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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

DARREN JOSEPH McMAHON

Before: Morgan LCJ, Stephens LJ and O'Hara J

STEPHENS LJ (delivering the judgment of the court)

Reporting restriction, anonymization and introduction

[1] By virtue of section 1 of the Sexual Offences (Amendment) Act 1992, as amended by section 48 and Schedule 2 of the Youth Justice and Criminal Evidence Act 1999, no matter relating to the complainant shall, during her lifetime, be included in any publication if it is likely to lead members of the public to identify her. As a consequence we will not identify the complainant by name and we will not identify by name a number of individuals who gave evidence at the trial.

[2] Darren Joseph McMahon, ("the applicant") applies pursuant to section 16(2) of the Criminal Appeal (NI) Act 1980 ("the 1980 Act") for an extension of time in which to lodge an application for leave to appeal against his conviction on 17 January 2014, at the conclusion of a trial with a jury before Her Honour Judge Loughran at Dungannon Crown Court and by a unanimous jury verdict, on one count of rape which offence was committed on 3 March 2012. By virtue of section 16(1) of the Criminal Appeal (NI) Act 1980 notice of an application for leave to appeal against conviction is required to be given within 28 days from the date of the conviction. That statutory requirement is an aspect of the principle of finality, see *R v Guinness* [2017] NICA 47 and *R v Smith* [2013] EWCA Crim 2388. The notice in this case was given on 7 February 2017, not 28 days, but rather just over three years from the date of the applicant's conviction. The application for an extension of time was considered and 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 renews his application for an extension of time to this court.

Various grounds were provided to seek to explain the considerable delay of some three years, including the applicant being advised by his original counsel and solicitor that there were no grounds for an appeal so that between 17 January 2014 and 13 March 2015 he accepted that advice and took no steps to lodge an appeal. For the period following 13 March 2015 a detailed chronology was submitted up to 7 February 2017 when the notice of appeal was lodged setting out all the various steps which were taken and when they were taken. In view of the concession correctly made by Mr Greene QC, who appeared on behalf of the applicant with Mr Halleron, that there were no substantial grounds to explain the entire period of delay (paragraph [8] (ii) of *Brownlee*), we do not consider it necessary to analyse that chronology in detail but rather we illustrate the general nature of the reasons given in it by reference to the period between 7 June 2016 and 21 July 2016 during which it was stated that "the papers were being read". It is self-evident that is not a substantial ground to explain that part of the delay. In itself the period taken to read the papers, which were not voluminous, was in excess of the 28 day period for lodging an application for leave to appeal. Mr Greene 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*).

Factual background

[3] On 2 March 2012 the complainant travelled to Enniskillen with two female friends to stay in a flat which was rented by another female friend. All four of them then went for a night out in Enniskillen visiting a number of bars in the town centre before returning to the flat. At this stage a number of other individuals were also present in the flat including the applicant. At the trial there was a conflict of evidence as to the responses of both the applicant and the complainant when they met. It was the complainant's evidence that she had never seen the applicant before and that from the outset he was rude and aggressive to her threatening to get her beaten up for no apparent reason. That as a result she wanted him to leave the flat. It was the applicant's evidence that the complainant showed interest in him. In relation to that issue the complainant stated that she was nearly sure that one of her female friends, whom she named, was present at the time that she was threatened by the applicant. However, the female friend stated in her evidence that she was unaware of any fallout between the applicant and the complainant. The complainant stated that she put the applicant's phone number into her phone because she felt scared with the intention of deleting it after he left rather than because she intended or was interested in meeting the applicant again. The complainant also stated that she told a man who was one of the tenants of the flat that she wanted the applicant out of the flat. In his evidence that witness said he could not remember that conversation.

