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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

-v-

STEPHEN MENEICE

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Before: Morgan LCJ, Deeny LJ and Maguire J

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MORGAN, LCJ (delivering the judgment of the Court)

[1] This is an appeal against the appellant's conviction at Belfast Crown Court on 11 May 2017 on seven counts of sexual touching involving penetration of a person under 16 contrary to Article 16 of the Sexual Offences (Northern Ireland) Order 2008 and two counts of sexual touching of a person under 16 contrary to the said Article of the said Order.

Background

[2] The appellant is a 40 year old male. The charges all relate to the actions of the appellant in relation to a 14 year old girl, a little over twenty years his junior, between 11 July 2012 and 15 September 2012. The appellant was an acquaintance of the complainant's father and her mother's then partner and the relationship started after an 11th night bonfire encounter. The complainant was having difficulties at home and staying out late owing to a lack of parental control. The prosecution case was that the appellant groomed her, providing cigarettes, alcohol and other gifts as well as giving her lifts in his car and lavishing attention upon her. During the offending period the appellant was alleged to have had regular sexual intercourse with her. Counts 1, 5 and 6 concerned alleged sexual assault by penetration in the appellant's father's flat. Counts 2, 3 and 4 were allegations of sexual activity involving penetration at the appellant's mother's house and count 7 was a specimen count of sexual penetration. Count 8 related to an allegation of oral sex on the same occasion as Count 5 and Count 9 was a specimen count relating to kissing.

[3] In the latter part of 2012 the complainant's parents became aware of rumours that there had been an inappropriate sexual relationship between the appellant and the complainant. They raised this with the complainant on a number of occasions but she denied that any such activity had taken place. She was, however, accompanied by her parents to a police station on 10 January 2013 and there alleged that there had been one incident of sexual activity. She said that she remembered lying on the bed, the appellant started kissing her and then he got on top of her and "that's whenever I had sex". She was asked for further detail by the social worker who was questioning her for an ABE interview but said that she did not want to talk about it. The social worker then asked her whether she could say that his penis was inside. She said that it was but it is agreed by both prosecution and defence that this was a leading question which it was inappropriate to put to her. When asked if there had been other occasions of such activity she said that it had occurred only once. That was the only time when something happened.

[4] The complainant made a further ABE in May 2014 when she made the allegations which constituted the charges in counts 2 to 9. The complainant agreed that she had lied in January 2013 when she said there had only been one occasion of sexual activity but said that she was not ready to tell everything at that time. The evidence also indicated that prior to attending with the police in January 2013 the complainant had written a note to herself in which she had described only one incident of sexual activity and her feelings in respect of it. This note had been given to the complainant's mother prior to the visit to the police station but there was a dispute as to whether it had been given to her by the complainant or her brother. The defence contended that this note, which apparently was made between September 2012 and January 2013, was inconsistent with the later allegations.

The Issues in the Appeal

Makanjuola

[5] In light of the history of disclosure set out above it was clear that on the prosecution case the complainant had lied during her ABE interview in January 2013 when she denied that there had been any sexual activity other than that the subject of Count 1. The Recorder had a discussion with counsel prior to speeches in which he indicated that this was a proper case for a Makanjuola warning. He then provided counsel with a note of what he intended to say.

[6] The Recorder informed the jury that the evidence of the complainant was central to the prosecution case. He reminded them that she had admitted telling a lie to the police during the January 2013 interview and repeated it several times during the interview. He then went through some other answers exposing those lies. He reminded them that when asked in the interview of May 2014 about why she said this she replied "I was scared to speak before". In cross-examination she added "I was not ready to tell them everything".

[7] The judge then warned the jury that in light of the lies told during the investigation of the offences the jury should exercise considerable care in the analysis of the evidence of the complainant. He continued:

> "The fact that she told a lie, and repeated it several times, means you must consider her credibility as a whole and whether you can believe her evidence as a whole, particularly when looking at her evidence in relation to the offences you are considering. The defence case is that her entire evidence about sexual activity is a lie and is false. The prosecution case is that it is not. You are entitled to consider her explanation as to why she lied and take into account her age and the surrounding circumstances that you have heard about. Ultimately it is a matter for you whether you consider her evidence to be reliable."

