**Neutral Citation: [2016] NICA 52** | *Ref:* **GIL10088**

***Judgment: approved by the Court for handing down*** | *Delivered:* **07/12/2016**

***(subject to editorial corrections)****

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE QUEEN**

**-v-**

**D**

**Before: Gillen LJ, Weatherup LJ and Weir LJ**

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**GILLEN LJ (giving the judgment of the court)**

**Introduction**

[1] The applicant was convicted of 13 counts comprising of indecent assault and gross indecency. The offences occurred between 1988 and 1997. He was sentenced to eight years imprisonment. The complainants were two relatives "X", and "Y". "Z" was also a witness for the Crown.

[2] Leave to appeal against conviction was refused by the Single Judge on 23 August 2013.

[3] Accordingly this is an application for leave to appeal pursuant to Section 1 of the Criminal Appeal (NI) Act 1980 ("the 1980 Act") against his convictions. Mr McCartney QC appeared on behalf of the applicant with Mr Moriarty and Mr Weir QC appeared on behalf of the prosecution with Ms Ievers.

[4] We draw attention to the need for anonymity in compliance with Sections 1 and 2 of the Sexual Offences (Amendment) Act 1992.

**Background**

[5] The offences alleged against the applicant in relation to X are said to have occurred […] commencing when she was still at primary school. The offences alleged in relation to Y were said to have occurred between the ages of 5 and 13 years […]. The applicant denied all of these allegations.

[6] The key issue which arises in this appeal is the successful application for bad character admission made by the prosecution on 6 November 2012 at the outset of the trial.

[7] The focus of the application was the applicant's alleged violent abusive behaviour towards Z. It was intended to adduce evidence of this violent behaviour from X, Y and Z.

[8] The application was moved pursuant to Article 6(1)(c) of the Criminal Evidence (Northern Ireland) Order 2004 ("the 2004 Order").

[9] It is relevant at this stage therefore to set out the provisions of Article 6(1)(c) of the 2004 Order:

> "Defendant's bad character
>
> 6.—(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—
> ……..
>
> (c) It is important explanatory evidence.
>
> ……."

[10] Article 7 of the 2004 Order provides as follows:

> "Important explanatory evidence
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> 7. For the purposes of Article 6(1)(c) evidence is important explanatory evidence if—
>
> (a) Without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
>
> (b) Its value for understanding the case as a whole is substantial."

**Principles governing the admission of explanatory evidence**

[11] The necessity to admit evidence of this kind, for its explanatory as distinct from its probative value, was well accepted at common law in a line of authorities that continue to be relevant under the 2004 Order. The principle derives from the judgment of Purchas LJ in R v Pettman (2 May 1985 Unreported) who said:

> "Where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence."

[12] However, this is a principle that needs cautious handling if it is not to become a lame excuse for admitting the inadmissible. This gateway must not be deployed to "slide in" evidence of propensity under the guise of explanatory evidence where the former would not be admissible or would be subject to additional safeguards.

[13] The importance of distinguishing between explanatory evidence and evidence of propensity was stressed by the Privy Council in Myers v R [2016] AC 314 where, at paragraph [52], Lord Hughes said:

> "52. The Pettman proposition, valid as it is, needs cautious handling if it is not to become a token excuse for admitting the inadmissible. Claims by prosecutors that the evidence is necessary to understanding of the case, or, as is sometimes asserted, to discourage the jury from wondering about the context in which the events discussed occurred, need to be scrutinised with care. It is only where the evidence truly adds something, beyond mere propensity, which may assist the jury to resolve one or more issues in the case, or is the unavoidable incident of admissible material, as distinct from interesting background or context that the justification exists for overriding the normal prohibition on proof of bad behaviour."

[14] Consequently, to say that the evidence fills out the picture is not the same as saying that the rest of the picture is either impossible or difficult to see without it.

[15] In this context R v Lee (Peter Bruce) [2012] 176 JP 231 is instructive. This was a case which involved convictions on a single count of indecent assault on a child against a man who had been tried on a total of seven counts relating to two children. Bad character evidence had been admitted in support of the Crown case deriving from one of these children. This additional evidence amounted to incidents of voyeurism, setting up a camcorder in her bathroom and also attempted making of indecent images some substantial time after the course of events which formed the subject of the charges before the jury.

[16] In the course of his judgment Hughes LJ VP said at paragraph [4]:

> "To say that evidence fills out the picture is not the same as saying that the rest of the picture is either impossible or difficult to see without it. On the facts of this case, the rest of the evidence was not difficult to see without it. … *we should also add the fact that the jury might wonder about the delay or the time lag in reporting an incident cannot make it a sufficient basis for admission of evidence* (*our emphasis*). Of course, had it not been admitted in the way that it was, there might well have been a real possibility of it becoming admissible had there been cross-examination directed to the time lag. But the evidence of (the complainant) about offences which were alleged against the defendant was perfectly comprehensible without this evidence."

