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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

S and C

Before: Morgan LCJ, Coghlin LJ and Gillen LJ

COGHLIN LJ (giving the judgment of the court)

[1] S and C are two brothers each of whom has been granted leave by the Single Judge to appeal their convictions of sexual abuse of S's two children Y and Z. Those convictions were handed down at the conclusion of a trial before His Honour Judge Kerr and a jury at Londonderry Crown Court on 6 February 2014. The names of the appellants and the injured parties have been anonymised because of the involvement of children. No person should publish any material which is intended or likely to identify the appellants or any child involved in these proceedings except insofar as may be permitted by direction of the court.

[2] On 27 June 2013 the two appellants, together with a third male, G, were returned for trial at Londonderry Crown Court in relation to a multitude of offences alleging sexual abuse of the two children Y and Z between 1990 and 1998. The appellants also faced a number of further counts alleging sexual abuse of their sister X between 1968 and 1987. At their arraignment on 20 August 2013 both the appellants pleaded not guilty to all counts. On 20 January 2014 C was re-arraigned and pleaded guilty to one count of attempting to rape his sister X, ten counts of indecently assaulting her and two counts of gross indecency with or towards her. On 3 February 2014 S pleaded guilty to 11 counts of indecently assaulting his sister, X, and three counts of gross indecency with or towards her.

[3] For the purposes of the appeal Mr McMahon QC and Mr Reel appeared on behalf of the appellant S while Mr Rodgers QC and Mr Kearney represented the appellant C. Ms Orr QC and Mr Connell appeared on behalf of the DPP. The court wishes to acknowledge the assistance that it derived from the carefully prepared and attractively delivered submissions advanced by all sets of counsel.

Background facts

[4] The relevant background facts were helpfully summarised by the learned trial judge during the course of his sentencing remarks in the following terms in relation to Y who was then 29 years of age:

> "….she was brought up by her parents until the marriage ended. After the marriage finally ended the defendant S had access to her on an overnight basis at his home. There is a dispute in the evidence as to when that ended. The earliest incidents that she alleges were in 1992 when she would have been between 6 and 7 years old. She recalls the abuse continuing to her early teens. The abuse from her father started with incidents of him lying beside her in the bed. She recalls him kissing her and putting his tongue into her mouth, Count 20. This then progressed to him penetrating her digitally, Count 21. Then making her masturbate him, Count 22. It further progressed to forcing her to perform oral sex, Count 26.
>
> Her evidence was that his treatment of her generally was cruel. She recalls incidents of him punching her in the stomach and choking her, Count 23, and punching her in the face causing her nose to bleed, Count 24. She recalls being raped by him when she was 10 in his house, Count 27, and after he had raped her he kicked her in the ribs and put in a scalding bath, Count 28. The following morning he raped her again, Count 29.
>
> She recalls her uncle, the defendant C, becoming involved in the abuse. She describes the two defendants coming into the bedroom together and taking turns raping her. Count 10 for C, Count 30 for S.
>
> She recalls them videoing the abuse of her, Count 11 for C, Count 31 for S. Her evidence was that they made her watch the abuse, Count 12 for C, Count 32 for S. She describes that they were both very aggressive towards to her, Count 13 for C, Count 33 for S. The two of them continued with their abuse

together taking turns to rape her and bugger her, Count 15, C and Count 35 S.

Her evidence was that there were multiple incidents of rape and aggression by them, Count 16, C, and Count 36 S. She recalls a specific rape by her father in the kitchen of the house, Count 37. On one occasion when he collected her from school and was in a car with her brother asleep in the back he made her perform oral sex upon him. She recalls two occasions when he assaulted her. On one occasion he stubbed cigarettes out on her stomach, Count 42, and on another she was thrown by him across the floor dislocating her knee which he crudely put back into place. She said that this had caused permanent restricted mobility. Medical evidence at the trial confirmed 'a looseness' in the area of the knee. Although it could not be established medically what had caused the injury the evidence was that if caused by trauma it was a blow of considerable force.

The abuse ended when issues came to light about the abuse of her aunt. At the time she made a limited complaint about her father only but did not reveal the true extent of the abuse that she had suffered."

