Neutral Citation No. [2014] NICA 14 | *Ref:* **GIR9115**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **22/01/2014**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

THE QUEEN

v

BARRY MOONEY

Applicant

Before: Girvan LJ, Coghlin LJ and Gillen J

GIRVAN LJ (delivering the judgment of the court)

[1] This is an application for leave to appeal brought by Barry Mooney ("the applicant") who was refused leave to appeal by the single Judge. The applicant was initially returned for trial on 8 November 2010 on one count of indecent assault on a female contrary to Section 52 of the Offences against the Person Act 1861. Having pleaded not guilty to the charge, his trial commenced on 28 March 2011 at Belfast Crown Court. Before completion of that trial the jury had to be discharged due to something said during closing submissions on behalf of the defence. The applicant was put up again for trial. That trial commenced on 13 May 2013 before His Honour Judge Kerr QC ("the trial judge") sitting with a jury. The applicant was convicted by a majority verdict of 10 to 2. He was sentenced to 18 months' imprisonment on 1 July 2013 and subjected to sexual offences notification requirements for a period of 10 years.

[2] Mr Irvine QC appeared with Mr Green on behalf of the applicant. Mr McMahon QC and Mr Henry appeared on behalf of the Crown. The court is indebted to counsel for their helpful arguments in relation to the application.

THE EVIDENTIAL BACKGROUND

[3] The complainant sadly died before the commencement of the second trial. The court permitted the evidence given by the complainant to be adduced as hearsay on the basis of the transcript and digital audio recording of the complainant's evidence

in chief and cross-examination at the original trial. According to the Crown case the complainant had been at a Hallowe'en party on the evening of 31 October 2001. She returned home with her daughter in the early hours of the morning and went to bed. She was awoken by a knock at the front door. When she answered the door she found the applicant standing there. He asked if her son Paul was at home. It appears that the applicant had played football with her son some years previously at school. The complainant informed the applicant that her son was not at home. He then asked to use the bathroom which the complainant permitted. While the applicant was in the bathroom she returned to her bed.

[4] According to the complainant's account, the applicant then entered her bedroom and asked her to give him a "blowjob". The complainant ordered the applicant out of the house and thought he had gone. However, when the complainant awoke for a second time, she discovered the applicant straddling her on the bed and masturbating over her. The complainant alleged that the applicant ejaculated over her and the bedclothes. There was an issue whether, as she had told the police, this had occurred before or, as she claimed at the trial, after she woke up. She alleged that he touched her breast. The complainant again ordered him out of the house and this time she locked the front door. The complainant said she felt dirty so she had a bath and changed the bedclothes. The next morning she went to her neighbour in a distressed state and told her what had happened. The neighbour contacted the complainant's daughter and the police were informed.

[5] During his initial police interview on 1 November 2008 the applicant claimed he had never been in the complainant's home and claimed that she was a fantasist and alcoholic. Three days later on 4 November 2008 he re-attended the police station and on this occasion he gave a pre-prepared statement but refused to answer questions. According to his new account, the applicant claimed that, while he was walking home, he saw the complainant standing at the front door in her nightwear smoking a cigarette. He spoke to her and she invited him in. They chatted for a while and he then asked to use the toilet. When he came out of the bathroom he heard the complainant calling him into the bedroom. He entered the bedroom and the complainant was lying on the bed with her breasts exposed. He went to the side of the bed and began masturbating while she was caressing her breasts moaning and encouraging him to ejaculate. He ejaculated over her and the bedclothes. The complainant then asked him to clean up and get her an ashtray both of which he did. She became annoyed when he indicated that he wished to leave. He then left the house.

GROUNDS OF APPEAL

[6] The applicant's grounds of appeal may be summarised as follows:

(i) The trial judge erred in deciding that he could adequately address the issues raised on the hearsay evidence of the complainant in his charge to the jury.

(ii) The trial judge's charge to the jury failed to adequately cure the potential prejudice to the applicant caused by the hearsay evidence.

(iii) The trial judge failed to focus on the reliability of the evidence and the counterbalancing of the prejudice caused by the hearsay evidence.

(iv) The trial judge erred in failing to stay the proceedings on the grounds of unfairness to the applicant and in breach of his Article 6 Convention rights.

The applicant initially sought to rely on the ground that the judge inadvertently placed pressure on the jury to reach a quick verdict by indicating he was commencing a new trial shortly and therefore the jury might be delayed in being able to give their verdict. Mr Irvine made clear, however, that the applicant was not pursuing that ground of appeal.

