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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

NOEL JESUS FORONDA

Before Morgan LCJ, Girvan LJ and Coghlin LJ

COGHLIN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal by Noel Jesus Foronda ("the Appellant") from his conviction of the offence of sexual assault by penetration contrary to Article 6(1) of the Sexual Offences (Northern Ireland) Order 2008 (the "2008 Order") on 22 May 2013 at the conclusion of a trial before His Honour Judge Fowler QC and a jury at Downpatrick. The appellant had originally been tried upon indictment containing two counts but he was acquitted of the offence of sexual assault contrary to Article 7(1) of the 2008 Order. As a consequence of the conviction the appellant was sentenced by the Learned Trial Judge to a determinate sentence of two years, comprising one year imprisonment and one year on licence. The Learned Trial Judge also subjected the appellant to a Sexual Offences Prevention Order for five years containing a number of prohibitions and gave a number of ancillary directions. The appellant appeals from the conviction with leave of the Single Judge granted on 18 September 2013. The Single Judge refused the appellant leave to appeal against sentence and no appeal against that decision has been lodged. The appellant was represented by Mr Charles McCreanor QC and Mr Mark Farrell while Mr Robin Steer appeared on behalf of the Director of Public Prosecutions. We are grateful to both sets of counsel for their succinct and carefully prepared oral and written submissions.

The Factual Background

[2] On 22 July 2012 the appellant and the complainant, both of whom are members of the Filipino community in Bangor, Co Down, went out for a social evening with two other male friends. After consuming alcohol at the appellant's home, they left and visited two bars. They then returned to the house of a mutual friend where they consumed more alcohol as a result of which the appellant fell asleep on a chair. Before falling asleep a sexually orientated discussion had taken place between the three individuals. The complainant and the other adult agreed that the appellant was too drunk to be able to make his own way safely home and they decided that he should stay in the spare room. Both helped the appellant upstairs to bed.

[3] The prosecution case was that the appellant lay or sat on the bed. The complainant then tidied up and was about to leave the bedroom when the appellant called to her, rose from the bed, approached her and said that he wanted to lick her vagina. He then began to kiss her, pinned her against the wall of the bedroom, pulled up her top and bra and sucked her nipple. The prosecution alleged that the appellant put his hand down her trousers, inside her pants and inserted his finger into her vagina against her will. This conduct ceased when some moments later, another adult entered the room.

[4] The prosecution alleged that all of this activity took place against the will of the complainant while the defence case was that the conduct was consensual.

The Grounds of Appeal

[5] The single ground relied upon by the appellant was that, due to an irregularity during the trial relating to the conduct of an interpreter engaged by the Public Prosecution Service ("PPS"), the conviction was unsafe and unsatisfactory in the circumstances.

The Alleged Irregularity

[6] For the purposes of the trial an interpreter was provided for the appellant by the Northern Ireland Court Service ("the Court Service"). In accordance with the usual practice the complainant was assisted in giving evidence by an interpreter appointed by the PPS. The function of both interpreters was to interpret the Filipino national language of Tagalog. During the course of cross-examination of the complainant it was suggested to her that she had "played down" the amount of alcohol that she had consumed before returning to the house with the two men. At that point a representation was made to the Learned Trial Judge that a matter required to be dealt with in the absence of the jury. In the absence of the jury the interpreter appointed by the Court Service informed the Learned Trial Judge that the complainant and the interpreter appointed by the PPS had been whispering in Bisaya. The Court Service interpreter said that Bisaya was a completely different

dialect which she did not understand. The Court Service interpreter further alleged that the PPS interpreter had been prompting the complainant in that dialect. While she did not fully understand the conversation she was alleging that, in effect, the interpreter had been "dictating" what the complainant was to say. The Learned Trial Judge afforded both Ms Taggart, the PPS interpreter, and Ms Leighton, the Court Service interpreter, an opportunity to make representations and, having done so, he ruled that Tagalog was the only language to be used during the trial. He went on to say:

> "I must caution everyone in this court that it is only translation, interpretation, there is no comment to be made, that is to the defendant or the witness. If there is any I will abort this trial. We will start the trial again with other interpreters … There is to be no qualification in relation to questions or any translation or interpretation that could lead to a suggested answer."

