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ICOS NO. 18/085107

IN THE CROWN COURT IN NORTHERN IRELAND

SITTING IN BELFAST

REGINA

-V-

TONY CHEE

His Honour Judge McFarland
Recorder of Belfast

Introduction

1. This is a ruling in respect of a renewed abuse of process application made on behalf of the defendant. The defendant is a medical practitioner and in the course of his general practice of medicine he carried out intimate examinations of female patients. He was committed for trial and arraigned in January 2016 and pleaded not guilty to a significant number of counts of sexual assault, sexual assault by penetration and indecent assault of a female (contrary to articles 6 (1) and 7 (1) of the Sexual Offences (NI) Order 2008 and section 52 of the Offences against the Person Act 1861). The indictment was severed by agreement with the first trial (ICOS reference 15/113560) dealing with eleven counts involving seven complainants. These counts related to patients who had made complaints to a number of people and then either directly or indirectly to the police. The defendant was found not guilty in respect of all counts in May 2018. The remaining thirteen counts were dealt with at a second trial (ICOS reference 18/085107) which concluded in February 2020. This group of counts arose in respect of complaints which were made subsequent to publicity in relation to the charging and appearance in court of the defendant and a public appeal by the police in August 2014. No evidence was offered in respect of one complainant and the defendant

was found not guilty in respect of that count, and after a trial he was also found not guilty in respect of seven further counts. The jury could not reach verdicts in respect of the remaining five counts (counts 2, 3, 4, 7 and 9) and the prosecution have applied for the defendant to be tried for a second time in respect of those counts. The defendant asserts that this is an abuse of process.

Re-trial and Abuse of Process jurisdiction

2. Whether or not a subsequent trial is an abuse of process was examined in the case of *Henworth [2001] EWCA Crim 120.* At [20] it was stated that "*as to abuse of process the important matter in our judgment to bear in mind is that it is, and must always be, closely related to the facts of the instant case*". That case related to a proposed third trial after an earlier conviction had been set aside, and then one later trial with a jury disagreement. The Court of Appeal was keen to stress that where a serious crime has been committed and it is shown that there is a case to answer there is a clear public interest in having a jury decide positively, one way or the other, whether that case is established. However, they then added at [26] –

> *"Having said that, we recognise the possibility that in any given case a time may come when it would be an abuse of process for the prosecution to try again. Whether that situation arises must depend on the facts of the case which include, first, the overall period of delay and the reasons for the delay; second, the results of previous trials; thirdly, the seriousness of the offence or offences under consideration; and, fourthly, possibly, the extent to which the case now to be met has changed from that which was considered in previous trials."*

3. I propose to look at these four factors under three headings – seriousness, delay and the previous results and the case against the defendant.

Seriousness of Complaint

4. The allegations of this nature against a medical practitioner are serious in that they involve complaints of sexual assaults carried out during purported medical examinations.

Delay

5. On the issue of delay, the examinations complained of by the first set of complainants took place between June 2009 and April 2011, with the first complaint being made in April 2011. The defendant was interviewed by police under caution in November 2013 and in August 2014, and was then charged in August 2014. He has been acquitted of all the counts relating to

that first set of charges. The remaining set of counts, which include the ones being considered for this further trial, relate to complaints made in August 2014 about which he was interviewed in May 2015. There has been no evidence of any specific prejudice or unfairness arising from the delay. The complaints relate to examinations which occurred in 2009 and 2011. The relevant dates of the examinations in relation to the five remaining counts are between August and October 2009 (count 2), August 2010 (count 3), July 2008 (count 4), February 2009 (count 7) and October 2010 (count 9). It has been the defendant's evidence that he remembers little if anything about the alleged incidents. Some evidence from his clinical notes is available although the notes are of limited value.

