The trial proceeded on an un-amended defective indictment resulting in an irregularity in the course of the trial. The question that is raised is as to the correct approach on appeal to errors in the indictment.

[26] In *R v Ayres* [1984] AC 447 at 460 G - 461 B Lord Bridge questioned the helpfulness of the distinction between indictments which were a "nullity" and indictments which were "defective." He observed:

> "For my part, I doubt if this classification provides much assistance in answering the question which the *proviso* poses. If the statement and particulars of the offence in an indictment disclose no criminal offence whatever or charge some offence which has been abolished, in which case the indictment could fairly be described as a nullity, it is obvious that a conviction under that indictment cannot stand. But if the statement and particulars of offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed under the *proviso* must depend on whether, in all the circumstances, it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant.
>
> … The particulars of offence in this indictment left no one in doubt that the substance of the crime alleged was a conspiracy to obtain money by deception. The judge in summing up gave all appropriate directions in relation to that offence. The co-accused Westbrook having pleaded guilty, the evidence amply proved that offence against the present appellant. The jury in returning a verdict of guilty must have been sure of his guilt of that offence. The judge passed a modest sentence comfortably below the maximum for that offence. The misdescription of the offence in the statement of offence as a common law conspiracy to defraud had in the circumstances not the slightest practical significance." (emphasis added).

[27] Until 1995 Section 2 (1) of the Criminal Appeal (Northern Ireland) Act 1980 provided that an appeal lay on grounds: (a) that the verdict was unsafe or unsatisfactory; (b) a wrong decision had been reached on a question of law; or (c) there had been a material irregularity in the course of trial; with the *proviso* that an appeal might be dismissed if no substantial miscarriage of justice has occurred. There was an identical provision in England and Wales. In both jurisdictions the test for allowing an appeal was changed and the *proviso* was removed so that the sole test

became the safety of the conviction. Subsequently the Court of Appeal in *R v Graham* [1997] 1 Cr. App. R. 302 considered the approach to be taken to errors on the indictment as a result of this amendment. Lord Bingham stated:

> "But now there is no *proviso*. Our sole obligation is to consider whether a conviction is unsafe. We would deprecate resort to undue technicality. A conviction will not be regarded as unsafe because it is possible to point to some drafting or clerical error, or omission, or discrepancy, or departure from good or prescribed practice. We would, for example, expect *R v McVitie* [1960] 2 QB 483, (1960) 44 Cr App Rep 201 to be decided under the new law in the same way as under the old. But if it is clear as a matter of law that the particulars of offence specified in the indictment cannot, even if established, support a conviction of the offence of which the Defendant is accused, a conviction of such offence must in our opinion be considered unsafe. If a Defendant could not in law be guilty of the offence charged on the facts relied on no conviction of that offence could be other than unsafe." (Emphasis added).

[28] The correct approach on appeal to irregularities in the course of a trial was also considered in *R v Ashton, Draz and Riley* [2006] EWCA Crim. 794; (206) 2 Cr. App. R 15; (207) 1 WLR 181. In that case the court considered three appeals where there had been an irregularity in the way in which an accused came to be convicted and/or sentenced at the Crown Court. Fulford J gave the judgment of the court and at paragraph [4] he observed:-

> "In our judgment it is now wholly clear that whenever a court is confronted by failure to take a required step, properly or at all, before a power is exercised ('a procedural failure'), the court should first ask itself whether the intention of the legislature was that any act done following that procedural failure should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure."

[29] In *R v Stocker* [2013] EWCA Crim. 1993; [2014] 1 Cr. App. R. 18 the Court of Appeal reviewed all of the authorities and concluded:

> "[42] In our judgment, there is a clear judicial and legislative steer away from quashing an indictment and allowing appeals on the basis of a purely technical defect. The overriding objective of the Criminal Justice System is to do justice - to ensure the acquittal of the innocent and the conviction of the guilty. To that end, procedural and technical points should be taken at the time of the trial when they can be properly and fairly addressed.