[4] A number of individuals who were present in the flat left, but the applicant who was on the sofa in the living room remained. The complainant stated in evidence that she wondered why he was staying in the flat but she put a blanket over him because he looked cold, before going upstairs and falling asleep on a single

bed. She stated in evidence that she woke up to find the applicant's hand in her genital area and his penis was going in and out of her vagina. She was not sure whether he ejaculated but she thought he did. Her left leg was out of her pants and her leggings. She stated that semen was coming into her pants and her leggings from her vagina. She gave evidence that she realised what was happening and punched him hard in the face, running into her friends to explain what had happened. She denied initiating any sexual contact downstairs and she expressly denied consenting to any sexual contact whatsoever in the bedroom. She repeatedly asserted in cross examination that the account of the applicant was "complete and utter lies".

[5] The applicant's account was that the complainant initiated sexual contact between the parties whilst he was sitting on the sofa in the living room. She rubbed his leg a few times and smiled at him, which he took to be her suggesting that she wanted sexual contact. He then fell asleep on the sofa. On waking up he stated that the complainant invited him into her bed because it was cold. The complainant then moved her head towards him and began to kiss him and then began to touch him whilst he was touching her. She then put her hand towards his penis, which caused him to become erect. Both parties were lying on their sides face to face. The complainant lay on her stomach and the applicant tried to penetrate her but was not successful in doing so. His penis then went to her thigh area where he ejaculated then they just lay on the bed and after a few minutes the complainant left the room and began to shout "he tried to have sex with me". The applicant asserted that at all times the complainant was fully awake and consented to the activity which had taken place.

[6] The police were called and Constable McToal was the first officer on the scene. He stated that the complainant reported that the applicant had raped her. The complainant was transported to Mahon Road PSNI station for medical examination. The medical examination was carried out by Dr Cupples and intimate samples were taken from her upper and lower vaginal area as well as the anus and perianal region. No semen was found in the high or low vaginal swabs. Her clothing, including her pants and leggings, were also sent for examination. Semen was found in the leggings and pants. It was noted that the complainant had a stiff left knee from a previous operation. There were no other visible marks or injuries to her body. An issue arose at trial as to how the complainant remained asleep whilst her stiff left leg was being manipulated in order to take it out of her pants and her leggings.

[7] On the 4 March 2012 police conducted an ABE interview with the complainant and this was ultimately shown to the jury.

[8] Also on 4 March 2012 Constable Blair arrested the applicant for the rape. After caution the defendant replied "this is a set up". He was taken to the police station and interviewed. He was charged with rape.

[9] The applicant was committed for trial on 7 January 2013. At his arraignment he pleaded not guilty. The trial commenced on 13 January 2014 lasting four days. The applicant gave evidence and was cross examined by senior counsel for the prosecution.

[10] At trial there was no dispute that sexual activity had occurred. The primary issue for the jury's determination was whether the prosecution had discharged the burden of establishing beyond reasonable doubt that the complainant did not consent and that the applicant did not reasonably believe that the complainant was consenting to sexual intercourse. In resolving those issues the jury would have to form an assessment of the credibility of the complainant and of the applicant, having the advantage of seeing both of them give evidence and taking into account for instance that there were aspects of the complainant's evidence that were not supported by other witnesses.

[11] At trial there was also an issue as to whether penetration had taken place. That issue also depended on the jury's assessment of the credibility of the complainant and of the applicant with the complainant stating that there was penetration and the applicant stating that there was not. The learned trial judge in addition to the count of rape correctly left the alternative verdict of attempted rape given that the applicant in his police interviews had been asked "What do you do with your penis?" and he had replied "I was trying to have full sex or penetration in behind. I tried to penetrate her from behind towards her vagina. I was lying on top of her, just trying to enter her, and there was no penetration whatsoever." That remained his evidence at trial. In addition the learned trial judge left an alternative verdict of indecent assault. Again in relation to both of these alternative verdicts the prosecution had to discharge the burden of establishing beyond reasonable doubt the issues in relation to consent.

[12] The learned trial judge charged the jury on 17 January 2014 leaving all the issues to the jury but with the aim of identifying the real issues for their determination, see *R v BZ* [2017] NICA 2 at paragraph [19]. She sent the jury out to deliberate that same day and they returned later that day with a unanimous guilty verdict.