6. It is interesting to note that in *Henworth* the Court of Appeal, although stating that delay was an issue to be considered, did not discuss the delay in that case in much detail. A subsequent application to the European Court of Human Rights (*Henworth –v- UK [2004] ECHR 579*) found that the delay in the case was a violation of the defendant's Article 6 (right to a fair trial) rights. At [31] of its judgment, the Court concluded that

> "*whilst there are no unusually long and unexplained periods of inactivity, there are a number of delays which, taken together and in light of the decision to retry the applicant again after July 1998, disclose that the proceedings did not proceed with the necessary expedition and failed to satisfy the reasonable time requirement."*

7. The delay in Chee's case is a relevant factor, notwithstanding that the trial process in any trial should be able to deal with the matter of delay given the lack of specific prejudice. The trial judge would, in normal circumstances, alert the jury to the delay and give suitable warnings as to how this may make it difficult for the defendant in presenting his evidence and his case.

8. The delay, is however not insignificant in this matter. By the date of any re-trial it will have been six years since he was first charged with the first set of allegations. As a stand-alone factor it would not be sufficient to merit a stay as an abuse of process, but it is a factor that that must be taken into account in any overall assessment.

Nature of the prosecution case and previous trials

9. A more detailed analysis is required concerning the nature of the prosecution case and the results of the previous trials.

Definition of "sexual assault" and "indecent assault"

10. Before doing this, it is important to review the nature of the offences which are alleged against the defendant. The offences are sexual assault (including one offence of penetration) and indecent assault. The indecent assault count relates to an incident which occurred before the coming into operation of the Sexual Offences (NI) Order 2009 (on 2 February 2009). Both offences involve an assault which is the unlawful application of force and can involve touching. The specific allegations involve digital penetration of the vagina and touching of the breasts.

11. The law in relation to what is "indecent" (in the Offences against the Person Act 1861) and what is "sexual" (in the Sexual Offences (NI) Order 2008) is not exactly identical but can, to all intents and purposes, be treated as the same. An assault is indecent if the touching and the circumstances accompanying it are capable of being considered by right-minded persons as being indecent. Sexual is defined by Article 4 of the 2008 Order and activity would be sexual if

> *"a reasonable person would consider that (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both), it is sexual."*

The Court of Appeal in *H [2005] EWCA Crim 732* emphasised that two distinct questions had to be considered by the jury – Firstly whether because of its nature the touching might be sexual, and if it was, secondly, whether in view of the circumstances and/or the purpose of the defendant in relation to it, the touching was in fact sexual.

12. These definitions were examined by the House of Lords in *Court [1989] AC 28* and by the Court of Appeal in *Kumar [2006] EWCA Crim 1946*.

13. *Kumar* involved a medical practitioner and the clinical examination of a patient's breasts. At [12] the judgment stated –

> *"It is important to have in mind that the Crown's case was that a breast examination for [the patient] was clinically indicated but that the way the appellant carried it out was wholly improper and demonstrated an intention to use it as cover for indecently assaulting her. This was emphatically not a case of a doctor carrying out a clinically indicated procedure in a proper manner but having a sexually indecent intent."*

14. Later at [21] the Court of Appeal set out what the Crown's case against Kumar had been. It was not a secret intent case and that it was not an entirely appropriate examination that was properly carried out in all respects, but that he obtained sexual gratification from it. To further that case, the Crown called evidence that Kumar's conduct during the examination went way beyond best practice.

15. The discussion in *Kumar* involved consideration of the decision in *Court [1989] AC 28*. That case related to an allegation of indecent assault, (under an identical provision to the Offences against the Person Act offence), with Court striking or smacking a 12 year old girl outside her clothing on her buttocks. The jury, through a question, at the trial raised the issue of a comparison with a medical examination, and both the Court of Appeal and the House of Lords discussed this issue. The trial judge in his response to the jury's question stated that

> *" .. what is vital is whether the examination was necessary or not. If it was not necessary, but indulged in by the medical practitioner it would be an indecent assault. But if it was necessary, even though he got sexual satisfaction out of it, that would not make it an indecent assault."*

16. Lord Akner at 44 in *Court* stated that he entirely agreed with that response and then set out in detail his reasons. It is beneficial that they are set out in full –