> [43] However, the question for us is whether this is a purely technical defect or whether the count itself was fundamentally flawed because it breached r 14(2) by failing to identify accurately the legislation allegedly contravened. The clear purpose of r 14(2) is to ensure that an accused has sufficient information to know the case he has to meet and for all parties to know which statutory provisions apply. Here, the position could not have been clearer. Everyone understood and proceeded upon the basis that the Appellant was charged with an offence under the 2003 Act committed in 2007 or 2008. The Particulars of the Offence which were read to the Appellant upon arraignment, the evidence served in advance of trial, the prosecution opening of the case, and the evidence called by the Crown all made it plain that the Crown's allegation related to a rape committed on a day at the end of 2007 or beginning of 2008. (The date was in fact altered from 2007 to 2008 as a result of the complainant's evidence). The Appellant and his legal representatives knew all they needed to know about the case he had to meet and any relevant statutory provisions which applied."

[30] We were also referred to the decision in *R v Pickford* [1995] QB 203, [1994] 3 WLR 1022, [1995] 1 Cr App Rep 420. In that case the facts were that in 1975 the appellant forced L, born on 22 August 1961, to have sexual intercourse with his mother, the appellant's wife. The appellant was charged with and pleaded guilty to, an offence under the Sexual Offences Act 1956, in that on a day between 1 January 1975 and 31 December 1975, he unlawfully incited L to have sexual intercourse with a woman whom he knew to be L's mother. The precise date of the offence could not be precisely specified and L's 14th birthday, on 22 August 1975, fell between the two dates referred to in the particulars. At the time of the trial the law's presumption, now abolished, was that a boy under 14 was incapable of an offence involving the act of sexual intercourse by him. It followed that if the person incited was not capable of committing the principal crime, then that the appellant could not be guilty of incitement. The appeal was determined by the application of the un-amended test for allowing an appeal (see paragraph [27] of this judgment). The court held that there was a wrong decision on a question of law in the acceptance of the appellant's plea, and thus his conviction, upon the erroneous assumption that the boy's age did not matter. Laws J, giving the judgment of the court, stated that:

> "The features of the present case upon which (the appellant's) submissions must turn may be isolated thus. First, although there is no concession that the stepson was under 14 at the material time, the Crown nevertheless accepts, as we have indicated, that it is not demonstrated that he was over that age. Secondly, in the light of his date of birth it is clear, as we have said that the indictment covers a period 1 January 1975 to 21 August 1975, in which he was indubitably under 14. In our judgment this latter fact is of great importance. It implies that when the charge was framed, the prosecutor did not have

> in mind the significance of the stepson's date of birth. If he had, he would inevitably have drawn the indictment so as to refer only to a period after the boy's 14th birthday. When one sets this alongside the inconclusive state of the evidence as to the date of the incident, the inference is that this case was not mounted, nor did the appellant plead guilty, on the basis that it was a necessary ingredient of the offence that the stepson be over 14 when it was committed."

The court having found that there was a wrong decision on a question of law, then applied the proviso dismissing the appeal on the basis that the appellant, on exactly the same facts, (which he undoubtedly admitted) could have been charged differently with another offence (inciting his wife to commit the offence of a woman over 16 permitting her son to have sexual intercourse with her), with no prejudice to him, and in terms which would have avoided altogether the defect upon which the appeal was founded in that the presumption of incapacity applied only in respect of offences committed by, rather than against, boys under 14.

[31] We consider that in *Pickford* there was a significant and highly relevant concession by the prosecution that the witness statements, so far as they bore on the date of the incident, did not establish, beyond doubt, that it took place after 21 August 1975 and therefore after the boy's 14th birthday. Furthermore in that case there was no evidence at trial, as the appellant pleaded guilty.