[7] On the following day, 14 May 2013, Mr Farrell obtained leave to question Ms Taggart in the absence of the jury. Ms Taggart confirmed that she was not registered with the National Register of Public Service Interpreters ("NRPSI") but that she had been employed through the Northern Ireland Council for Ethnic Minorities ("NICEM"). She was then asked whether she held a Diploma in Public Service Interpreting ("DPSI") and she confirmed that she did not. Mr Farrell then put to Ms Taggart that, in the course of interpreting for the complainant on the previous day, she had said to her "just tell him only one" when the complainant was asked about the amount of alcohol that she had consumed. Ms Taggart replied that the first language of the complainant was Bisaya, her second was Tagalog and the third was English. In such circumstances she said:

> "So I tried to explain to her, in her native language what are you trying to ask? The question that you are trying to ask her. … she was kind of stuck …"

Mr Farrell then put to Ms Taggart that she had reverted to a different language so that Ms Leighton would not be able to detect the fact that she was actually prompting the witness. It was also suggested to Ms Taggart that, on the previous day, she and the complainant had lunch together, that she had travelled in a car with the complainant's family and that they had discussed the case. Ms Taggart firmly denied that she had discussed the case with the complainant and explained that she had simply been given a lift by the family from the door of the court to the main gate where she had alighted and gone to her own vehicle.

[8] Ms Leighton was also questioned on behalf of the appellant and she confirmed that she had heard Ms Taggart say to the complainant "Tell them only one" and that they had then continued a whispered discussion in Bisaya which she

was unable to follow. Ms Leighton confirmed that she had been permitted to listen to the tape recording of the relevant portion of the evidence on the previous day and explained that it was "very vague". She was then asked directly by the judge was the phrase "just tell him one" on the tape or not on the tape to which she replied "it is not on the tape".

[9] Mr Farrell then applied for an order discharging the jury in response to which the Learned Trial Judge delivered the following ruling:

> "I have listened to Ms Taggart and I have listened to Ms Leighton in this regard. As far as Ms Taggart is concerned, in relation to going to lunch and being transported out of the Court to her parked car, a very short distance away from the Court, it is quite clear from her evidence that she has indicated that there was no discussion of this case and I accept that, and I would not discharge a jury based upon that."
>
> In relation to the word that was heard by Ms Leighton: 'Just tell him one.' I am not satisfied from the fragment that was heard, that that was feeding the witness answers, to you. The position as far as that is concerned is that I am of the view that it does not appear on the FTR, it does not seem as though it was anything other than perhaps an effort to translate what was a very fast moving cross-examination and perhaps to recapitulate on that, and I cannot be satisfied, just on that fragment, captured at that moment in time, that that was an effort or an attempt to feed answers to the complainant. I cannot be satisfied on that. If I am wrong on that particular point, Ms Leighton very properly drew the court's attention to that very quickly. A direction was made that Tagalog would be used from that point forward and the ultimate test is that Mr Farrell, in this cross-examination, was successful in the strategy that he adopted, in moving the complainant from a modest or, perhaps, what might be perceived as a modest amount of alcohol consumed to a more significant amount of alcohol consumed which will ultimately be, no doubt, deployed in the closing on behalf of the defendant, to indicate that the complainant had more drink taken that evening than she is perhaps wanting the court of know. That, taken into account with an advantage to the defendant, and the fact that the complainant has already given evidence for almost a

> day (between evidence-in-chief and cross-examination) I come to the conclusion that it would not be in the interests of justice, nor would it be a case where the particular situation in this trial has reached what would be described as a high degree of need or evident necessity for the discharge of this jury in this case."

[10] However, after taking into account her lack of appropriate qualifications, the Learned Trial Judge decided to direct that Ms Taggart should not continue to interpret on behalf of the complainant. He observed that this direction was no reflection upon Ms Taggart but:

> "It is simply my view that for the proper presentation of this case the person advising the complainant should have the appropriate accreditation."

The Parties Submissions

[11] On behalf of the appellant, while it was conceded that, unlike the Court Service, the PPS has no minimum standard which must be met for the appointment of interpreters, it was submitted that, in the particular case, Ms Taggart's lack of recognised qualifications, together with the allegation of prompting, led to a procedural irregularity which had irretrievably compromised the fairness of the trial.

[12] The prosecution relied upon the careful fact finding investigation carried out by the Learned Trial Judge of two apparently conflicting versions of events. The recording did not provide any useful objective evidence. In the circumstances, the Trial Judge was entitled to reach the conclusion that the evidence did not support a finding of a sufficiently high degree of necessity or procedural irregularity which would have necessitated the discharge of the jury. The Learned Trial Judge had taken immediate steps to prevent any further risk of prejudice to the appellant.