> *"If it could be proved by the doctor's admission that the consent of … the patient, was sought and obtained by the doctor falsely representing that the examination was necessary, then, of course, no true consent to the examination had ever been given. The examination would be an assault and an assault which right-minded persons could well consider was an indecent one. I would not expect that it would make any difference to the jury's decision whether the doctor's false representations were motivated by his desire for the sexual gratification which he might achieve from such an examination, or because he had some other reason, entirely of his own, unconnected with the medical needs or care of the patient, such as private research, which had caused him to act fraudulently. In either case the assault could be, and I expect would be, considered as so offensive to contemporary standards of modesty or privacy as to be indecent. A jury would therefore be entitled to conclude that he, in both cases, intended to assault the patient and to do so indecently. I can see nothing illogical in such a result. On the contrary, it would indeed be surprising if in such circumstances the only offence that could be properly charged would be that of common assault. No doubt the judge would treat the offence which had been motivated by the indecent motive as the more serious."*

17. Professor JC Smith, a renowned commentator on the criminal law, summarised the law after *Court* in the following fashion –

> 1) *"Where the manner or the external circumstances of an assault include no element of indecency, the assault is not an indecent assault, however indecent the purpose of the offender;*
> 2) *Where the manner or the external circumstances of an assault are unambiguously indecent, the assault is an indecent assault, whether the offender has an indecent purpose or not, provided only that he is aware of the external circumstances;*
> 3) *Where the manner or the external circumstances of an assault are ambiguous, the assault is an indecent assault only if the offender has an indecent purpose."*

In describing the type of incidents that may give rise to this approach, Professor Smith added that in case (1) no reasonable observer of the event would think he was witnessing an indecent assault; in case (2) any reasonable observer of the event would be quite sure that he was witnessing an indecent assault; and in case (3) a reasonable observer would think "This may be an indecent assault or it may not. Why is he doing it?"
(*Criminal Law Review [1988] CLR 537 at 538*)

18. Returning to *Kumar*, the concluding paragraph of the judgment deals with the authority derived from *Court.* A doctor who obtains sexual gratification from a necessary medical examination properly conducted is not guilty of indecent assault.

19. The authors of two leading textbooks on the subject have summarised the law as follows –

Blackstone's Criminal Practice (2020 edition at B3.59)

> *"[Article 4] will have the effect of making an intimate medical examination … 'sexual' where the examination is not a bona fide examination and the doctor's purpose is sexual gratification. Arguable, even where the doctor conducts a properly required intimate medical examination, if it is conducted in an inappropriate manner, it may be concluded that the activity was 'sexual' if it can be established that the doctor has an ulterior purpose of sexual gratification"*

Rook and Ward on Sexual Offences Law and Practice (5th edition 2016 at 2.75)

> *"It is important to note that a defendant's purpose is capable of making an activity sexual only if the activity because of its nature could be sexual. So if*

> *a doctor carries out an intimate medical examination of a female patient, which is in fact unnecessary, and there is evidence that he has a sexual purpose, the case will fall readily within the scope of [Article 4 (b)] … But if the examination is a necessary one, the fact that the doctor secretly obtains sexual gratification from it will not make it a sexual assault."*

and later in that paragraph dealing with the admissibility of evidence

> *"Under [Article 4 (b)] the admissibility of evidence of a [doctor's] purpose will turn on whether his conduct because of its nature may be sexual, and that question could not be answered adversely to [the doctor] in relation to a necessary and properly conducted medical examination."*

20. Based on the cases of *Court* and *Kumar* the law in relation to an intimate clinical examination by a medical practitioner (under both the 1861 Act and the 2008 Order) could be summarised as follows – the Crown must prove, to the requisite standard, that either the examination

    a) was not a necessary examination; or
    b) it was a necessary examination, but was conducted in an inappropriate manner.

    Whether or not the medical practitioner intended to obtain, or did in fact obtain, sexual gratification from conducting the examination is not a relevant factor, provided the examination is necessary and conducted appropriately.

Prosecution case and evidence at previous trials

21. I have dealt at some length with the law as it applies to medical examinations as this is relevant to the Crown case as has been presented in the two trials to date.

22. The first trial involved seven complainants with six breast examinations and one vaginal examination. The breast examinations followed three instances of commencing the contraceptive pill, two during a post-natal check-up and one following a complaint of mastitis. The vaginal examination followed a complaint of vaginal discharge.