Bad character application

[13] At trial the prosecution applied to adduce evidence of two previous convictions. The applicant had been charged with and had pleaded not guilty to two counts of indecent assault on a female. After a contested hearing on 25 October 2000 at Enniskillen Magistrates' Court he was convicted. Both of the offences arose out of the same incident and they were committed on 4 December 1998. A statement from Constable Pamela Feeney dated 2 January 2013 set out the relevant facts which facts can be discerned from a statement agreed between the prosecution and the defence following the learned trial judge's ruling. The statement was in the following terms:

> "The accused was convicted of two offences of indecent assault on a female, at Enniskillen Petty Sessions on 25 October 2000 arising out of an incident which had occurred on 3 December 1998 in Lisnaskea.
>
> He was admitted to a house at 6.30 a.m. and made unwanted advances to a female known to him in the house. He persistently tried to kiss her and kissed her neck.
>
> He exposed his erect penis to the female. She told him to pull his clothes up which he did. He went on to pin her on the sofa by sitting astride her and holding her wrists and kissed her mouth and neck, felt her left breast and kissed her body just above her breasts."

[14] The bad character application, which was opposed, was made by an amended notice dated 7 June 2013. The applicant also applied under Article 6(3) to exclude the evidence on the basis that it would have such an adverse effect on the fairness of the proceeding that the court ought not to admit it. On the application the prosecution sought to adduce the convictions to demonstrate the applicant's propensity to "commit offences" and the statutory basis was stated as Article 6(1)(d) and Article 8(1)(a) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. The application was made before the learned trial judge during the trial and on the same basis as the written application.

[15] After hearing submissions from both parties the learned trial judge ruled in favour of the prosecution's application. After that ruling the statement which we have set out was agreed between the prosecution and the defence and was read to the jury at 2.25 p.m. on 15 January 2014.

The charge to the jury

[16] The learned trial judge in her charge to the jury gave a number of directions including for instance the functions of judge and jury, the burden and standard of proof, the matters which have to be proved in relation to the offences of rape, attempted rape and indecent assault and a *R v Lucas* 73 Cr. App. R.159 direction in relation to lies. No issue was raised on appeal in relation to any of those directions including the learned trial judge's direction in relation to the effect, if any of a lie.

[17] In relation to bad character the learned judge gave the following direction:

> "I have got another direction of law for you, ladies and gentlemen of the jury, and this is in relation to what is called the bad character of the Defendant. Up until about ten years ago, juries would never have been told about

previous offences of a defendant and that was because of the fear that if a jury learned that information it would unduly prejudice the jury against the defendant. The jury might give that evidence more weight than it deserved. Today, such evidence is often admitted because a jury, understandably, want to know what the defendant is alleged to have done is out of character, or whether he has been behaved in a similar way before. In order to convict this Defendant you must be satisfied beyond a reasonable doubt that he engaged in some non-consensual sexual activity against (the complainant). When considering that offence you may consider it relevant that the Defendant was convicted of two offences of sexual nature committed against a young woman some 30 years ago and that he denied those offences. The Prosecution say that the Defendant has tendency to engage in sexual offences against young woman **and to lie about those offences** and that his previous offences, therefore the tendency, supports the Prosecution's case. The Defence say that those two offences are of some vintage. They are offences of indecent assault which is a completely different offence to that of rape. They also involved a lady whom the Defendant knew and there was no suggestion that the victim was asleep when the offences were committed. Those points made by the Defence are in fact true as a matter of fact. It is for you, ladies and gentlemen of the jury, to decide the extent to which, if at all, the Defendant's previous convictions assist you in deciding whether he committed any offence against (the complainant). I must warn you, however, to be careful not to place undue reliance on the previous offences. You shouldn't conclude that he is guilty of any offence against (the complainant) merely because he committed other sexual offences. Although those offences may show a propensity, it doesn't mean that the Defendant committed any offence against (the complainant). You have to decide whether the Defendant's previous offences in fact show a propensity. If you find there is a propensity you are entitled to take that into account in determining whether the Defendant is guilty, but propensity is only one relevant factor and you must assess its significance in the light of all the other evidence in the case" (emphasis added).