[5] In dealing with the convictions in respect of Z the learned trial judge said:

"He is the son of S. He recalls the abuse by his father starting when he was 7 or 8 years of age. The first incident he described is his father rubbing him over his body and taking his trousers down and touching his penis, Count 47. This happened more than once, Count 48. On occasions the touching was accompanied by him kissing him, Count 54. He recalls being in his father's shed and being touched by him and his father simulating sex upon him, Count 56.

He recalls incidents when acts of gross indecency involved the defendant masturbating himself, Counts 49 and 51. He recalls in the bathroom being made to masturbate and perform oral sex upon him, Count 52. He recalls there were many such incidents, Count 53, specimen count. In addition he suffered cruelty at his father's hands. He recalls an incident

when he had asked for a basketball and after one being bought he was slapped on the face, then on the legs and being put under a cold shower. He recalls being burnt by cigarettes on a number of occasions, Count 56 a specimen count."

The grounds of appeal

S

[6] (*i*) The learned trial judge erred in granting the prosecution application to adduce as bad character evidence S's pleas of guilty to the counts on the indictment in relation to sexual abuse of his sister, X;

(*ii*) The learned trial judge erred in giving the jury an 'exhortation' to reach decisions and further erred in the contents of same;

(*iii*) The verdicts returned by the jury are inconsistent;

(*iv*) The learned trial judge misdirected the jury in relation to the evidence of the appellant and the agreed evidence on the issue of his contact with Y and Z following his separation from their mother;

(*v*) The learned trial judge erred in permitting the jury to return his verdicts in a piecemeal fashion;

(*vi*) Fresh evidence, namely Y's account of her knee injury in her Victim Impact Report, cast further doubt on the credibility of Y.

C

[7] (*i*) The learned trial judge misdirected himself in law in relation to permitting the prosecution to adduce as bad character evidence the appellant's pleas of guilty to the counts on the indictment relating to the sexual abuse of his sister, X;

(*ii*) The learned trial judge erred in his 'exhortation' to the jury to reach decisions on the remaining counts on the indictment;

(*iii*) The jury's verdicts are inconsistent.

The admission of the pleas of guilty to the abuse of their sister as bad character evidence

[8] The prosecution sought to adduce the evidence of these pleas of guilty in accordance with Article 6 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order"). The particulars of bad character evidence specified in the Notice of Intention to Adduce the Evidence included the following:

> "The proposed evidence is admissible under Article 6(1)(*d*) and Article 8(1)(*a*) and 8(1)(*b*) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. It is relevant to an important matter in issue between the defendant and the prosecution. It shows a propensity to commit offences of the kind with which he is charged and it demonstrates that the defendant has a propensity to be untruthful in that he previously denied the commission of these offences to which he has now pleaded guilty."

[9] The learned trial judge reminded himself that it was necessary to consider the application in respect of each appellant separately but, having done so, he ruled that the guilty pleas were admissible as showing a propensity to commit the type of offence in respect of which both appellants had been indicted. He also ruled that no question of a propensity to be dishonest had arisen in either case at that stage but that he would reconsider that aspect of the application, if requested to do so, when either or both of the appellants came to give evidence.

[10] During the course of cross-examination by Ms Orr S confirmed that the allegations made by his sister to which he had pleaded guilty were true. The cross-examination then continued as follows:

> "Q. You were arraigned in respect of K's allegations; isn't that right?
>
> A. Yes.
>
> Q. In or about August of 2013, if I'm correct. You know what arraigned means?
>
> A. Yes, I do. Yes.
>
> Q. You were asked whether or not you pleaded guilty or not guilty?
>
> A. Yes.
>
> Q. And what did you plead at that stage?
>
> A. I plead not guilty.

> Q. Yes. And then following from that on 20 January you pleaded guilty; is that right?
>
> A. That is correct, yes."