23. The Crown opened its case to the jury on the basis that these examinations were carried out for the purpose, at least in part, of obtaining sexual gratification.

24. Evidence adduced by the Crown included expert medical evidence that the defendant's practice in relation to breast examination was outdated, there was no privacy curtain at one of the surgeries, the examinations were carried out without a chaperone, and there was a deficiency in notetaking. It was, however, accepted that when the defendant had been trained as a doctor in the 1990s, breast examinations of this nature would have been routine.

25. After a 16 day trial, the jury returned not guilty verdicts after a very short period of deliberation of just over an hour.

26. The second trial lasted 20 days, and resulted in the seven further acquittals. The specific evidence in relation to those complaints was that four related to post-natal check-ups, one to the contraceptive pill, one in relation to breast awareness and self-checking and one in relation to a complaint of sore breasts.

27. The Prosecution case in relation to both sets of cases was identical.

28. The remaining five complaints relate to four breast examinations and one vaginal examination. The breast examinations followed one case of mastitis, one relating to oral contraception and another during a post-natal visit. One other was following a complaint of feeling faint. The medical evidence indicated that the breast examination was entirely appropriate. The final case was a vaginal examination after a complaint of a prolapsed bladder. In this case the agreed medical evidence was that the examination was warranted given the history given.

29. The trial judges, at both trials, would not permit any bad character cross-admissibility, save for one discrete point in relation to upper garment removal described by a number of witnesses (although the subsequent acquittals now make this point redundant).

Abuse of Process

30. The defendant argues that it would be an abuse of process to proceed with the third trial on the two limbs of the jurisdiction – firstly he could not get a fair trial, and secondly it would be unfair to try him (see *DPP for NI in the matter of a judicial review [1999] NI 106*).

31. The court is mindful of the well-established principle, that it should be very slow to stay proceedings as an abuse of process and then only in the most exceptional circumstances (see *DPP –v- Humphrys [1977] AC 1*). However, as Lord Devlin observed in *Connelly –v- DPP [1964] AC 1254* at 1354, the courts

have an "*inescapable duty to secure fair treatment for those who come or are brought before them*".

32. The two limbs of the jurisdiction are distinct and must be considered separately, and in particular the second limb (whether it is unfair to try the defendant) involves a balancing exercise of competing interests, while the first limb (whether the defendant will receive a fair trial) does not. (as per David LJ in *D Ltd –v- A [2017] EWCA Crim 1172* at [35]).

Can the defendant receive a fair trial?

33. Can the defendant receive a fair trial? The core of his case is that he admits that he carried out medical examinations of an intimate nature, but that each examination was clinically necessary, and conducted in a manner which followed the training that he received as a student in the 1980s. It is also part of his defence that any notion that there were twenty independent complaints of similar conduct, thus a strong rebuttal to any suggestion of coincidence, has been discredited given the evidence adduced at the two earlier trials. A final plank in his defence is that all the complaints, far from arising from independent sources, were in fact a result of significant misunderstandings on the part of the complainants, which in turn had arisen, in part or in full, from various discussions that had taken place with other complainants and interventions by third parties. They had arisen out of conscious, or sub-conscious, contamination and collusion (using the broadest of meanings of those terms).

34. It is argued that the genesis of both sets of complaints is highly relevant to the defence case as it shows that they arose from a complete misunderstanding on the part of each of the complainants. The first tranche coming forward after four family members discussed what had happened to them with a fifth relative (who had not been examined), and who in turn, and without their knowledge, complained to a doctor. That doctor then informed the practice receptionist and her daughter subsequently made a complaint. One further complaint was made to that doctor and another complaint was made to another doctor (the spouse of the first doctor). The second tranche of complainants, made their complaints after publicity issued by the police and after the defendant had been charged and had appeared in court.

35. The defendant argues that it is important for him to introduce the contamination and collusion evidence at the third trial. This would be part of his positive case, as opposed to merely disproving any notion that these were independent complaints. The defence assert that it will be impossible for him to introduce this evidence at a third trial in a way that would be fair to him.

