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Judgment: approved by the Court for handing down | *Delivered:* **21/12/2016**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

WC

Applicant

Before: Morgan LCJ, Weatherup LJ and McBride J

McBRIDE J (delivering the judgment of the court)

Introduction

[1] This is an appeal brought by the appellant against his conviction on 3 December 2015 by a unanimous jury verdict, at Londonderry Crown Court, on six counts of indecent assault, three counts of inciting a child to engage in sexual activity involving penetration, one count of sexual assault by penetration, one count of rape and one count of common assault.

[2] The appellant lodged a Notice of Appeal against conviction on 7 December 2015. Leave to appeal conviction was granted by the Single Judge Keegan J on 7 June 2016, on the first ground of appeal only.

[3] The complainant is the appellant's daughter. Given the familial relationship between the appellant and the complainant, no details pertaining to the identification of the appellant or the complainant should be revealed in any publication of any sort or released to the media, so as to preserve the complainant's anonymity.

[4] Mr Ciaran Mallon QC with Mr Eoghan Devlin appeared for the appellant. Ms Jackie Orr QC appeared with Mr Gary McCrudden for the Crown. The court is grateful to counsel for their submissions.

Evidential background

[5] The complainant was born on 28 February 2002. Her parents separated in 2005 and she moved with her mother to Donegal. Following a period of no contact the complainant had supervised contact with the appellant at her mother's home. This progressed to overnight contact at the paternal grandmother's home where the appellant resided.

[6] At trial the complainant's Achieving Best Evidence ("the ABE") interviews were played and she was cross-examined. In the ABE interviews the complainant alleged that she was sexually abused by the appellant during overnight contact at her maternal grandmother's home. The abuse occurred when the appellant was drunk and took place over a four year period, when the complainant was aged 6 to 10 years.

[7] Counts 1 to 6 relate to indecent assaults, which the complainant alleged occurred when she remained up late to watch TV and the other occupants in the home retired to bed. She described how the appellant touched her on her backside and over the genitalia. The abuse continued for four years.

[8] Counts 7 to 9 relate to five separate occasions when the complainant alleged the appellant incited her, as a child, under 13 years to engage in a sexual act.

[9] Count 10 relates to an incident on 21 April 2012, when the complainant gave evidence that the appellant digitally penetrated her genitalia scraping her and causing bleeding.

[10] Count 11 relates to a charge of rape. The complainant gave evidence that on 28 April 2012 the complainant alleged the appellant forced her onto the floor, removed her lower garments and raped her.

[11] Count 12 is a charge of common assault. The complainant stated the appellant grabbed her by the arm causing redness, after she telephoned her mother to come to collect her after contact on 5 May 2012.

[12] After the incident on 5 May 2012 the complainant made a complaint to her mother and thereafter the police were contacted.

[13] There was no forensic or eyewitness evidence. Findings on medical examinations of the complainant were normal. At trial a number of witnesses gave evidence.

[14] The appellant denied all the allegations at police interviews. The case made on his behalf at trial was that the complainant was lying. She had either been put up to making the allegations by her mother and/or stepfather or alternatively the allegations were a product of her imagination and invention caused by her taking

things she had seen on TV and incorporating these into a narrative about herself. The defendant gave evidence at trial.

Grounds of appeal

[15] The appellant's grounds of appeal against conviction are:

(a) Ground 1 – There was a material irregularity in that the learned trial judge invited the jury to convict on the basis of a case that had not been positively made by the prosecution at all, be it in opening the case, during the trial or in a closing speech, alleging the "grooming" of the complainant by the applicant.

(b) Ground 2 – There was a misdirection of fact when the learned trial judge incorrectly and inaccurately put to the jury a case that had not been put forward by the defence stating in reference to the allegations of indecent assault that he (the defendant) stated such incidents would be explained away by his mistakenly or innocently touching her (the complainant) over clothing.

(c) Ground 3 – There was an improper comment on the facts and on the case sought to be advanced by the defence surrounding the variation on the account provided by the complainant of the alleged rape as between what she had stated in her ABE interview dated 3 October 2012 and that of 8 October 2012 with the learned trial judge exhibiting a level of unfairness and a pro-prosecution bias in seeking to undermine the defence case.