[32] The purpose of the particulars of the offence is to give reasonable information as to the nature of the charge. Applying the test in *R v Ashton, Draz and Riley* we do not consider that the intention of the legislature was that any technical defect in the particulars should lead to the trial process being invalid. We have gone on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the defect in the particulars. We do not consider that there was any prejudice to the appellant or, for that matter, to the prosecution. In advance of trial DB's statement dated 26 July 2011 was served on the appellant. That statement made it clear that the incident the subject of Counts 2 and 3 occurred when DB was 11 or 12 years of age. On the basis of that statement the offence would have been committed between a date in 1989 and a date in 1991. The prosecution opening of the case to the jury and the evidence of DB at trial was that the incident occurred when he was 11 or 12 years of age. The learned trial judge in his charge informed the jury that the offence "is age limited in the sense that the offence has to be with someone who is under 14 years of age" and when referring to Counts 2 and 3 which arose out of the same incident the learned trial judge said that the incident allegedly occurred when DB was "aged about 11 or 12." The appellant had sufficient information to know the case that he had to meet prior to trial. There was no issue at trial as to the age of DB when the incident occurred. There was no requisition to the judge at the conclusion of his charge. At trial the error in the indictment was either not noticed by counsel on behalf of the appellant, as it was quite plain that the incident was alleged to have occurred when DB was aged 11 or 12 or alternatively, if

it was noticed, then the point should have been taken at the time of the trial when it could have been properly and fairly addressed by a simple amendment to the particulars. We consider that it was a pure technicality which caused no prejudice whatsoever. We do not consider that it gives rise to any concern about the safety of the conviction on count 3.

Ground 3 - The description of the evidence in the charge to the jury

[33] The appellant contends that this was a complex multi-complaint historic trial of childhood sexual abuse and that it was essential that the jury were assisted by the judge in his charge summing up the competing evidence between the prosecution and the defence in order to crystallise for the jury the evidence being relied upon. It is contended that the learned trial judge failed to remind the jury of the actual evidence called by both parties and of the cross-examination of the various witnesses. So the focus of this ground of appeal is on the manner in which the learned trial judge directed the jury on the facts. It is contended on the part of the appellant that such was the brevity of this aspect of the charge, that there was an inadequate direction as to the evidence.

[34] In relation to a direction to a jury Lord Steyn stated in *R v Aziz* [1995] 3 W.L.R. 53 [1996] A.C. 41 that "a good starting point is that a judge should never be compelled to give meaningless or absurd directions." There is an element of discretion and as Lord Alverstone CJ stated in *R. v. Stoddart*, 2 Cr.App.R. 217:

> "Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively."

So the exercise of discretion is to be informed by the trial process and the direction should be "custom built to make the jury understand their task in relation to a particular case" see Lord Hailsham L.C. in in *R. v. Lawrence* [1982] A.C. 510 at 519. Lord Hailsham also stated that "a direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's notebook" rather "it should … include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts." In *R v Meehan & others* [2011] NICA 10 this was also the approach which this court reminded judges to follow.

[35] The judge in his charge set out the function of judge and jury, assisted the jury in relation to the assessment of credibility, set out the burden and standard of proof, directed as to separate consideration of each count, gave directions as to the constituent elements of the various offences, gave directions as to the difference between specific charges and sample charges. At this stage of his charge the learned trial judge then went through each count on the indictment reminding the jury of the

basic factual allegation in relation to each count and stating in relation to each that if the jury was sure that the incident occurred they would be entitled to convict, but if they were not sure then they must find the defendant not guilty. For instance the direction that the learned trial judge gave in relation to the evidence of one of the complainants was that, if the members of the jury were sure that his evidence is correct and the incidents which he described took place, having regard to the denials by the defendant, then the jury would be entitled to convict. If not, then that the jury should acquit. In relation to some of the counts the learned trial judge reminded the jury of some aspects of the cross examination of the complainants. The trial judge then directed the jury as to how to approach the defendant's evidence, gave a good character direction, directed as to the effect of delay, directed the jury as to inconsistencies in the evidence of the witnesses, directed in relation to the cross-admissibility of evidence and also directed as to evidence of complaints. The learned trial judge then summarised the defence case, before giving a standard direction as to a unanimous verdict.