Discussion

[13] Whether any perceived procedural irregularity is so substantial as to warrant the discharge of a jury is always a matter for the exercise of the discretion of the trial judge. In Winsor v The Queen [1886] LR 1 QB 390 Erle CJ confirmed that the decision to discharge was purely a matter for the judge's discretion and that such a decision should not be taken unless a high degree of need had arisen. In order to establish that there had been a failure to properly exercise such a discretion it would be necessary to identify a material consideration that had not been taken into account, an immaterial consideration that had been taken into account or that such an exercise was perverse in the circumstances. In this case the Learned Trial Judge permitted both interpreters to be questioned in detail after arranging for the parties

to have access to the relevant portion of the taped record of the evidence. Those enquiries proved inconclusive. The Learned Trial Judge also took into account the headway that Mr Farrell had made in cross-examination of the complainant with regard to the amount of alcohol that she had consumed upon the evening of the alleged offences. We note that during the course of cross-examination the complainant conceded that she had misled a doctor as to the amount of alcohol that she had consumed and agreed that she had been "tipsy". The investigation of this matter that was carried out by the Learned Trial Judge was both careful and conscientious and, having given the matter very careful consideration, and taken into account all the circumstances of the case, we are not persuaded that he failed to properly exercise his discretion in relation to this decision not to discharge the jury. Accordingly, the appeal will be dismissed.

[14] However, we consider it to be appropriate to make some further observations with regard to the topic of interpreters before completing this judgment. For most people the experience of giving evidence in a public court during the course of the adversarial process is liable to generate feelings of anxiety and vulnerability. In cases in which a defendant or witnesses are not native speakers of English formidable difficulties are likely to arise in relation to ensuring fairness and accurate communication during the course of the trial. Common law fairness and Article 6(3)(e) of the ECHR require that a defendant has the free assistance of an interpreter if he cannot understand or speak the language used in court. While Article 6(3)(e) relates to a defendant's entitlement to an interpreter, such an entitlement will also arise with regard to a witness who is required to give evidence but does not speak English with sufficient expertise. It will be necessary to ensure, as far as practicable, that the language difficulties encountered by such a witness do not inhibit his or her ability to fairly and properly give evidence. For those for whom English is not their native language an adversarial trial conducted in English may present real difficulties of communication. In such circumstances, the court and practitioners must seek to ensure that the defendant and any such witnesses can accurately follow the proceedings. The questioning of witnesses requires to be conducted with care so as to ensure that the defendant, the witnesses and the jury are able to properly comprehend the evidence and procedures in the course of the trial.

[15] Interpreters must be suitably qualified and expert for, otherwise, there would be a real possibility of inaccuracy creeping into the translation of questions and answers which, in turn, might lead to a jury hearing an answer which neither reflected the actual question nor the actual answer. An interpreter should be suitably qualified and aware of his/her responsibilities to ensure accuracy and objectivity in the provision of interpretation services. Accordingly, if a witness does not understand a question and requires assistance in relation to translation of that question the interpreter must provide that translation openly and clearly. The court recording will record what is said so that, if at a later stage a question arises as to whether a mistake has arisen in the translation of the question and/or the answer, it will be on the record and can be the subject of subsequent investigation. Private or whispered conversations between an interpreter and a witness giving evidence are

inappropriate since they generate a real risk of unidentifiable error, the risk of a complaint about lack of objectivity on the part of the interpreter and may undermine the principle of open and transparent justice.

[16] In such circumstances this court found it very difficult to understand the procedures adopted by the PPS for the purpose of affording a proper standard of interpretation services for witnesses. The PPS Victims and Witnesses Policy published in March 2007 committed the PPS to making appropriate arrangements to have an interpreter available for prosecution witnesses for court proceedings in which such services are required. The National Agreement on the use of Interpreters published in August 2008 emphasised that Articles 5 and 6 of the ECHR require a suspect to be informed "*in language which he understands* "of the nature of the accusation and the reason for any arrest and/or charge. Article 6 also requires the provision of the "*free assistance of an interpreter* "if a suspect cannot understand or speak the language used in the relevant court. In February 2010 the Court Service issued a consultation paper on the Provision of In-Court Interpretation Services in the course of which the Court Service confirmed that it requires interpreters in more complex cases who are registered with NRPSI and possess a DPSI diploma. In December 2013 the CPS in England and Wales published Guidance that required that "…every interpreter working in courts and police stations should be registered with NRPSI."

[17] Before this court Mr Steer confirmed that there is a PPS Departmental Instruction that requires interpreters to be properly registered. The Departmental Instruction No4/2011 records that the PPS has entered into a contract with Connect Interpreter Services to provide face-to-face interpreter services and specifies that a designated booking form should be used. All staff booking interpreters for the Crown Court are asked to note that the judiciary require an interpreter in a Crown Court trial to be registered with NRPSI and that such a requirement should be set out on the booking form under 'Additional Information.' That appears to have been totally ineffective in this case. We have been shown the booking form which did not include any such requirement and no effective cross-check or supervision appears to have been carried out. Without any reflection upon the abilities of the individual concerned the result was the booking of an interpreter who did not comply with their own required standards.