(d) Ground 4 – The learned trial judge's summing up to the jury was unfair to the applicant and particularly one-sided.

Ground 1 – Learned Trial Judge's reference to "grooming"

[16] In his charge to the jury the learned trial judge stated that the prosecution had described this as a "grooming" case. Thereafter he used this concept on a number of occasions to describe the Crown case.

[17] The learned trial judge was requisitioned by Mr Mallon QC on the basis that the prosecution had never used the word grooming during the trial and never alleged any offence of grooming which is a separate offence under the Sexual Offences (Northern Ireland) Order 2008. He complained that the repeated use of the word over-emphasised the prosecution case and thus represented a pro-prosecution bias. The learned trial judge declined to re-address the jury after this requisition.

[18] Ms Orr QC accepted that the word grooming was not specifically used by her during the trial but submitted that the prosecution case was that there was an escalation in the sexual abuse from touching over clothes to inciting a child to perform oral sex on him to digital penetration and ultimately rape. Further, she

submitted, the prosecution case had been that there was an escalation in the means used by the appellant, to secure compliance and silence from the complainant, progressing from promises to threats of violence. In her closing speech Ms Orr specifically referred to the abuse starting at level one and then progressing to level 2 and level 3.

[19] This is a case in which the prosecution presented the case on the basis of an escalation of abuse both in terms of the level of sexual activity and the means used to secure compliance. The word grooming entails no more or less than the case presented by the prosecution. The use of the wording grooming therefore could not have caused any confusion in the mind of the jury. We, therefore, consider the learned trial judge was entitled to use this descriptive adjective to describe the prosecution case, even though the actual word had not been used by the prosecution.

[20] In the circumstances, we see no error on the part of the learned trial judge in the use of this phrase, in his charge to the jury. The use of the word did not over-emphasise the case.

[21] We therefore dismiss this ground of appeal.

Ground 2 – Putting a case which had not been made by the defence

[22] The learned trial judge stated in his charge:

> "All these things the prosecution say was the defendant slowly and deliberately over time sexualising this child in a way that perhaps if she told someone it would have been explained away as some sort of innocent touching of her body over her clothes, innocent or accident touching …."

[23] Mr Mallon submitted that the appellant's case had always been that none of the incidents occurred and by including this statement in his charge to the jury the learned trial judge made it appear that the appellant accepted the occurrence of the incidents but would explain them away. He submitted this was a mis-direction on the facts and therefore the jury was misled in their assessment as to whether the appellant accepted the occurrence of contact in the circumstances alleged.

[24] Ms Orr submitted, the learned trial judge was entitled to express a possible interpretation of the facts on the basis the jury was informed factual matters were a matter solely for them to decide. As a question was raised in cross-examination about this matter the learned trial judge could refer to it in his charge.

[25] The learned trial judge was not requisitioned in respect of this matter. As was noted in R v Pomfrett [2010] 2 All ER 481 at paragraph [72]:

> "Insofar as it is said that the judge erred in a summary of the evidence, it was incumbent on counsel to draw the errors to the judge's attention, so that they could be put right at the appropriate time."

[26] If this matter was one of real concern we would have expected it to have been the subject of a requisition.

[27] We do not find that there was a misstatement of the evidence by the learned trial judge. In this part of the charge he was arguably simply drawing the jury's attention to common sense points they may or may not find to be of assistance to them. Throughout his charge the learned trial judge clearly set out the appellant's case that none of the incidents occurred.

[28] We therefore dismiss this ground of appeal as we are not satisfied that there was a misstatement of the evidence or that the manner in which the evidence was presented was such as to make the verdict of the jury unsafe.

Ground 3 – Unfair summing up in respect of inconsistencies in the complainant's evidence

[29] The defence complain that the learned trial judge's summing up in relation to the complainant's ABE interviews recorded on 3 October 2012 and 8 October 2012 was unfairly in favour of the prosecution and diminished to an unjust extent the appellant's case. In particular it was submitted that the learned trial judge failed to adequately address the material inconsistencies in the two accounts given by the complainant in respect of the rape charge. Mr Mallon submitted that the learned trial judge unfairly explained away the inconsistencies and dealt with the defence case in a sparse and dismissive manner.