[11] During her cross-examination of C Ms Orr asked the following questions:

> "Q. These offences against K, am I right in thinking, were committed whenever she was between the ages of 4 and 14?
>
> A. That's correct.
>
> Q. And you initially were arraigned on that some time in August, am I right in thinking, of 2013?
>
> A. Yeah.
>
> Q. Yes. And did you, at that point in time did you plead not guilty in respect of those offences?
>
> A. I did, yes, that's correct.
>
> Q. I am right in saying that you pleaded guilty to those offences on 20 January just before the commencement of this trial?
>
> A. That's correct. And I would have pleaded guilty to them at the start if these other charges hadn't been there. If I had been arrested for what happened with our K I would have admitted to it the minute I went into the barracks, and I took the first opportunity to tell my family after that interview that I would be pleading guilty and to tell K I would be pleading guilty and she would never have to stand in court and I wouldn't be lying about it."

[12] There was no objection to the admission of the guilty pleas in relation to K being admitted as evidence of propensity and an agreed statement of facts was prepared by the prosecution and the defence to be read to the jury detailing the circumstances of those offences. Before this court both Mr McMahon and Mr Rodgers criticised the decision by the learned trial judge to permit questioning of the appellants about their change of plea from not guilty to guilty submitting that the admission of such evidence could not establish a propensity to be untruthful and, at the same time, was highly prejudicial.

[13] No further direction was given nor was any subsequent application made during the trial with regard to the significance of the changes of plea. Mr McMahon referred this court to the learned judge's charge in relation to credibility which was expressed in the following terms:

> "Now when I say that you are deciding on the facts, members of the jury, what are the facts that you are deciding? Well, in a case like this clearly, members of the jury, one of the primary things you are doing is deciding who you believe and what you believe. And it is very important to make it clear that there are two decisions there – it's not one decision – it's two decisions. First of all you have to consider credibility, and credibility is saying: I have listened to the witness and I believe the witness is a truthful witness, and I believe I am getting a truthful account. However, even if you believe that a witness is a credible witness and you are getting a truthful account, in acting upon that person's account you must also decide: is the witness reliable? In other words: is the witness who is believable and, I believe trying to tell me the truth, is the witness able to accurately recollect what has happened and describe it to me in evidence?"

[14] At the conclusion of the learned trial judge's direction to the jury Mr McMahon raised two requisitions the second of which referred to the pre-trial pleas of guilty in respect of the offences alleged against K. He drew the attention of the judge to paragraph 13.68 of the 2014 edition of Archbold relating to the appropriate warnings to be given to a jury in relation to propensity. The learned trial judge brought the jury back and gave them a careful direction as to how they should approach the evidence of previous offences against K explaining that, while they might be a factor suggesting propensity, such offences were not evidence in themselves that the accused had committed the offences that were the subject of the indictment. The learned trial judge did not give any direction relating the previous offences to the issue of truthfulness nor was he asked to do so.

[15] There are many reasons why a change of plea may come about with perhaps the most obvious being a consequence of tactical advice on the part of the legal representatives of an accused. That certainly appears to have been the reason for the initial denial on the part of the appellant C in this case. Authorities such as R v Hanson [2005] 1 WLR 3169, R v Campbell [2007] EWCA Crim. 1472, R v Atkinson [2006] EWCA Crim. 1424 and R v King [2007] NICC 17 illustrate the very limited circumstances in which previous convictions may become admissible for the

purpose of establishing a propensity for untruthfulness. As Gillen J observed in King at paragraph [64](4):

> "(4) As to propensity to be untruthful, previous convictions are likely to be capable of showing such propensity only where, either there was a plea of not guilty and the defendant gave an account which the jury must have disbelieved, or the way in which the offence was committed showed such propensity e.g. by making false representations."

[16] During the course of the trial at first instance neither the speeches of counsel nor the charge to the jury by the learned trial judge suggested that the change of pleas amounted to evidence of a propensity for untruthfulness. We are quite satisfied that the observations on "credibility" contained in the learned trial judge's charge to the jury and drawn to our attention by Mr McMahon accorded with the standard form utilised in such charges with regard to general credibility and not to any specific propensity for untruthfulness. In our view the cross-examination of the appellants with regard to the changes of plea was simply irrelevant and probably should have been avoided. However, after carefully considering the evidence as a whole we do not consider that such questions raise any doubt as to the safety of these convictions.