[17] Of relevance to this case also is the further comment of Hughes LJ at paragraph [16] where he said:

> "That leads us to the summing up. When the judge came to sum up, she did not sum up the evidence simply as explaining some other evidence that the step daughter had given. Although she did not use the language of propensity to commit the offences charged, she narrated the evidence at a number of points in the summing up in terms which recounted the step-daughter's assertion that these two pieces of evidence showed the defendant to have a propensity to commit offences of the kind that were charged. As a result she gave the jury no caution about the right approach to propensity evidence."

[18] Finally, a useful case for future guidance in such matters is found in R v Butler (Diana Helen) [1999] Crim LR 385 (CA (Crim Div)). In that case the appellant was charged with the murder of her cohabitee. The prosecution had adduced evidence of previous acts of violence by her against him which had taken place some three years before the fatal event. The judge ruled that such evidence could be given because the jury might have a false impression of the appellant who was seeking to present herself as a passive woman.

[19] The court said that in the event of an issue arising as to the admissibility of evidence under this principle, counsel should endeavour to agree an account of the background so as not to distract the jury's attention from the central events. Failing agreement of which the judge approves, there should be a fuller analysis of the situation in the absence of the jury.

**The ruling and summing up of the learned trial judge**

[20] The learned trial judge acceded to a Crown application to admit evidence relating to the applicant's violent abusive behaviour. The argument made was that the applicant had behaved in a violent and abusive way towards Z and Y which was witnessed by X. The argument was that the fear instilled in Y and Z was the explanation for the delay on their part in coming forward to the police.

[21] In the course of the argument on this issue before the learned trial judge, he made it clear that the court would conventionally not permit an examination of the alleged incidents of violence towards Z because that was not a matter in respect of which the applicant was charged. The only basis upon which this would be admitted was that there was alleged to be "a background of violence which explains or, on the prosecution case, they explain the alleged fear on the part of the complainants and the delay on the part of the transmissions of complaints". He went on to say:

> "If as here there was a historical sex abuse case ……, it is inevitably going to be an issue that the jury are going to want to consider as to why these complaints have taken so long to surface."

[22] In the course of his judgment on this issue, the learned trial judge acknowledged that it was not claimed that the alleged acts of violence accompanied or were mixed up with any of the alleged sexual acts carried out at the relevant times. Nor did it appear to be claimed that individual acts of violence resulted in sexual acts being committed or vice versa. The gravamen of his conclusion that this evidence should be admitted was contained in the following part of his ruling:

> "The jury will need to know and understand that case and the alleged factual background to it so as to enable them to properly understand and assess the explanations put forward for any delay. Here [Y] … at page 15 of the deposition statement expressly makes the case that delay on her part in making allegations against the defendant was referable to fear on her part of what the defendant might do to her."

[23] We pause here to cite precisely what was contained in the deposition statement of Y and upon which the learned trial judge relied:

> "I also suffered physical abuse at the hands of [the defendant]. I also witnessed [Z] suffer physical abuse at his hands. He has banged my head against the wall, grabbed me by the throat, called me names, told me I was worthless, stupid, ugly, fat, that I would never get

> married and that I was a disgrace to the family. I used to think I had a disability because he had me convinced I was stupid. I have not talked about this abuse before because I was not wanting to. I was and am still terrified that he would do something bad to me. I just put it out of my head for years never wanting to talk about it. Another reason was that I did not want to hurt [Z] by telling her. I hated [the defendant] when I was younger for what he used to do to [Z] but I loved him as well."

[24] The learned trial judge went on in the course of his ruling to state:

> "I conclude that were the jury not to hear the evidence from [Y] as to what acts of physical and/or verbal abuse she says were previously occasioned upon her by the defendant, it would be impossible or at the very least difficult for the jury properly to understand other evidence in the case namely the reasons which she herself expressly puts forward as to why she did not make these allegations sooner. And I am also satisfied that the potential value of that evidence for the jury being able to understand the case as a whole is substantial."

[25] The learned trial judge then turned to the evidence of Z and stated:

> "[Z] in her two deposition statements at pages 6 and 7 makes reference to alleged acts of physical violence on the part of the defendant which she says spanned an extended period of time. Whilst she does not in her deposition statement in quite as clear and express terms as does [Y] make the case that any delay might be there on her part in assisting in the transmission to police of these current complaints once these complaints had come to light is referable to fear on her part as to what the defendant might do to her in response, that appears to be implicit in much of what she says."