[18] It was common case that the applicant had pleaded not guilty at trial in relation to the 1998 offences and had been convicted after a contested hearing.

The grounds of appeal

[19] The following grounds of appeal were advanced on behalf of the applicant:

(a) The learned trial judge erred in law by admitting evidence of the applicant's previous criminal convictions as bad character evidence when the offences were not capable of establishing a propensity to commit offences of the same kind with which he was charged.

(b) The learned trial judge erred in law by refusing to exclude the bad character evidence under Articles 6(3) and/or 8(3) of the Criminal Evidence Order 2004 and/or article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989.

(c) The learned trial judge erred in law by directing the jury they were permitted to consider that the applicant had a tendency to lie about committing sexual offences. This direction significantly impacted on the fairness of the trial for the following reasons:

i. The direction unfairly undermined the evidence of the applicant far beyond that permitted in an evaluation of his credibility.

ii. The direction focused the jury's attention unfairly on a supposed tendency to lie to support the conclusion that he must also have lied to the jury in the instant case.

iii. The direction exceeded the scope of the prosecution's application to adduce bad character evidence, which was grounded solely on the basis of a propensity to commit sexual offences.

iv. It is clear from the content of the prosecution closing remarks that a propensity to lie about previous sexual offences did not form part of the case against the applicant. The prosecution focused solely on the credibility of the account given by the applicant during the trial.

v. The learned judge compounded the error in directing the jury that the prosecution's case was that the applicant had a tendency to tell lies when their case was not presented in that way. This was not the case, either in the written prosecution application to adduce bad character, the agreed factual document put before the jury or in the prosecution closing remarks.

(d) The only appropriate remedy was to discharge the jury and abort the trial and such an application ought in all the circumstances have been made by trial counsel. Notwithstanding this failure, the learned trial judge ought to have discharged the jury of her own motion in the interests of justice and of a fair trial once the matter was brought to her attention.

(e) The direction in respect of a propensity to tell lies failed to provide any guidance so that the jury could properly understand how this aspect of the bad character evidence they had heard may be relevant and how they could legitimately use it. In the absence of such a direction there was an overwhelming risk that the jury would apply such evidence inappropriately.

[20] These grounds of appeal are in respect of three distinct matters. First the grounds of appeal at (a)–(b) related to the admission in evidence of the bad character evidence. Second the grounds of appeal at (c) and (e) related to the content of the learned judge's charge in respect of the bad character evidence. Third the ground of appeal at (d) related to the consequence that it is suggested ought to have been followed, namely the discharge of the jury, if either grounds (c) or (e) were established.

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

The grounds of appeal relating to the admission in evidence of the bad character evidence

[22] Article 6(1) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004, in so far as relevant to this case, provides that "in criminal proceedings evidence of the defendant's bad character is admissible if, but only if—…, (d) it is relevant to an important matter in issue between the defendant and the prosecution, …." Article 8(1) provides that "for the purposes of Article 6(1)(d) the matters in issue between the defendant and the prosecution include—(a) the question whether the defendant has *a propensity to commit offences of the kind with which he is charged*, except where his having such a propensity makes it no more likely that he is guilty of the offence; (b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect." The prosecution in making an application under Article 6(1)(d) to admit the bad character evidence relied on Article 8(1)(a) and a propensity to commit offences of the kind with which he is charged. One possible way in which the prosecution may use Article 8(1)(a) is to show that the defendant has a propensity to commit offences of the kind with which he is charged is by showing he has previously committed an offence "of the same description" as this offence, (Article 8(4)(a)). Another possible way in which the prosecution may use Article 8(1)(a) to show that the defendant has a propensity to commit offences of the kind with which he is charged is by showing he has previously committed an offence "of the same category" (Article 8(4)(b)). In

this case the prosecution did not rely on Article 8(1)(b) and a propensity to be untruthful. Article 8(3) provides that "paragraph (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case." Article 6(3) provides that "the court must not admit evidence under paragraph (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