[36] There is discretion as to the amount of factual evidence to be included in a charge which discretion is informed by, for instance, the length and dynamics of the trial. We note that there was no requisition by counsel to the judge at the conclusion of his charge. We consider that the factual outline in the charge was brief, but was given in the context that all of the allegations were denied and had been denied on oath by the defendant on the day before and on the day of the charge. We have carefully considered whether the degree of brevity affected the safety of the convictions in this appeal but having done so it seems to us that the issues were properly before the jury. We consider that the description of the evidence in the charge to the jury does not give rise to any concern about the safety of the convictions.

Ground 4 – Character direction and historic allegations

[37] The learned trial judge gave a standard two limb character direction, the first limb as to credibility and the second as to propensity. The appellant contends that the learned trial judge ought to have, but failed to direct the jury as to the good character of the appellant in the years since the offending behaviour was alleged to have occurred, so as to give an enhanced propensity direction to the effect that the jury might think that because so long has passed since the alleged historical offences and the appellant has committed no offence in that time, it is less likely that he committed the offences charged. The appellant contends that the failure of the learned trial judge to give an enhanced good character direction was a material irregularity at the trial.

[38] In *R v Small* [2008] EWCA Crim. 2788 there was a 19 year period of alleged sexual offending so that the first alleged offending was some 37 years and the last alleged offending was some 18 years, prior to trial. In *R v B* [2011] EWCA Crim 867 there was a two year period of alleged offending so that the first alleged offending was some 18 years and the last alleged offending was some 16 years, prior to trial. In

R v Small Sir Christopher Holland, in giving the judgment of the court, whilst acknowledging that "obviously a mere failure to adopt a specimen direction cannot in itself found an appeal", stated that the failure to give the third limb *contributed* to the finding that the delay directions were seriously flawed. In *R v B* Lord Justice Stanley Burton stated that the character direction "was not sufficiently tailored to the facts of" the case and that "the so-called third limb of the direction should clearly have been given." In considering the impact of the decision in *R v B* it is also relevant to note that there were a number of errors identified by the court in the summing up and that Stanley Burton LJ stated in paragraph [34] that "the matters to which we have referred, if viewed in isolation, might well not have led to this appeal being allowed. However, we had to consider the cumulative effect of these matters." It was the cumulative effect of the matters which rendered the conviction in that case unsafe.

[39] We note that there was no requisition to the learned trial judge in respect of this or any other aspect of his charge and if there had been that the jury would have been reminded of the 19 year span of the alleged offending. A good character direction should be tailored to the facts of the particular case. In *R v B* there was a short two year period of alleged offending with that period ending 16 years prior to the trial. In this case there was a 19 year period of alleged offending, involving seven different complainants, that came to an end some eight years prior to the trial. In view of the lengthy period of alleged offending and by comparison the short period since the period of offending, we consider that it was an appropriate exercise of discretion not to give the third limb of the character direction. We consider that this ground of appeal does not give rise to any concern about the safety of the convictions.

Ground 5 – Evidence of distressed demeanour at the time of making complaint

[40] The appellant contends that the learned trial judge ought to have, but failed to, direct the jury that the distress of the complainants at the time of making a complaint was part and parcel of the complaint and should not be given any separate weight. It can be seen that this ground of appeal relates to the content of the learned trial judge's charge there having been no objection at trial or on appeal to the evidence of demeanour being admitted.

[41] The distressed demeanour of a complainant immediately after an alleged sexual offence or at the time that he or she makes a complaint to, for instance, a family member or to a police officer was formerly considered in the context of a requirement for corroboration. The corroboration previously required was that the offence had been committed and that the accused committed it. If there was no corroboration then it was a requirement to warn the jury of the danger of convicting on the uncorroborated evidence of the complainant. That requirement was abolished by Section 32 of the Criminal Justice and Public Order Act 1994. It is no longer necessary to consider a requirement to warn the jury of the danger of convicting on the uncorroborated evidence of the complainant. However distress

can still amount to corroboration and so questions remain as to whether evidence of distress is admissible, if so what direction should be given to the jury as to how to approach such evidence and, if there is a misdirection or non direction, whether it affects the safety of the conviction.