Any advantage gained by the placing of the evidence before the jury that these were not independent spontaneous complaints, but arose because of contamination and collusion, could be lost as the jury will, not unreasonably, be driven to speculate about the outcome of those other complaints. Even if the evidence of the acquittals was to be admissible, a jury could be side-tracked into re-trying those cases, and even worse, determining that the defendant was wrongly acquitted, and then use that conclusion as evidence against him in relation to the five remaining counts. The trial judge would, no doubt, give strong directions and warnings about this, however it is difficult to see how a jury could put out of their minds the fact that 15 other women had made complaints of a similar nature within the same time frame.

36. In a previous abuse of process application, this court rejected the defence submission based on the then position, as it was thought that this was just one of the tactical decisions that defendants are faced with and the trial process is capable of ensuring fairness to both sides. That decision has been shown to be correct, as the jury were able to deliberate in relation to the second tranche of complainants and still return some 'not guilty' verdicts.

37. The difference now is that the problem is magnified from what was then seven acquittals when dealing with thirteen other complaints to what is now fifteen acquittals when dealing with five complaints.

38. The defence have referred to decisions of *Maxwell* and *McGrath*. The case of *Maxwell* was considered in some detail in my earlier decision following an abuse of process application, and I consider that it continues not to have specific relevance to the issues in this application. *McGrath* has been referred to, but unfortunately, although a written copy of the judgment is available, it has not been formally reported and the date is uncertain. What is known is that it was a decision of His Honour Judge Hart QC sometime in or about 2003 and related to an application for a second trial after partial acquittals. The first trial involved 19 counts of a sexual nature, brought by two complainants. The jury acquitted the defendant on 11 of the counts (one on the direction of the judge), leaving 8 counts to be determined by the intended second trial. These counts involved one complainant (described as 'A' in the judgment) and could be categorised as allegedly having occurred at a certain address. Allegations of escalating sexual behaviour, including rape, at different locations on later dates had been rejected by the jury resulting in acquittals.

39. In his judgment Judge Hart stated at page 8 –

> *"As can be seen the credibility of A is central to the Crown case. Arising from that there are many issues and strands of evidence in respect of many aspects of the relationship between A and the defendant … over a considerable period of time, a period much longer than covered by counts 1 – 8 [the remaining counts] inclusive; and indeed indecent behaviour which is alleged to have occurred throughout the whole of the period, compounded by later, more serious allegations."*

Later on page 8, Judge Hart states -

> *"It cannot be denied that the evidence in relation to [the later events] is capable of being seen as intrinsically part of the evidence that would form the basis of the decision of a jury as to whether its members can be sure that [she] is telling the truth."*

and finally on page 8 and onto page 9 –

> *"It is of course open to the defence … to tell the jury of the offences that the defendant had faced and on which another jury had found him guilty. That however in itself is not in my opinion sufficient in order to afford the defendant a fair trial. Not to go into the evidence of the events which grounded the other counts would leave a jury wondering why the defendant had been acquitted and potentially to speculate, for example that there may have been evidence over and above that of A which allowed that jury to come to that conclusion."*

40. Judge Hart then went on to analyse how a second trial could be run in a way that allowed relevant evidence to be properly laid before a new jury taking into account whether a danger arises with the new jury taking an alternative view on the acquitted charges to that of the first jury, and then transferring that view to the remaining counts, and potentially re-trying the defendant for offences of which he has been found 'not guilty'. His conclusion was that it could not. The public interest had been addressed during the first trial when all matters were placed before the jury. All issues and evidence in respect of all the allegations were intrinsically linked. He therefore concluded that the defendant's interests would be prejudiced in a significant way, and as a consequence a second trial would constitute an abuse of process.

41. Turning back to this case, on my analysis as to how the defendant could run his defence at the third trial, he will be faced with two options. He can ignore the other complaints and complainants, and can treat the remaining five complainants as stand-alone witnesses. This would mean giving up a valuable plank of his case that these five witnesses had been mistaken and misled in their interpretation as to what had happened to them in the

consulting room. It would also leave unanswered the inevitable question that will be in the mind of the jury – why did five patients, without knowledge of each other's circumstances, make complaints spontaneously to police in August 2014 about medical examinations they had undergone four to six years earlier?