[30] In his charge to the jury the learned trial judge said:

> "The defence say that (the complainant) is inconsistent as between what she told the police in the ABE regarding the rape and what she later told the police in her subsequent interview five days later on 8 October. The defence threw (sic) [transcription erroneously transcribed 'threw' instead of 'drew'.] out a number of discrepancies. You can recall that the ABE … was read to you because the DVD wouldn't record properly and you may well have noted … on the transcript that the buzzer sounded ten times … It is a matter entirely for you to determine if that in any way was off-putting and not conducive to obtaining the best possible evidence from a ten year old. It is

> entirely a matter for you that there are these discrepancies and the defence have properly drawn them to your attention. It is a matter for you as to what you consider the importance of those discrepancies …"

[31] In R v Berrada [1990] 91 Cr. App. R. 131 it was noted:

> "It is of course, part of the duty of the judge in a case of this kind to indicate the nature of the conflict … what is inappropriate however is to inflate the conflict and to describe it in sarcastic or extravagant language."

[32] The appellant is therefore entitled to have impartial directions given to the jury about the facts.

[33] We are satisfied that when the summing up of the learned trial judge is considered in its entirety, the learned trial judge addressed fully the inconsistencies raised by the defence and referenced these specifically in his charge to the jury. He reinforced to the jury that this was a matter for them and further explained to the jury the approach they should take in respect of inconsistencies. We do not consider that the learned trial judge's charge was either unfair or undermined the defence case. He was entitled to explain to the jury the issues which arose with the ABE interview. We therefore dismiss this ground of appeal.

Ground 4 – The Learned Trial Judge's summing up was unfair

[34] The defence complained that the learned trial judge's summing up was unfair and unbalanced on the basis:

(a) He spent significantly more time setting out the prosecution case than he spent on the defence case.

(b) He put the defence case in a dismissive manner.

(c) He wrongfully suggested that the defence case was that the complainant was working to a script.

(d) He failed to direct the jury's attention to specific instances of inconsistencies.

(e) He failed to put the appellant's case based on the implausibility of the complainant in relation to specific allegations.

[35] As is noted in R v McDade [1989] 8 NIJB 1:

> "An accused charged with serious criminal offences is entitled to have his defence put adequately and fairly before the jury."

[36] A judge should not therefore make comments in his summing up which are so weighted against the defendant as to leave the jury little real choice other than to comply with the judge's views. A trial judge is, however, entitled to express an opinion and to comment upon the evidence and to do so, where appropriate in strong terms.

[37] Having regard to the entirety of the charge given by the learned judge we are satisfied that the appellant's case was presented fully before the jury and a close reading of the charge shows that the learned trial judge spent a similar amount of time presenting the appellant's case as the prosecution case. The learned trial judge did not err when he said the defence case was that the complainant was working to a script. This was the case put by the defence to the complainant, namely her mother and/or stepfather had put her up to making up the allegations. The learned trial judge did refer the jury to inconsistencies and directed them in respect of inconsistencies. At the beginning of the charge and throughout he directed the jury, in conventional terms, that the evidence and facts were entirely for them. We are satisfied that he presented a fair summary of the evidence and left it open to the jury to accept or reject such parts of it as they chose.

[38] Mr Mallon submitted that in a case where the singular issue was one of credibility the learned trial judge ought to have interwoven the prosecution and defence cases. The learned trial judge did interweave the cases to some extent. It is a matter of choice for the learned trial judge how he sets out the evidence and the style he adopts. In a case, where there is a complete denial of the charges, there is nothing to say the approach the learned trial judge adopted in this case rendered the verdict of the jury unsafe. We therefore dismiss this ground of appeal.

Conclusion

[39] We have carefully considered the question whether the verdict is unsafe. Having considered the matters raised by the defence, individually and in aggregate, we are satisfied that the conviction is safe. We have no lingering doubt as to the guilt of the appellant. The jury had the benefit of seeing and hearing the witnesses and it is clear that they believed the complainant's evidence. Accordingly, we dismiss the appeal. We refuse leave on the same grounds.

[40] This judgment has been amended as a result of the error made in the transcription which is referenced at paragraph [30] above.