[42] The cases in relation to distress illustrate considerable variation in circumstances. We will illustrate that variation by reference to the following cases.

(a) In *R v Redpath* (1962) 46 Cr App Rep 319, 106 Sol Jo 412, the complainant, a girl aged 7, alleged that she was indecently assaulted on a moor by the appellant. There was evidence of distress from two witnesses and the distress observed occurred at two different times. First a witness stated that at a time immediately after the incident was alleged to have occurred he saw the complainant emerging from the moor in a very distressed condition. Second the complainant's mother stated that the complainant, on arriving home on the day of the alleged incident, made a disclosure about the assault and that the complainant was in a terrible state. Parker LCJ, giving the judgment of the court, considered that there was a difference as to the proper approach to those two witnesses. He stated that the evidence of distress at the time, if accepted by the jury, was "very strong evidence of … the little girl's story." This was because the complainant had emerged from the moor in a matter of seconds after the appellant had left, she was observed by an independent witness, she was not considering making a complaint at that time, she had no idea that she was being observed or that anybody thought that anything improper had happened. By way of contrast the Lord Chief Justice stated that the mother's evidence of the girl's condition *may* in law be capable of amounting to corroboration, but "quite clearly the jury should be told that they should attach little, if any, weight to that evidence because it is all part and parcel of the complaint." He also stated that the girl making the complaint might well put on an act and simulate distress.

(b) In *R v Chauhan* (1981) 73 Cr App Rep 232 the complainant alleged that whilst alone in a room with the appellant, he touched her breast and tried to kiss her. She stated that she extricated herself, immediately running upstairs to the ladies lavatory, in a distressed condition, crying. A fellow employee heard the complainant crying and screaming and saw her going into the lavatory. This was evidence of distress immediately after the alleged indecent assault. In that case the trial judge had directed the jury to consider whether the evidence of distress was fabricated or whether any fantasy had caused the distress. He directed that if they were not sure that the distress was genuine or were not sure that it was not the product of a fantasy, then the evidence would have been of no use whatsoever. The Court of Appeal

accepted that the evidence could amount to corroboration and that the jury had been correctly directed.

(c) In *R v Venn* [2002] EWCA Crim 236 the complainant, a girl, at the time of the offences aged between 9 and 12 years old, alleged that she had been indecently assaulted by the appellant. There was no contemporaneous report. The appellant's mother gave evidence that at or about the time of the alleged assaults the complainant had become withdrawn and given up various pursuits, such as riding, choir practice and going to school discos, but that immediately after the complainant's video interview, she appeared to dramatically change back to her previous light-hearted demeanour and activities. A police officer also gave evidence as to the complainant's distress when he visited her home before she gave the video interview. The defence sought to exclude the evidence of the police officer. The trial judge admitted the evidence on the basis that it was linked with and integral to, the evidence of the mother, as to the untypically depressed demeanour of the complainant over a long period, which was dramatically reversed following her revelation and complaint as to the conduct of the appellant. The Court of Appeal held that in view of the *uncertainties* involved in establishing a link between the complainant's demeanour and the earlier abuse that, rather than leaving it to the jury to decide whether on the basis of the mother's evidence any significance could be attached to the complainant's behaviour over the relevant period, the judge should have excluded it from their consideration. However given that the learned trial judge gave the jury a careful direction which ended with a clear indication that they should attach little importance to such evidence the appeal was dismissed.