[8] The judge also addressed the jury about the evolution of the complainant. In particular he drew attention to the note contained in her diary which was a note to herself which only mentioned the first incident. He warned the jury that in the first ABE the social worker had expressly asked whether the appellant's penis was inside her. This was a leading question and may have prompted the reply. He reminded the jury that there had also been inconsistencies in her evidence particularly in relation to the location at which the offences had occurred.

[9] The appellant had particular personal attributes to his appearance about which there was a degree of discussion in the course of the case. He had a substantial tattoo on his chest of a lion and much was made of the fact that although the complainant referred to the tattoo she was unable to give any detail as to its content. She was, however, in a position to describe his penis piercing and the appellant admitted that he had a gold hoop piercing on his penis.

[10] The approach which a judge should take in directing the jury on the unsupported evidence of an alleged complainant in a sexual case was helpfully set out by Lord Taylor in R v Makanjuola [1995] 2 Cr App R 469. He noted that the requirement for corroboration in such cases had been abrogated but that it was a matter of discretion for the judge as to whether to urge caution in relation to a particular witness and the terms on which that should be done. In considering that discretion he said:

> "Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the contents and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however the witness has been shown to be unreliable, he or she

may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence."

[11] Lord Taylor then summarised the guidance in the following terms:

> "(1) Section 32(1) abrogates the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories.
>
> (2) It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.
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> (3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.
>
> (4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.
>
> (5) Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction.

> (6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.
>
> (7) It follows that we emphatically disagree with the tentative submission made by the editors of Archbold in the passage at paragraph 16.36 quoted above. Attempts to reimpose the straitjacket of the old corroboration rules are strongly to be deprecated.
>
> (8) Finally, this Court will be disinclined to interfere with a trial judge's exercise of his discretion save in a case where that exercise is unreasonable in the Wednesbury sense."

[12] There is no suggestion that the learned trial judge failed to take into account the lies and inconsistencies on which the appellant relied in challenging the complainant's evidence. Indeed it is clear from his charge that he put those matters squarely before the jury. It is also accepted that he plainly was aware of and took into account the guidance contained in Makanjuola. He initiated a discussion with counsel on the nature of the warning that should be given and provided a draft of the comments he intended to make. He supplemented those comments with detailed reference to those matters upon which the appellant relied in respect of inconsistencies concerning the appearance of the appellant and the location at which the various offences were alleged to have occurred.

[13] The appellant's complaint, therefore, on this issue comes down to an assertion that the discretionary judgement of the trial judge was outside the range of that which was available to him. As Makanjuola makes clear there are very limited circumstances in which the court will interfere with such a judgement. The trial judge is always in a much better position to form a view about what is required in the circumstances of the particular case. We find no basis upon which to interfere with the exercise of his discretion in this case.

The Prosecution's Closing Speech

[14] There were a number of criticisms of the manner in which prosecuting junior counsel closed the case to the jury. The first issue concerned the description of the background to the relationship between the appellant and the complainant. She said:

> "…this is where your own experience of life, you know, you're all various ages, you might have children that age. Some of the younger ones might have brothers or sisters that age, nieces, nephews, no doubt you've got a 14-year-old thereabout somewhere in your family social circle. And you know the way… And you were all 14 yourselves at one stage, so you

> all know how that time of life, when you're just blossoming into adult and puberty is hit big-time perhaps and you know the sort of emotions and things that go on people's lives. So, that's where you use your own experience of life and your own common sense about the way a child might think about this big hard man with his tattoos and his piercings and: Oh, you know, I, he fancies me and all that sort of thing. It's a matter for you, members of the jury, but I want you to think about how a child might think about that type of attention that she was getting from this man."

[15] This passage is criticised on the basis that counsel is seeking to bring into the jury's deliberations experiences from outside the evidence. We do not accept that criticism. It is the task of the jury to apply their common sense to the issues before them and in doing so they are bound to take into account their experience of life. We consider the invitation in the passage set out above did no more than invite such consideration. We agree, however, that the reference to "this big hard man with his tattoos and his piercings" was extremely colourful language. Although there was no reference on the evidence to "this big hard man" defence counsel put it in cross-examination that the appellant was a well-known "character" in the area in which he lived. In the circumstances of this case, therefore, we do not consider that these prosecution comments were out of place.

[16] The next passage concerns the treatment by the prosecution of the appellant's decision not to give evidence. Junior counsel said:

> "Members of the jury, his Honour will direct you of why he isn't coming into that… The defendant isn't coming into the witness box to tell you that, because you think that if any of you were accused, any of the males among you or, in fact, the females, any of your male relatives were accused of something of this nature, you would probably want to get in there and tell the people you didn't do it. But that's a matter for you, members of the jury."

