Neutral Citation No [2017] NICA 22 | *Ref:* **MOR10274**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)** | *Delivered:* **5/04/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

GERARD JUDGE

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Before: Morgan LCJ, Weir LJ and Colton J

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MORGAN LCJ (giving the judgment of the court)

[1] This is an application to extend time for leave to appeal against conviction on one count of attempted buggery and seven counts of indecent assault at Craigavon Crown Court in October 2015. The application was not made until 18 November 2016 and it is accepted that in order to succeed the applicant must demonstrate that his appeal is likely to succeed. Mr O'Donoghue QC and Mr Barlow, who did not appear below, represented the applicant and Mr MacCreanor QC appeared with Mr Tannahill for the PPS.

Background

[2] The charges on the indictment related to events which allegedly occurred in the early 1980s and the complainant first brought these to the attention of police in 2013 more than 30 years later. It was common case that when the complainant was 14 years old he worked in a public house run by the applicant in Portadown. The charges alleged a specific count of rubbing up against the complainant, a specimen count of similar behaviour, a specific count when the complainant's penis was touched for the first time while watching a blue movie, a specific count of attempted buggery, a specimen count of masturbation, a specific count representing the first time the applicant allegedly put his penis into the complainant's mouth, a specimen count reflecting the same conduct and a specific count of the same behaviour in a car park.

[3] The applicant denied that any of these incidents occurred. As with so many of these cases there was no independent evidence. The applicant accepted that there was an incident where he had grabbed the complainant by the testicles but that was horseplay and there was no sexual connotation. This account was denied by the complainant and did not feature as one of the charges.

[4] It was again common case that during this period when he was working in the public house the complainant raised the issue of inappropriate behaviour with his parents. They spoke to the applicant's brother as a result of which the applicant arrived at the complainant's home to speak to his parents. The applicant claimed that the complaint related to the horseplay incident and that he apologised and explained the context. The complainant's evidence was that he told his parents what he alleged had been happening between himself and the applicant although he did not specify what exactly he told them. The complainant's mother is since deceased and his father was not called to give evidence. There was, therefore, no independent evidence about the conversation between the applicant and the parents. The complainant alleged that on the night of the visit the applicant had vomited outside his house. This was denied by the applicant.

[5] As he got older the complainant began to abuse alcohol and drugs. He alleged that there were two occasions on which the applicant gave him money. The first was when he was a teenager and asked for £40 to go to a Celtic match. The applicant had no recollection of that transaction. The second occasion was when the complainant borrowed £500 from him because he was in debt. The applicant agreed that he had provided the money but said that he had done so because he felt sorry for the complainant and wanted to help his family.

The trial

[6] At the end of the evidence the learned trial judge heard submissions from counsel on the issues which should be dealt with in the charge and he then prepared his charge which he provided to counsel in advance of their closing speeches. That was an appropriate and careful manner in which to deal with this case and he is to be commended for that.

[7] In his closing speech to the jury senior counsel for the prosecution relied heavily on the evidence of complaint as undermining the applicant's account. He said that the complainant:

> "complained as a child, he complained at the level that he went to his parents, and his parents took it so seriously they went to Malachy, the brother, who wasn't even responsible for running the pub. Right, think about that. You've also heard this all came out

> in July 2013, it was out in the public, right. So it's not just that some last-minute thing…"

He then returned to the theme when he said:

> "he does make a complaint against Gerard Judge in '82, he does make the complaint, and he makes it to his parents, and you should look at this very closely ladies and gentlemen. And I'm trying to say here, firstly, what is not in dispute, before we get to the fine points. And his parents do speak to Malachy, and Malachy speaks to Gerard, and Gerard goes to their house and he apologises for inappropriate behaviour…"

At a later point in his speech he said:

> "Right, there is no doubt he thought this was serious enough as a child, to go home and tell, and that's even a rare, right, and they thought it was serious enough to do something about it. And it was serious enough that it wasn't a phone call or anything like that. Down to the house, face-to-face. And I'll tell you what lets you know that it's full on, ladies and gentlemen, that he vomited. He vomited outside the house in the gully, right, and he was caught and he was exposed and you can imagine that pressure that must have come down on him at that moment – this was out.."

[8] The learned trial judge dealt with the complaint in his charge. He noted that the complainant said that he made his first complaint to his parents when he was still working at the bar. In his evidence he did not specify what he told his parents but said that he told them what was happening. They then went to Malachy Judge's house and the applicant called at the complainant's house that evening to speak to his parents. The complainant recalled that the applicant vomited outside the back door. The judge noted that the complainant was seen by a psychiatrist in April 2006 after taking ibuprofen and alcohol. The doctor's notes recorded that he denied any history of physical or sexual abuse or a criminal record. The judge also noted that the complainant denied that the applicant had come to his house to speak to his parents as result of the horseplay incident although he was not apparently a party to the discussion between the applicant and the complainant's parents.