[23] The three essential questions for the learned trial judge are those identified in *R v Hanson* [2005] EWCA Crim 824, namely:

> "(1) Does the history of conviction(s) establish a propensity to commit offences of the kind charged?
>
> (2) Does that propensity make it more likely that the defendant committed the offence charged?
>
> (3) Is it unjust to rely on the conviction(s) of the same description…and, in any event, will the proceedings be unfair if they are admitted?"

[24] In relation to the first question one conviction or as in this case two convictions relating to one incident, can establish a propensity, that is to say a tendency, see *R v Corrigan* [2014] NICA 85 at paragraphs [25] and [26] and *R v Hanson* at paragraph [9]. There is no minimum number of events or convictions necessary to demonstrate a propensity. The fewer the number of events or convictions the weaker is likely to be the evidence of propensity. Accordingly, and as is apparent from *R v Hanson*, more caution has to be exercised by a trial judge before admitting in evidence one single conviction or two convictions relating to the same incident, though the precise circumstances in which this can or should be done are not prescribed.

[25] On appeal it is only in limited circumstances that this court will hold that evidence of bad character should not have been admitted at the trial, see *R v Hanson* at paragraph [15] and *R v Corrigan* at paragraph [22]. In relation to the decision to admit the evidence of the two previous convictions the issue is as to whether the judge's judgment as to the capacity of those prior events to establish propensity is plainly wrong, or whether her discretion has been exercised unreasonably in the *Wednesbury* sense.

[26] There is a distinction between a decision as to the admission of evidence and then the subsequent direction as to the use that may be made of that evidence. This ground of appeal relates to the decision to admit the evidence.

[27] In this case the learned trial judge recognised that the prosecution was relying on previous convictions relating to one incident to establish a continuing propensity some 13 years and 3 months later. She considered that there were considerable similarities between what was alleged to have occurred on 3 March 2012 and what had occurred on 4 December 1998. That there were such similarities was accepted by senior counsel then instructed on behalf of the applicant. On 4 December 1998 there had been unwanted and persistent sexual activity on the part of applicant which had escalated to pinning his victim down despite a clear indication that she did not consent. Senior counsel then instructed for the applicant contended that the major difference between what had occurred on 4 December 1998 and what was alleged to have occurred on 3 March 2012 was that the victim in 1998 was awake whereas the complainant's evidence in this case was that she was asleep. The learned trial judge also considered the strength of the prosecution case and the dates of the convictions in deciding that the history of the convictions established a propensity to commit offences of the kind charged, that the propensity make it more likely that the applicant had committed the offence charged and that it was not unjust to rely on the convictions and that the proceedings would not be unfair if they were admitted.

[28] We consider that the learned trial judge was perfectly correct in determining that the difference that the victim was awake in 1998 and was asleep in 2012 was not a difference of any significance. We consider that an overall consideration of similarities is a broad-ranging exercise leading to a decision as to whether there is a sufficient combination of features, which may not be striking in themselves, but which amounts to a sufficient degree of similarity. We do not consider that the learned trial judge's assessment in relation to similarity can be faulted. Of course if a decision is made to admit the evidence the points of distinction should be duly noted and brought to the jury's attention so that it is a matter for the jury to weigh the evidence in the overall context of the case. The test on appeal is whether the judge's judgment as to the capacity of the two previous convictions to establish propensity is plainly wrong. That test has not been met.

[29] The length of time since the conviction also was considered by the trial judge. As was noted in *Hanson* "a defendant's sexual mores and motivations are not necessarily affected by the passage of time." We consider that her exercise of discretion to admit the evidence could not be termed *Wednesbury* unreasonable.