(d) In *R v Romeo* [2003] EWCA Crim 2844; [2004] 1 Cr. App. R. 30; [2004] Crim. L.R. 302; Times, October 2, 2003, the complainant, who at the time of the offence was aged 17, alleged that she had been indecently assaulted in a house which she shared with another young woman. It was the prosecution case that the appellant took the complainant to her room and forced her to have oral sex with him. After the incident there was evidence that the complainant went to the house of a neighbour, to whom she complained about the incident. The neighbour and the police were called to the house and they gave evidence that the complainant was upset and distressed. Lord Justice Scott Baker giving the judgment of the court stated:

> "[13] The complaint is that the jury should have been given a specific direction that little weight should be attached to the fact of the complainant's distress. Reliance is placed on passages in *Knight* [1996] 1 All ER

647, (1966) 50 Cr.App.R 122 at 125 and *Chauhan* (1981) 73 Cr.App.R 232 at 234 commenting on the case of *Redpath* (1962) 46 Cr.App.R 319. However, in our view the most significant and important passage in these authorities from the viewpoint of the circumstances that prevail today - that is where corroboration is no longer a requirement - is the passage at page 235 in *Chauhan*. There the Lord Chief Justice said this:

> "In normal cases, however, the weight to be given to distress varies infinitely, and juries should be warned that, although it may amount to corroboration, they must be fully satisfied that there is no question of it having been feigned."

We prefer a statement of the law in those terms, rather than that juries should routinely be warned that little weight should be attached to such evidence. It seems to us that what is necessary is that in appropriate cases the judge should alert the jury to the sometimes very real risk that the distress may have been feigned."

(e) In *R v AH* [2005] EWCA Crim 3341 the complainant, a traffic warden, alleged that she was raped by the appellant, a special constable, in her house. His defence was that what had occurred was consensual. She stated that about half an hour after the incident she telephoned her divisional officer, Mr Young, to tell him what had happened. At trial the complainant gave evidence that she was very distraught and in tears during the call. Mr Young gave evidence that there were pauses and a few tears from her. In relation to the evidence of distress given by the complainant the judge in his charge made it clear to the jury that the recent complaint was not evidence of what had happened or independent evidence of what had happened. However, the court considered that the direction given by the judge was deficient in failing to draw attention to the relevance of the recent complaint as only going to consistency and in that way to the credibility of the complaint. In relation to the evidence of the complainant's distress given by Mr Young it was contended on appeal that the trial judge should have directed the jury to the effect that the evidence of distress was an integral part of the complaint and carried no extra weight. Moreover, that the divisional officer had not seen the complainant's distress, but merely heard it on the telephone. Lord Justice Richards stated that:

> "[34] Miss Chan accepts that the judge ought to have given a direction as to the evidential value of distress, but she points out that the judge did refer to both parties' comments on the making of the call to Mr Young. She submits that by inference if, as the defence was contending, the call was to fabricate an allegation of

> rape in order to protect against rumours, then the allied distress was likewise feigned and of no value. Accordingly, submits Miss Chan, it does not matter in this case that the judge failed to give a specific direction in relation to distress.
>
> [35] Whether a direction of that kind is needed and, if so, in what terms, depends very much on the particular circumstances of the case. In the circumstances of this case, we take the view that the judge was wrong to draw attention to the evidence as to distress and then to give no guidance to the jury on how to deal with it. In our view, he should have given a direction to the effect that the distress in this case was part and parcel of the complaint and should be assessed together with the complaint and not be given any separate weight. Again, therefore, we think that there was here a material misdirection."

(f) In *R v Zala* [2014] EWCA Crim 2181 the appellant, a retired GP, was convicted on 19 June 2013 of 10 counts of indecent assault which took place on three of his patients between January 1985 and May 1991. None of the three complainants had complained at a time earlier than 2007. The evidence in respect of the complainants' distress was evidence given by each of the complainants about the distress each experienced and by other witnesses in respect of the second and third complainants' distress. The other evidence in relation to the second complainant was from her husband, her mother and a school friend. In respect of the third complainant there was a statement from a witness which was read. It was clear from the statement that the complainant had cried in the witness's presence when she said that the doctor had touched her somewhere where he should not have done. In addition to that there was evidence from Dr Caroline Jessel who had conducted investigations into the appellant. She had spoken to the complainant in August 2012 about her complaints and the complainant was very distressed at that time. The court held that there were two mis-directions in the judge's summing up. The first was that the complainant's own evidence of distress could not provide support to her case. Secondly, in the circumstances of this case, the judge should have carefully distinguished between the evidence that was contemporaneous to the complainant's original complaint and the evidence of Dr Jessel in particular, many years after the event. However, the court went on to hold that the mis-directions were immaterial and did not affect the safety of the convictions.