[26] Turning to X, the learned trial judge said:

> "The position as regards the bad character evidence of [X] is a little different. Whilst she makes no allegations of physical violent conduct as against the defendant at all, she does allege that violence was inflicted on [Z]

> and that she was afraid of the defendant but she does also seek to make the case that she was told by the defendant on one occasion that if she was to disclose what she says had been done to her by the defendant, not only would she not be believed but also it would have disastrous social consequences for her […]. *Issues of delay and explanations for delay will inevitably arise so far as her evidence is concerned (our emphasis*). She says at page 3 of the depositions, after having described the first of the alleged incidents relied upon her, 'I did not scream out because I was afraid of him'. Because of the need for the jury to be able to understand and assess the case made by [X] as to why she could not scream out on the occasion referred by her, and also as to why she did not make her complaints earlier, I do consider that the evidence of [X] as to the alleged acts of violence which she says were committed not against her by the defendant but against [Z] is similarly evidence such as without it the jury would find it impossible or difficult properly to understand other evidence in the case and also that its value for understanding the case is wholly substantial."

[27] The judge finally went on to state:

> "I make it clear that in my summing up to the jury I intend amongst other things to make it clear that the defendant has not here been charged with any alleged offences of violence as against either complainant or against [Z] and also to stress that it is vitally important that the jury focus on the issue as to whether having regard to the evidence they can be satisfied beyond reasonable doubt that the defendant committed any of the sexual offences charged against him and that the jury are not to be diverted into any consideration of alleged acts of physical violence or alleged incidents of abuse or threats for which he does not stand charged and out of which none of these counts arise. I will also make it clear that the court will not permit the trial to become diverted into or bogged down by satellite issues and that should be carefully borne in mind by each of the parties."

[28] In his summing up the learned trial judge dealt with the question of the violence against Z in the context of delay. He encouraged the jury to give consideration as to the question as to why the allegations had not come to light

sooner. He informed the jury that X had told them she was frightened of the defendant and of what he might do to her, that she was not ready to come forward, that she was fearful as to what people might think of her if she came forward and also as to how disclosure of these alleged events might adversely impact upon a relationship with her partner and her marriage. So far as Y was concerned, the learned trial judge informed the jury that she also was afraid and not as yet ready to come forward.

[29] Turning specifically to the allegations of misconduct or bad behaviour in the context of the violence alleged against the applicant by Z, the learned trial judge said:

> "In this case you were permitted to hear evidence of allegations of physical violence made against the defendant by [Z]. You will also recall having heard the defendant admit that on occasions in the past he would have used physical violence and verbal abuse which each of them made against the defendant. You were permitted to hear that evidence in this trial solely and exclusively because the court considered that evidence to be important explanatory evidence as to the nature of the various relationships in the [accused's setting]. The court also considered that evidence to provide an important background against which the actual evidence relating to these alleged offences needed to be considered if all of the evidence in the case as a whole was to be capable of being properly understood by you in its proper context. You must however treat this evidence as to the defendant's previous violent conduct and behaviour with very considerable caution. That evidence does not tell you whether the defendant has committed the sexual offences with which he is charged in this case. That is the crucial issue in this trial. However you should bear in mind the fact that the defendant is not charged in these proceedings with any alleged offences regarding the use of physical violence either against the two complainants or [Z]."

[30] Finally in this section we move to the cross-examination of the applicant by Crown counsel on the issue of violence against Z. There is merit in the contention by Mr McCartney that the cross-examination was developed to expose the disparity and physical presentation between the applicant at 6 feet 5 inches in height and 18½ stone in weight compared to Z at 5 feet 4 inches. The questioning of the applicant did continue at length about the type of violence that was perpetrated against Z by the applicant and how long it lasted. Crown counsel did then revisit this on a

number of occasions during the cross-examination using the phrase "leaving aside the violence" on no fewer than five of those occasions. It is right to say that neither the judge nor for that matter defence counsel intervened to confine the extent or length of the cross-examination about this previous violent conduct.

**Discussion**

[31] We recognise that this case was not without difficulty in its management. We are conscious of what Lord Mackay said in R v Adomako [1995] 1 AC 171 at 172:

> "The task of trial judges in setting out for the jury the issues of fact and the relevant law … is a difficult and demanding one. I believe that the supreme test that should be satisfied in such directions is that they are comprehensive to any ordinary member of the public who is called to sit on a jury and who has no particular acquaintance with the law. To make it obligatory on trial judges to give directions in law which are so elaborate that the ordinary member of the jury will have great difficulty in following them and even greater difficulty in retaining them in his memory for the purpose of application in the jury room, is no service to the cause of justice".

[32] However invocation of Gateway 6(1)(c) requires cautious handling. It requires to be used sparingly. We are not satisfied that there was a sufficient foundation of fact to justify the introduction of the evidence of violence against Z in the context of the case at the moment when the learned trial judge made the decision to do so.