The judge's 'exhortation' to the jury with regard to a possible re-trial

[17] The jury commenced its deliberations on 5 February 2014. At 11.00am on the 6 February the jury indicated that they had reached unanimous verdicts in relation to some but not all of the counts. The learned trial judge asked counsel whether they had any objection to receiving the agreed verdicts at that stage and counsel confirmed that they had no objection. The jury then brought in unanimous 'guilty' verdicts in respect of seven counts against S. At this point the learned trial judge gave a majority direction in respect of the remaining counts. At 11.45am the jury returned 'guilty' by majority verdicts in respect of a further 18 counts alleged against S.

[18] At 1.05pm on the second day of their deliberations the learned trial judge called the jury into court in order to answer a question that they had posed. After answering the question the learned trial judge went on to say:

> "Members of the jury, I received a note that was sent, I have obviously had note of it and informed the counsel and the parties what is in your note.
>
> Now can I just say this to you, that obviously if you can't agree a verdict, you simply can't agree a verdict and you cannot be forced to agree verdicts. However,

> it is very important that if you can reach a verdict that you should do so. It is in the interests of all parties. It is in the interests of defendants to have a resolution of the case, it is in the interests of the complainant to have a resolution of the case because it is possible that there may have to be, if you can't reach verdicts, a further trial and of course it is also in the interests of the public in the sense that if the jury that has heard this case (as you have so patiently, and deliberated upon it over the course of three weeks) then another set of your peers in a jury panel may have to do the same at a future date. For all those reasons it is vitally important, if you can, to reach verdicts."

[19] The learned trial judge then reminded the jury of the oath that they had taken and invited them to return to their room and renew discussion with a view to reaching a verdict observing:

> "As I say, it is a very important thing from everyone's point of view, if you can, for you to do so."

He suggested that the jury should resume deliberations for at least a further hour but, if, after such a period, they were unable to reach verdicts he would bring them back and decide whether or not they should be discharged.

[20] The jury then returned to their room at 1.08 pm. In the absence of the jury Mr Rodgers then drew the attention of the learned judge to a passage at page 1815 paragraph D19.86 of the current edition of Blackstone and the case of R v Wharton [1990] Crim. L. R. 877. The particular passage referred to by Mr Rodgers was:

> "When giving a majority direction the judge should not refer to the possibility of another trial taking place if the jury cannot agree, as to do so might put undue pressure on them to reach agreement."

[21] In the circumstances Mr Rodgers requisitioned the learned trial judge to recall the jury and advise them to disregard his reference to the possibility of a re-trial. The learned trial judge agreed to do so and, upon the return of the jury to court at 1.25 pm, the following exchange took place:

> "Judge: Now members of the jury, the parties have brought to my attention, quite properly, that when I asked you to go and reconsider whether or not you could reach verdicts, that I referred to the possibility of another trial. I should not have done that, to do that is considered to put the jury under too much

> pressure and, accordingly, you should disregard entirely whether or not there may have to be another trial in this case, it is not a consideration for you, okay. That's the first thing. The second thing is you've now had a further 20, 25 minutes to discuss the matter. Are you in a position to say whether or not, if given time, there is a prospect of you reaching verdicts at this stage ….?
>
> Jury: Ehm, at the moment it's looking unlikely.
>
> Judge: Well it's a matter whether or not the jury feels that a wee bit more time would be well spent in trying to do so, but whether you think that there is no chance of verdicts …..?
>
> Jury: We'll have another try.
>
> Judge: Yes. But remember, don't have any regard whatsoever to whether or not there may have to be anything further occurring in relation to this matter, it's not a matter for you to worry about at all. You just honestly come to your decisions on the basis of the evidence that you have heard."

The jury then returned to their room and the learned trial judge enquired whether Mr Rodgers was satisfied to which counsel replied:

> "Oh I am, if Your Honour pleases, yes."

[22] At 1.49pm the learned trial judge received a further note from the jury enquiring about the effect of the verdicts they had already given if they were unable to agree further verdicts. The jury returned to court at 1.51pm at which time they were informed by the learned trial judge that the verdicts they had already reached were final and would stand. They were then asked whether any further time would assist them in their deliberations to which the learned trial judge received a positive response. The jury then retired again at 1.52pm. At 2.40pm the jury returned with verdicts in respect of a further 22 counts. S and C were found 'guilty' by majority verdicts in respect of a series of both specific and specimen counts of rape, indecent assault and cruelty, they were found 'not guilty' by majority in respect of sexual offences alleged to have been committed at the parties and majority 'not guilty' verdicts were delivered in all the counts alleged against G. The jury were unable to reach a verdict on one count alleged against S.