[17] It is common case that prosecution counsel should regard themselves as ministers of justice. In closing the case to the jury counsel should be clinical and dispassionate and the case should be presented fairly. It was, of course, open to prosecution counsel to comment upon the fact that the appellant had failed to give evidence before the jury. The Judicial Studies Board has prepared a specimen direction on the manner in which the jury should be directed in respect of the failure to give evidence which specifically ensures that various protections are drawn to the jury's attention.

[18] The first of these is that the jury are advised that the defendant has the right not to give evidence. In this case the appellant had answered all the questions put to him in the course of police interviews and he relied on those answers as part of his case. Secondly, the jury should be advised that they may draw an adverse conclusion against the appellant only if they think it fair and proper to do so and that they should be satisfied first that the prosecution's case is such that it clearly calls for an answer by him and that the only sensible explanation for his silence is that he has no answer or none that would bear examination. Thirdly, the jury should be told that they should not find the defendant guilty only, or mainly, because he did not give evidence.

[19] In her close to the jury junior counsel did not make any reference to these protections and the decision was if anything exacerbated by her invitation to consider the position of the males among the jury or the male relatives of those females on the jury. In light of this inappropriate speech by the prosecution, senior counsel for the appellant in his closing explained to the jury that it was his role to advise his client on whether to give evidence and he pointed to the fact that his client had answered in detail all questions during five hours of interviews and that there was no exaggeration, inconsistency or contradiction in his answers. Were it not for the manner in which the prosecution had closed the case that would, of course, have been inappropriate comment but in the light of events it is understandable in this instance.

[20] As appears from the portion of transcripts set out above prosecution counsel introduced these remarks by referring to the overriding guidance to be given by the trial judge. As one would expect the Recorder provided a careful direction on this issue highlighting the protections to which we have referred including the fact that the appellant had set out his case at interview with the police. There was no criticism of the Recorder's approach and in our view no reason to consider that the jury failed to follow his guidance. There was no application to discharge the jury at the end of the prosecution close and defence counsel had a certain liberty in dealing with this issue in his speech. In the circumstances, therefore, although we consider that the remarks of prosecution counsel were inappropriate for the reasons given we do not consider that in the circumstances they rendered the conviction unsafe.

[21] The third area of criticism of the prosecution speech concerned evidence that when the complainant's father asked to see her mobile phone she said that she had deleted from the phone various messages from the appellant. In dealing with this prosecution counsel said:

> "Now, I'll tell you, when I was 14 a mobile phone had never been invented, but I can tell you if I'd had one and my daddy was going to see messages for some reason, you can rest assured I probably would have cleared all my messages. Would that not be the most natural thing in the world? The same way as it's the most natural thing in the world that as soon as you,

> and think of your experiences in life, as soon as you get onto a bus or train whatever, or you sit down to have a cup of coffee and you're on your own, is the first thing you do not to get your phone out of your pocket or your bag and have a wee nosey at it to see your messages; is that not what people do nowadays?"

[22] The actions of the complainant in deleting the messages was characterised by the defence as the destruction of evidence. The Recorder declined to accept that description on the basis that a criminal investigation had not by that stage commenced or been contemplated. It was perfectly legitimate for prosecution counsel to invite the jury to consider whether there was anything sinister in the deletion of these messages by this 14-year-old girl in the circumstances but it was entirely inappropriate to approach this on the basis that she would have done the same if she had been in the position of this 14-year-old girl. However, this is not of sufficient moment to endanger the conviction.

[23] This issue was addressed by the Recorder in his summing up to the jury on two occasions in which he highlighted the fact that the absence of these records was potentially an evidential opportunity lost to the appellant. He also invited the jury to consider why she had deliberately deleted the texts when considering her reliability as a witness. In those circumstances we do not consider that this portion of the summing up affected the safety of the conviction.

[24] The other issue raised in the course of the hearing was whether there was collusion between the complainant, members of her family and her friends. The issue of collusion was not raised in the discussion with the learned trial judge before speeches and was only touched on tangentially in the closing speech of defence counsel. The context was largely similar to the general issue of the reliability of the complainant's evidence and we do not consider that the issue of collusion added anything to the case.

Conclusion

[25] For the reasons given we consider that the appeal should be dismissed.