[9] The learned trial judge also directed the jury on whether an adverse inference should be drawn from the applicant's failure to mention certain facts when he was questioned under caution about the offence. During his police interview the

applicant denied that he had engaged in the conduct alleged but otherwise answered "no comment" to all of the questions put to him. The learned trial judge directed the jury in the following terms:

> "The Prosecution say that he did not mention certain facts when he was questioned under caution about the offence, that he mentioned in his evidence at the trial. He did not mention the horseplay incident, he did not mention meeting the complainant outside Carphone Warehouse and giving him a loan the same day. He did not mention going to see the complainant's mother about her complaint, he did not deny vomiting outside the house.
>
> The Prosecution case is that in the circumstances when he was questioned and having regard for the warning he had been given by the caution, he could reasonably have been expected to mention at that stage, the facts he subsequently mentioned in his evidence to you in court. And so you may decide that the reason they were not mentioned was that they have since been invented or that he believed that they would not stand up to scrutiny at that time."

Consideration

[10] Historic sex cases where there is no independent evidence are difficult to defend. In recognition of this there are a series of protections built into the trial system in order to ensure that the proceedings are fair. That includes making it clear to the jury that because these cases are difficult to defend the protections need to be given serious consideration but it also means that where there has been any material diminution in the required protection the safety of the conviction is likely to be in issue. Judges need to keep those propositions to the fore in their consideration of such cases and ensure that the jury is appropriately advised.

[11] In this case the prosecution laid considerable emphasis on the importance of the complaint evidence in supporting the evidence of the complainant. There was no dispute about the fact that the complainant had raised concerns with his parents but the applicant's case was that he explained the horseplay incident as the reason for the complaint. In order to deal with this evidence, therefore, the jury had first to decide whether they were satisfied beyond reasonable doubt that the complainant did complain to his parents about the matters which were the subject of the indictment. In that regard they needed to bear in mind that the complainant had given no specific evidence about what he said to his parents or indeed what they

said to him. The height of his evidence was that he had told his parents what he alleged had been happening.

[12] The second issue for the jury was whether the applicant had explained the complaint by reference to the horseplay incident. The jury needed to bear in mind that the only direct evidence of the conversation between the complainant's parents and the applicant came from the applicant himself. The complainant did not give any evidence about that conversation. If the jury believed the applicant or had a reasonable doubt about whether the horseplay incident may have been the subject of the conversation with the parents then that was a factor in the applicant's favour.

[13] Thirdly, only if satisfied beyond reasonable doubt that the complainant had made a complaint to his parents about the matters the subject of the indictment could the jury then take that matter into account in support of the complainant's evidence. If so satisfied, the jury would have been entitled to take the complaint into account in rebuttal of the applicant's case that these complaints were a recent invention. The jury needed to be warned, however, that the complaint was not itself independent evidence of the commission of the offences since the complaint came from the complainant himself.

[14] Despite the obvious care taken by the learned trial judge to ensure that counsel had every opportunity to assist him in identifying the matters that needed to be brought to the jury's attention in this case it appears that none of the matters identified by us at paragraphs [11] to [13] above were drawn to his attention and no direction was given to the jury in relation to them. In the absence of a proper direction there was in our view a real risk that the jury would have given undue weight to the evidence of complaint particularly in light of the importance it played in the prosecution closing speech. At the very least the absence of an appropriate direction leaves us with a distinct sense of unease in relation to the safety of this conviction.

[15] That unease is compounded by reference to the direction on adverse inference. We accept that there was a basis for the direction in relation to the failure to mention the horseplay incident and the failure to deny that he vomited outside the house. We do not accept, however, that the other matters identified by the prosecution and included in the learned trial judge’s speech could have justified such an inference. There was no dispute at the trial about the fact that the applicant had met the complainant outside Carphone Warehouse and had given him a loan. Insofar as there was any dispute about the circumstances of this meeting it related only to whether the loan was paid on the day it was asked for. That certainly was not made clear in the direction to the jury.

[16] Secondly, it was a central part of the applicant's case that he had attended with the complainant's mother about the complaint. This was a matter which was not in dispute and from which no adverse inference could properly be drawn. It was

suggested to us in argument that the adverse inference related either to the substance of the discussion about the complaint or whether the applicant spoke to the complainant's parents or the mother only but nothing of this kind was made clear by the learned trial judge in his direction. A direction in these terms ought not to have been sought by the prosecution and ought not to have been given to the jury.

Conclusion

[17] Despite the absence of any requisition on these matters, for the reasons given we consider that the conviction is unsafe. Accordingly, despite the late application, we extend time and allow the appeal.