42. Alternatively, he could introduce the evidence of the other complainants as an explanation as to how the five complainants had been mistaken and misled, thus exposing himself to re-running of issues at the earlier trials, the outcome of which could be adverse to his interests.

43. I would consider that this would go well beyond the normal tactical decisions that are open to a defendant when conducting a normal defence. Each option, despite whatever efforts can be exercised by the skill of his counsel and by warnings to the jury from the trial judge, will create significant prejudice to the defendant.

Is it unfair to try the defendant?

44. Would it be unfair to try him again? The second limb of the defence argument is that it would be unfair to try the defendant again following two acquittals. There is no general rule of law that says that a defendant cannot be tried for a second, or even a third, time. Each case is dealt with on its own specific facts. This application relates to a trial of the five outstanding complaints for a second time. However, the history of the proceedings has shown that two separate juries have both now heard the medical evidence as to what is appropriate clinical practice from two experts. There was, eventually, an element of agreement between the two experts, but ultimately the two jury verdicts reflect two separate determinations that the prosecution could not prove to the correct standard that any of the examinations were not clinically dictated and were not carried out in an appropriate manner, consistent with the medical training that the defendant had received.

45. I have set out the law in relation to the medical examinations in earlier paragraphs, particularly at [20]. The Crown must show that it was not a necessary examination; or that it was a necessary examination, but was conducted in an inappropriate manner. As I mentioned in my earlier judgment, each complaint is separate and will require separate determination in relation to the circumstances of the patient's medical history, their presentation and the history given. That will determine whether the examination of that patient by the defendant was clinically necessary, and if so, the method by which it was carried out. From my analysis of the evidence presented at both trials and particularly taking into account the evidence of

the experts, the Crown cannot prove, and have not proved, to two separate juries, that examinations of this type were not necessary.

46. That then requires a consideration of whether the examinations were carried out in an appropriate manner. There was some modest disagreement between some of the complainants and the defendant (insofar as he could recollect) as to what had, or could have, occurred during the examinations, however no evidence was presented to indicate that any of the examinations was carried out in an inappropriate manner. The main thrust of the Crown case was that the complaints seemed to have been in relation to the lack of a chaperone, and the use of these types of examinations which would not have accorded with developing trends in the medical profession. In one case there was evidence (denied by the defendant) that he sniffed his finger after digital examination of the patient's vagina. However when one considers the nature of the examinations conducted in relation to the complaints which resulted in an acquittal, there was not a significant difference.

47. This has now created a situation where the defendant's practice as a doctor both in relation to his clinical judgment as to whether a physical examination is required, and as to how that examination should be carried out, has been examined on two separate occasions by two different juries, and neither jury has been sure of the prosecution case.

48. The consideration of this limb is a balancing exercise of competing interests. I take into account all those interests. The public interest has already been served with two trials conducted over significant periods of time, with all issues properly ventilated and the conduct of the defendant fully examined. In relation to the complaints of the five remaining complainants it has been thoroughly examined on one occasion. The factor of the delay would not, on its own, give rise to an abuse of process but it bolsters the case that it would be unfair to proceed. Finally, two juries have determined that the practice of the defendant in assessing his patients and considering that an intimate examination was necessary, and then the conduct of that examination in relation to 15 patients was considered to be appropriate. Taking all these factors into account, I consider that it would be unfair to try the defendant again in relation to these remaining five counts.

Conclusion

49. I take into account the warnings that this jurisdiction should only be exercised in exceptional circumstances. I consider that the defendant could not receive a fair trial by virtue of the relevance of the two sets of earlier acquittals, and that it would be unfair to try him for a third time by virtue of the nature of the

case against him and the decisions made by the earlier juries, also taking into account the fact that the public interest has been served by the earlier trials and the delay in the case. For the removal of any doubt, the application succeeds on both limbs, and I have not attempted to conflate the two limbs.

50. The proceedings in relation to the remaining five counts will therefore be stayed as an abuse of the court's process.