[43] Given that the weight of evidence as to distress will vary according to the circumstances of the case we consider that whether the evidence is admissible and if so whether a direction is needed and, if it is needed, then in what terms, depends much on the particular circumstances in any given case. In giving consideration to those questions a distinction can be drawn between the complainant's own evidence of distress and evidence from a witness, who may be independent, as to the distress

of the complainant. A distinction can also be drawn between evidence of distress at the time or shortly after the alleged offence and distress displayed years later when making a complaint. If the jury is sure that distress at the time is not feigned then the complainant's appearance or state of mind could be considered by the jury to be consistent with the incident. Evidence as to the demeanour at the time of making the complaint may in law be capable of amounting to corroboration but "quite clearly the jury should be told that they should attach little, if any, weight, to that evidence because it is all part and parcel of the complaint" (*R v Redpath*) and "should be assessed with the complainant and not given any separate weight" (*R v AH*). In relation to evidence of a change in demeanour over a significant period of time, as in the mother's evidence in *R v Venn*, such evidence, although technically admissible or relevant, is likely to be of such tenuous relevance that it would not be right to admit it. We consider that the uncertainties are such that the evidence should either not be admitted or it should be excluded from the jury's consideration. Complainants may exhibit such changes in demeanour for many reasons and generally it is dangerous to infer that it should be regarded as indicative that sexual abuse has occurred. It is clear that in relation to the complainant's own evidence of distress and the evidence of a witness as to the distress of the complainant, the jury should be directed that they must be sure that there is no question of it having been feigned before they can rely on it (*R v Romeo*). In that way the jury is reminded that a person fabricating an allegation may support it by an equally false show of distress at the time of making a complaint.

[44] We consider that it is for the judge to look at the circumstances of each case and tailor the direction to the facts of the particular case emphasising to the jury the need, before they act on evidence of distress, to make sure that the distress is not feigned and drawing to their attention factors that may affect the weight to be given to the evidence.

[45] In relation to this ground of appeal, as in relation to all the other grounds, there was no requisition in relation to the judge's charge. We consider that this reflects the view of those present at, and who understood the dynamics of, the trial that this evidence was of a peripheral nature. In our judgment this is not a case in which the evidence of distress assumed unusual importance or particular prominence. We consider that the judge's direction was brief and that it would have been preferable to have given the jury assistance in relation to the evaluation of the evidence of distress. However, we note that it directed the jury to the material matter, namely to decide whether the evidence of distress was feigned or not. Furthermore, that the jury were directed that the complaints were not independent evidence that the offences took place. We do not consider that the judge's charge in relation to the distressed demeanour at the time of making complaints gives rise to any concern about the safety of the convictions.

Conclusion

[46] We have given careful consideration both individually and cumulatively to the various grounds of appeal. The task to be performed by this court when determining an appeal has been clearly and authoritatively expounded by Kerr LCJ in *R v Pollock* [2004] NICA 34 after a review of the relevant authorities. At paragraph [32] of his judgment the Lord Chief Justice set out the following principles to be distilled from the authorities:

> "1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.
>
> 2. This exercise does not involve trying the case again. Rather it requires the court, where a conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
>
> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
>
> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[47] Applying those principles we consider that none of the matters raised on behalf of the appellant, either separately or in combination give rise to any concern about the safety of the convictions and accordingly we decline to extend time in which to lodge an application for leave to appeal against conviction.