[30] We are not persuaded that the judge was wrong to admit the evidence. The grounds of appeal relating to the admission of the bad character evidence do not give rise to any concern about the safety of the conviction.

The grounds of appeal relating to the content of the learned judge's charge in respect of the bad character evidence

[31] Mr Greene accepted that even though the convictions did not demonstrate a track record of untruthfulness they were not irrelevant to the applicant's credibility

so that the jury was entitled to have regard to them when forming an assessment of the applicant's evidence. We consider that once admitted under the gateway of Article 6(1)(d) and Article 8(1)(a) bad character evidence does go to the credibility of the applicant. As was pointed out in *R v James Paul Singh* [2007] EWCA Crim 2140

> "That accords with common experience. It is, among other things, the obverse of the reason why a defendant is entitled to plead his own good character in support of his claim that he should be believed. The reason why he is entitled to do that is because ordinary human experience is that people of proven respectability and good character are, other things being equal, more worthy of belief than those who are not. Conversely, persons of bad character may of course tell the truth and often do, but it is ordinary human experience that their word may be worth less than that of those who have led exemplary lives."

The two convictions not only establish a propensity to commit offences of the kind with which he is charged but also can be used by a jury to reason that a person who would do something like that is not to be trusted. As was stated in *R v Campbell* [2007] 1 WLR 2798 at paragraph [28]

> "In considering the inference to be drawn from bad character the courts have in the past drawn a distinction between propensity to offend and credibility. This distinction is usually unrealistic. If the jury learn that a defendant has shown a propensity to commit criminal acts they may well at one and the same time conclude that it is more likely that he is guilty and that he is less likely to be telling the truth when he says that he is not."

[32] On the facts of this case we consider that the acceptance by Mr Greene that the bad character evidence went to the credibility of the applicant's evidence is another way of saying that it went to whether he was telling the truth or not. We consider that it would have been appropriate for the bad character direction to the jury to have included amongst other matters, a direction that if the jury thought that it was right to do so they could take the applicant's bad character into account in deciding whether or not the applicant's evidence to them from the witness box was truthful. That a person with a bad character may be less likely to tell the truth, but it does not follow that he is incapable of doing so. That they could weigh his convictions in the balance in deciding whether they believed his evidence to them, though it was a matter for them to decide to what extent, if at all, his character helped them when judging his evidence.

[33] In *R v Campbell* [2007] EWCA Crim 1472 the court concluded at paragraph [31] that the only circumstance in which there is likely to be an important issue as to whether a defendant has a propensity to tell lies is where telling lies is an element of the offence charged. As in *R v Brownlee* [2015] NICA 39 we accept that this was not a case where propensity to untruthfulness or a tendency to lie arose. We accept that the direction should not have been couched in the language of untruthfulness or in the language of a tendency to lie but rather the judge could and should have directed the jury in relation to the impact of the convictions on the applicant's credibility given that there was a real issue about the competing credibility of the complainant and of the applicant. In certain cases it may not be of significance to distinguish between conduct which shows that somebody has a tendency to lie and someone whose conduct may lead a jury to believe that they are liable to lie. In such cases those matters can be left to common sense of the jury. In circumstances where, as here, the bad character evidence went to the credibility of the applicant's evidence and as to whether on the facts of this case he was telling the truth or not we do not consider that the language used by the judge had any impact on the safety of the conviction or that her direction would have caused the jury to approach the evidence in a way which was unfair. We are confirmed in that view by the judge's *R v Lucas* direction in relation to lies. The grounds of appeal relating to the direction to the jury in relation to the bad character evidence do not give rise to any concern about the safety of the conviction.

The ground of appeal relating to the discharge of the jury

[34] In view of our conclusions in relation to grounds (c) and (e) this ground of appeal does not arise.

Conclusion

[35] We have given careful consideration both individually and cumulatively to the various grounds of appeal. The task to be performed by this court was set out by Kerr LCJ in *R v Pollock* [2004] NICA 34. 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'.
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> 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.
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> 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."

[36] 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.