[33] We have scrutinised with care the depositions/statements that were before the learned trial judge at the time he made his decision and, as Crown counsel conceded, upon which he based his determination to admit this evidence. As the extracts set out in paragraph [22] et seq above reveal, in none of those statements is it expressly or, in our view, impliedly stated that the abuse against Z contributed materially or at all to the delay on the part of the complainants in coming forward to the police. In this regard we sought the assistance of Crown counsel to draw our attention to any such reference in those statements and he was unable to assist to any degree.

[34] To have assumed without a solid basis in fact that this evidence afforded by implication a reason to justify the delay was a step too far in the absence of some positive assertion to this effect.

[35] In any event, as was adumbrated in Lee's case, the mere fact that the jury might wonder about the delay or the time lag in reporting did not make that in itself

a sufficient basis for admitting the evidence. It would have had to have emerged in the course of the evidence as a real issue in the context of this violence in order to make it admissible. The court seems to have assumed that this was bound to happen without recognising the need for an evidential foundation.

[36] In truth this was an anticipatory application made by Crown counsel on the basis that such evidence might well have occurred when the complainants came to relate their narrative. However instead of adopting a wait and see approach in order to consider how the evidence unfolded, the decision to admit it at this stage has all the hallmarks of a premature determination. It might well have been that had prosecution been able to intimate to the judge in the absence of the jury that this was going to be the *actual unequivocal* evidence of the witnesses a preliminary decision could have been taken.

[37] That was not the position and reliance was placed on their deposition statements alone which failed to justify such a proposition. The depositions proffered a number of reasons quite unrelated to the abuse alleged in the case of Z as to why the complainants had not come forward at the time of the alleged abuse against them. Y had recorded acts of violence against herself by the applicant which was admissible. Why then would it have been "impossible" or "difficult" for the jury to have understood "other evidence "or "the case as a whole" without the evidence of Z? The danger in satellite material such as this being introduced is that the jury may mistakenly invoke its use as prejudicial propensity. Hence the need for great caution in its introduction.

[38] Even if that had been the case, it would have been important to lay down firm limits as to the extent of the evidence that was to be admitted rather than, as happened, there commencing a free-ranging tour d'horizon of the whole abuse narrative by Crown counsel that allegedly occurred in this instance.

[39] In this regard Butler's case repays study. This might have been a classic instance where even had the decision been correct to introduce this evidence, a better control would have been kept on the material to go before the jury by counsel assisting the judge in suggesting the confines of the evidence that would be admitted.

[40] Alternatively there may have been an agreed statement of facts sufficient to give the jury the necessary background material without distracting them from consideration of the central issue. However this might have lent itself to a fuller analysis of the situation, in the absence of the jury, of what the issues were or were likely to be and what evidence of background events was absolutely necessary to properly resolve them.

[41] A second cause for concern to this court was the manner in which the evidence was treated in *the charge* to the jury once it had been admitted. In an otherwise comprehensive and careful charge to the jury, it was crucial that the jury

be advised in unequivocal and contextual terms as to the basis upon which this evidence had been admitted. Whilst the learned trial judge indicated that it had been admitted as important explanatory evidence "as to the nature of the various relationships in the accused's setting" and that it provided an important background against which the actual evidence relating to these offences needed to be considered, he omitted to explain in detail at this point that the *sole purpose* of its admission was to provide an explanation for the delay on the part of the complainants in reporting this matter to the police.

[42] Whilst the learned trial judge clearly understood this to have been the case in the course of the earlier exchanges between counsel in the absence of the jury, curiously his detailed analysis in the course of the charge omitted to include this vital reference at the point of his summing up where he was dealing with this precise issue. In short the jury has to be informed precisely as to why it is impossible for them to deal with this case without reference to this background violence. Merely to tell them that it is explanatory or background evidence is not enough.

[43] Our final concern in this case springs from the extent to which Crown counsel was permitted to dilate upon this peripheral aspect of the case. Time and again during the cross-examination counsel visited this question of violence against Z. For example counsel expressly stated on several occasions "leaving aside the violence" – which in our view served to elevate the importance of this aspect beyond its true significance in the case. Moreover in the absence of the full explanation by the judge in the course of the summing up as to the relevance of the introduction of this material, Crown counsel's repeated references became all the more significant.

[44] Ultimately the question for this court is whether the conviction of the appellant was unsafe. The Court of Appeal in R v Pollock [2004] NICA 34 set out the approach in the following terms:

> "(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 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.
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> (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."

[45] In the circumstances of this case, we do entertain a significant sense of unease about the correctness of the verdict given the real risk that the jury have been unfairly prejudiced by the extent of the evidence of abuse visited upon Z. Accordingly we have concluded that we should quash this conviction.

[46] Since this appellant has virtually completed the time specified on foot of his conviction, we do not order a retrial but leave this to the discretion of the Public Prosecution Service.