THE HEARSAY ISSUE

[7] The prosecution made an application to adduce the digital audio recording and transcript of the complainant's evidence in chief in cross-examination in the original trial pursuant to Article 20(2)(a) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order"). The trial judge noted that the defence accepted that the cross-examination of the complainant at the original trial was complete and that no other relevant matters were outstanding. He further noted that a Horncastle inquiry had been carried out in relation to the complainant and was available to the defence. He noted that senior counsel at the first trial had submitted that the recording was dangerous because there were expressions of emotion recorded. Since these could not be seen and assessed by the jury to gauge the genuineness of these apparent emotions it was unduly prejudicial to the defence to admit the evidence. Having considered the relevant authorities, the learned judge emphasised that he needed to be satisfied that the jury could assess the reliability/credibility of the evidence and as part of that exercise assess whether or not the evidence, although sole and decisive, could be supported by other evidence. The trial judge considered that the defendant's own pre-prepared statement to police, subject to a Lucas direction, could lend weight to the complainant's evidence in that the defendant accepted that a sexual encounter had taken place in the bedroom, albeit that on the defence case it was consensual. The trial judge concluded that a jury could nevertheless assess and judge the reliability of the evidence if properly directed with a hearsay warning, including a direction that they must be cautious of the fact that they have not seen the complainant giving evidence or being cross-examined. He also concluded that the triangulation of interests (the public interest, the victim's interest and the defendant's interest) supported the admission of the evidence.

[8] Mr Irvine's primary contention was that the trial judge should have stopped the case at the conclusion of the Crown case. Firstly, this was because during the course of the tape recording of the deceased's cross-examination she was heard to cry and sob when dealing with the issue whether the applicant had already ejaculated on her stomach prior to her waking up (as she had originally said) or whether he was still in the course of masturbating when she awoke. Secondly, during the course of the tape recording of the deceased's cross-examination she was heard to cry and sob when dealing with the issue of the applicant's touching on her breasts. The deceased had not referred to this in her statement to the police or in her account to her neighbour and daughter. Counsel argued that it would have been particularly important for the jury to have seen and assessed the complainant in dealing with these matters which went to the heart of the Crown case.

[9] Under Article 29(1) of the 2004 Order it is provided:

> *"(1) If on a defendant's trial before a judge and jury for an offence the court is satisfied at any time before the close of the case for the prosecution that –*
>
> *(a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and*
>
> *(b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant his conviction of the offence will be unsafe,*
>
> *the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury."*

The court retains a general discretion to exclude evidence both under Article 30(1) and Article 76 of PACE. It was accepted by the Crown that even if the trial Judge had, as here, decided to allow the admission of the hearsay evidence at the beginning of the trial it was open to him to reconsider the admissibility of the evidence at the conclusion of the Crown case or at any time before the matter was left to the jury.

[10] In his ruling given on 11 December 2012 admitting the complainant's evidence contained in the trial recordings and accompanied by a transcript the trial judge carefully considered the authorities including the Attorney General's Reference No 3 [1999] 2001 AC, the ruling of Grand Chambers in the ECtHR in Al Khawaja & Tahery v UK [2012] ECHR 2127, R v Ibrahim [2012] EWCA 837 and R v Riat [2012] EWCA. We detect no error in the trial judge's approach. As the defence accepted, this case differs fundamentally from many others in that the complainant

had been fully examined and cross-examined during the first trial. Her evidence had thus been tested. The defence was disadvantaged by the absence of the physical presence of the complainant in the witness box since the jury could not assess her demeanour while giving evidence. However, we consider that the trial judge correctly concluded that this disadvantage could be counterbalanced by a suitably worded direction. It must be assumed that the trial judge had considered the recording when giving his ruling and in his ruling he expressly recorded the defence arguments on the issue. We see nothing in the trial material that would have justified the trial judge excluding the evidence under Article 29(1) on the basis that the evidence was "so unconvincing" that any conviction of the defendant in reliance on it would be unsafe. There was material clearly fit to go to the jury on the issue. Nothing transpired in the course of the trial which should have led the trial judge to conclude that a change of approach should be adopted in relation to the admissibility of the hearsay evidence upon which he had ruled at an earlier stage. Provided that the trial judge's directions to the jury constituted a sufficient counterbalance to the disadvantage to the defence arising from the admission of the evidence without the complainant being available to go into the witness box, there was no unfairness to the applicant in allowing the jury to consider the evidence.

THE JUDGE'S DIRECTIONS TO THE JURY

[11] Strictly there was no ground of appeal that the trial judge in his summing up failed to properly direct the jury on how they should approach the question of the apparent emotions on the part of the complainant in the course of her recorded evidence. However, in the course of the submissions the adequacy of the trial judge's direction was fully debated and in fairness to the defence we have considered the adequacy of the Judge's summing up on the issue.