[23] Before this court Mr Rodgers and Mr McMahon submitted that, despite the correction delivered by the learned trial judge in response to Mr Rodgers

requisition, this court could not be satisfied that the jury were not put under excessive pressure to deliver a verdict. It was argued that the potential for the jury to feel themselves under such pressure was particularly strong in this case given the distress and harrowing circumstances of the allegations and the natural reluctance of members of the jury to transfer the burden of decision to others.

[24] In R v McKenna [1960] 1 QB 411 Cassells J emphasised at page 422:

> "It is a cardinal principle of our criminal law that in considering their verdict … a jury shall deliberate in complete freedom, uninfluenced by any promise, unintimidated by any threat."

[25] Juries in this and other common law jurisdiction perform a vital function in the course of administering the criminal law ensuring that those who are potentially at risk of punishment have their innocence or guilt determined by their peers. They discharge a very important public duty providing independent, objective and impartial decision-making in circumstances which may be distressing and harrowing in the extreme. The learned trial judge accepted that he had made an error in referring them to the possibility of a re-trial but that error was corrected, in accordance with the approval of counsel, within 20 minutes. Apart from a further brief return to court to be advised by the learned trial judge about the status of verdicts already returned, the jury then remained in deliberation for a further period of just over an hour before bringing in the final verdicts. It is not without significance that when asked by the learned trial judge prior to their retirement at 1.52 pm whether any further time would assist them the jury responded favourably to such an opportunity. In the circumstances of this case we are not persuaded that there is anything to indicate that the jury did not properly comprehend the content of the corrected direction given by the learned trial judge. We would simply add two further observations. First, as this court has indicated in R v Harbinson [2012] NICA 20 and R v A [2014] NICA 2 the practice of taking verdicts in sexual abuse cases in a piecemeal manner should, if possible, be avoided. A jury must give separate consideration to and return a separate verdict in respect of individual counts but the overall evidence in a case may be such that views, for example, on credibility on one count may affect the jury's view on credibility on other counts. Before delivering their verdicts on the various counts, the jury should stand back and review preliminary conclusions on some of the counts which they may ultimately consider they must revisit having regard to conclusions reached in later deliberations on other counts. As happened in this case, once it has announced its verdicts on some counts, whether it be by way of acquittal or conviction, it will not be open to a jury to change its mind on their earlier determinations even if they wish to do so. For this reason trial judges should take care as to the risks of returning separate verdicts at different stages and invite the jury not to return their verdicts until they have concluded their deliberations on all counts. In R v A this court suggested that the standard direction in the Bench Book should be amended accordingly. Secondly, juries are only human and multi-count indictments have the

potential to place considerable strain upon their powers of deliberation. We note that, in this case, the original indictment contained some 85 counts which were ultimately reduced to 56. While appreciating the need to avoid excessive demands upon time and resources and witnesses resulting from multi-trials, it seems to us that it is also important for the PPS to bear in mind the pressures placed upon individual juries charged with resolving multi-count indictments. We note that in this case it appears that an application to sever the indictment was made but was refused on the ground that it would not be fair to require the vulnerable victims to give evidence more than once.

Inconsistent verdicts

[26] This was a ground advanced only by Mr McMahon on behalf of S. Mr McMahon argued that there was no logical basis for the jury's acquittals of G on all charges and the acquittal of all of the accused on the counts related to 'parties'.

[27] The prosecution of all three defendants rested primarily upon the credibility and reliability of Y and Z. During the course of cross-examination Y was unable to identify or remember the faces of any of the other men who had attended the 'parties' and subjected her to abuse other than the three accused. She was also unable to identify particular dates or times.