[12] In the course of his summing up the trial judge said:

> "You must examine and consider the evidence of the injured party with great care. As a matter of law it is evidence upon which you can act if you are sure it is true. The best evidence for a jury is where a witness comes before you and under oath gives her evidence orally so that you can see and hear the witness. Seeing a witness giving evidence is a very important part of the process of deciding what or who you believe because it is common case that when you are deciding whether you believe someone you not only listen to the words they say but also have regard to the way they say it, their reaction to questions, how they present before you, their demeanour before you. This is not possible in this case for the regrettable reasons that we now know about. You are being asked to decide this case only on what you have

> heard the witness say. For that reason you should look at the evidence with added care. Have regard to the circumstances in which it was made. In this case it was testimony on oath in the witness box. You heard the witness being challenged on her evidence by Mr Greene. Have regard to all the matters he raised with her. The issues which had been mentioned by defence counsel not mentioning the breasts in her statement, not mentioning the door slamming in her statement and think of the explanations that she gave for those matters in her evidence. Consider her evidence in the context of all the evidence in the case. Have regard to the similarities in what she described and the defendant now accepts. Weigh all of it up. If, members of the jury, reminding yourselves of the fact that you did not see her give evidence, accept her evidence, you are entitled to act on it. If, however, you feel the failure to see her when she was giving her evidence leaves you unable to be sure her account is true then you should not and then indeed cannot act on it."

[13] We heard the relevant part of the recording of the complainant's evidence. It appeared from the recording that during the relevant portions of the evidence the complainant sounded somewhat distressed with her voice breaking and accompanied by the sound of the kind of sniffing associated with someone speaking while weeping. This aspect of the case should not be exaggerated since the relevant portions of the transcript and recording were short. In terms of time they amounted to a matter of minutes of evidence adduced as part of evidence given over two days with the witness being recalled on a third day. Very significantly, it was not put to the complainant in cross-examination that she was faking false emotions or that she was attempting to strengthen a lying case by contriving a display of false emotions. Faced with a witness in such circumstances defence counsel would have been bound to tread carefully. Challenging the complainant by suggesting that the emotion was false could have caused further upset to the witness, was liable to antagonise the jury and had the real potential to weaken rather than strengthen the defence case. It would be understandable why experienced defence counsel would not seek in cross-examination to put to the complainant that she was creating a false picture by her emotions. Clearly a tactical decision had to be made by the defence on this issue but the defence had to live with the risks and consequences of the course adopted.

[14] In the trial to which this appeal relates defence counsel in closing to the jury indicated to the jury that they did not have the advantage of seeing the witness and thus could not assess her demeanour in deciding whether the emotion was genuine or false. The trial judge did not deal with the question of the emotion or its possible impact on the jury's assessment of the complainant's evidence. It would probably

have been better if the trial judge had asked for further submissions on the form of any further direction to the jury on the possible relevance of that issue in their deliberations. It is, of course, always possible to think of improvements which could be made to a charge to the jury after the event. However, the question is whether the charge as given failed to properly direct the jury to the extent that the conviction should be regarded as unsafe.

[15] Two points must be made. Firstly, the trial judge did invite counsel to indicate whether there were any specific points which they considered should be brought to the jury's attention. Defence counsel did not raise the issue of emotion as one calling for a specific direction. Secondly, following the judge's summing up, the parties made no requisition on the point. Against the background that it would have made good tactical sense to the defence to leave the point in the terms of the trial judge's charge rather than to highlight the issue of emotion, it would have been understandable if, for tactical reasons, the defence decided not to raise a requisition on the point. If the defence pursued that course tactically they cannot complain about the content of the judge's summing up.

[16] Even if the defence had not thought the point through, if the question had been debated before the trial judge before the charge was finalised, the resulting direction would not have advanced the defence case and might well have weakened it. A fully balanced direction by the trial judge would have been bound to have left it to the jury to consider whether the emotion apparently to be heard on the recording might have been genuine or false. If false that would have assisted the defence case. If, on the other hand, it was genuine that might have assisted the Crown case. The trial judge would have been bound to warn the jury that in considering the question of the genuineness of the emotion apparently audible in the recording they must bear in mind that the complainant had never been challenged in cross-examination that her emotion was false and designed to elicit sympathy for a lying case. He would also have been bound to tell them that it is for the defence to make such a case to the witness if that was indeed the defence case. Faced with a proposed direction in such terms it seems highly likely the defence would have sought to persuade the trial judge not to give any such direction in relation to the issue and left his direction in the terms in which it was ultimately given. We are satisfied that the judge's actual direction resulted in no injustice to the defence and it does not undermine the safety of the conviction.

[17] In the result we conclude that leave to appeal should be refused.