[28] In R v A Girvan LJ delivering the judgment of this court considered the issue of inconsistent verdicts and referred to a number of relevant authorities. The learned Lord Justice cited the case of R v Dhillon [2010] EWCA Crim. 1577 as authority for the proposition that it is notoriously difficult to successfully challenge a jury's verdict on the grounds that inconsistent verdicts have been returned and he went on to set out the relevant principles identified in that case at paragraph [15] of the judgment. It is firmly established that a verdict will not be illogical simply because credibility is an issue. Girvan LJ also noted the well-known dictum of Buxton LJ in R v G [1998] Crim. L. R. 483 that neither the credibility nor the reliability of a witness is a 'seamless robe'. In this case the jury may well have taken the view that, given Y's difficulties in recalling identities, names, dates, times etc. they had a reasonable doubt with regard to the counts relating to "parties." The medical evidence did not corroborate the number of rapes alleged to have taken place at the "parties." We also note that, unlike S and C, G had no previous criminal convictions. A jury is entitled to accept part of a complainant's evidence whilst rejecting or, more accurately, not being sure about other parts. In the circumstances, we have not been persuaded that there was any logical inconsistency in the verdicts brought in in relation to the counts against S.

The application for receipt of fresh evidence

[29] During the course of her direct examination Y was asked by counsel about injuries that she had suffered at the hands of S and in the course of her answers she said:

> "Because, he threw me across the kitchen and I hit my knee on a chair and it came out of the socket. I was lying on the floor and I was screaming because it hurt so much and he came over to me and said 'Oh did that hurt' and then kicked me on it and it hurt more. Then he grabbed my leg and pulled it and my knee cap went back in."

She stated that the injury was to her left knee and that her continuing difficulties included walking with a limp after standing for a long time, restricted ability to run and pain in cold weather. In cross-examination Y confirmed that the assault had occurred in the kitchen when they were living in Kylemore. She agreed that she had told one of the medical specialists that she had seen that she had sustained the injury during a 'PE lesson' and another consultant that she had 'twisted' her knee some two years earlier. When asked to explain the different versions Y said:

> "I didn't know how to tell the doctor how it actually happened. I was ashamed."

The injury in question formed the basis for Count 38 alleging that S assaulted Y occasioning actual bodily harm, contrary to Section 47 of the Offences Against the Person Act 1861.

[30] Subsequent to the trial, but prior to sentence, Y was the subject of a victim impact report compiled by Dr Curran, consultant psychiatrist, at the North West Independent Clinic on 7 February 2014. During the course of her interview by Dr Curran Y recounted how she had been physically abused by S since the age of 11 and that she is quoted as having said that she was 'thrown down the stairs injuring her left knee'. She told Dr Curran that she had a noticeable limp when she walked the cause of which was a residual hypermobility about the joint. Mr McMahon sought to have the victim impact report admitted as fresh evidence in accordance with Section 25 of the Criminal Appeal (NI) Act 1980. He submitted that the information given to Dr Curran could not have been the product of shame since, by the time it was volunteered, S had been publicly convicted of the relevant offence.

[31] Count 38 of the indictment alleged that S had committed the assault upon Y on a date unknown between 17 August 1992 and 19 August 1998. Y told Dr Curran that she had been abused since the age of 11 by S but did not specify any particular date for the alleged assault. She would have reached her 11th birthday in August 1995. In cross-examination Y was unable to be positive about the date but she did assert that the assault took place in the kitchen at Kylemore. Kylemore was a bungalow and the family did not move to the house in Alcorn Place, in which there were stairs, until 1997. We did not specifically give leave to adduce the victim impact report as fresh evidence under the 1980 Act but we nevertheless have taken it into account. It appears that Y herself was unable to account for the source of the

information in the victim impact report and Dr Curran had long since shredded his notes. The interview for the victim impact report was of a very general nature and we note that, during the course of the trial, Y had been closely cross-examined as to her credibility about the manner in which this injury was sustained. In the circumstances we do not consider that the material in the victim impact report undermines the safety of these convictions.

[32] We have given careful consideration to the eloquent submissions of counsel in relation to each of the grounds relied upon in these appeals against conviction. We have also stepped back in order to consider the overall impact of their submissions. Having done so in the context of the decision of this court in R v Pollock [2004] NICA 34 we have not been left with any sense of unease nor have we been persuaded that the convictions are unsafe. Accordingly, the appeals of both appellants will be dismissed.