

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM BELFAST CROWN COURT

THE QUEEN

-v-

XYZ

Before: Morgan LCJ, Gillen LJ and Weatherup LJ

WEATHERUP LJ (delivering the judgment of the Court)

[1] This is an application for leave to appeal against conviction at Belfast Crown Court on 19 March 2015 of sexual offences against two young boys. Mr Barlow BL appeared for the applicant and Mr Steer BL for the prosecution.

[2] The applicant was convicted on four counts against A, being two offences of indecent assault on a male between 31 December 2006 and 2 February 2009 and two counts of sexual assault on a child under 13 between 1 February 2009 and 30 June 2011. The applicant was also convicted of five counts against B, being two counts of sexual assault on a child under 13, one count of causing a child under 13 to engage in sexual activity, one count of inciting a child under 13 to engage in sexual activity and one count of assault of a child under 13 by penetration, all between 1 February 2009 and 30 June 2011. The applicant was sentenced to five years imprisonment.

[3] There is one ground of appeal, namely, that the trial judge erred in refusing an application to stay the proceedings as an abuse of process. On 29 December 2015 the Single Judge, Keegan J, refused leave to appeal.

[4] A was born 13 September 2000 and B was born 15 January 2004. The applicant was in a relationship with the mother of the two boys, M, from 2001 to 2006. B is the son of the applicant. A is not the son of the applicant. After the breakdown of the relationship in 2006, M commenced a relationship with another

man. The applicant commenced a relationship with another woman who already had a son, C.

[5] After the breakdown of the relationship between the applicant and M in 2006, B and A continued to have contact with the applicant and stayed overnight with him from time to time. This arrangement continued until the Spring of 2011 when, as a result of a dispute between M and the applicant, B and A stopped staying with the applicant.

[6] Thereafter a complaint was made by C of sexual contact by the applicant. This complaint did not result in any charges against the applicant, who denied any impropriety. However the complaint was made known to M, who then approached her sons to ascertain if there had been any sexual contact with them by the applicant. After initial denials of such contact and continuing questioning by M the complaints were made by the boys that founded the charges against the applicant.

[7] Agreed admissions presented in evidence at the trial included the following:

“4. The PSNI conducted an investigation following disclosure by [C] that his mother’s partner [the applicant] had sexually touched him. [C] did not disclose during his ABE interview any criminal offences. The applicant was interviewed under caution by the PSNI during which he denied any inappropriate behaviour towards [C].

5. The PPS directed no prosecution in this matter.

6. Dee Mulholland a social worker made contact with [M] asking whether any of her children had contact with the applicant. This is normal procedure. He informed her that allegations had been made against the applicant but did not disclose any details to [M]. He then made subsequent arrangements to visit the family home and spoke with both children in the presence of their mother.

7. On 11 December 2011 [M] reported to the PSNI that her son [A] had disclosed sexual abuse.

8. On 16 December 2011 [M] reported to the PSNI that her son [B] had disclosed sexual abuse.

9. On 19 December 2011 a clarification meeting with [A] resulted in an ABE interview being conducted. On the same day [B] also had a

clarification meeting but he did not make any disclosures.

10. On 17 August 2012 [M] rang the PSNI informing him that [B] wanted to be interviewed by the PSNI. On 22 August 2012 [B] had a clarification meeting and on 13 September 2012 provided his ABE interview."

[8] The trial of the applicant commenced in March 2015. The applicant applied to stay the proceedings for abuse of process. The submissions of Counsel for the applicant to the trial Judge were in the following terms. The issue in the trial was the fundamental question of the reliability of both children as witnesses. Their ABE interviews were said to be inherently weak and in some parts contradictory. In all sexual abuse trials the significant aspect of any prosecution case will be the disclosures made by the children. Leaving aside the legal ramifications of complaint evidence, where young children made such significant disclosures the circumstances surrounding the disclosures became extremely important. Where the involvement of adults in facilitating such disclosures occurred it takes on vital importance in assessing the reliability of the child's disclosures. Such circumstances include any catalyst that initiates the questioning of children. In this case there were no concerns raised during the time the boys stayed over with the applicant. The concerns arose following the approach by Social Services to the boys' mother in light of the disclosures made by C. The mother, having had the seed planted, continued to ask the boys questions which subsequently resulted at different times in disclosures being made which led to the prosecution. The fundamental breach to the defendant's right to a fair trial was said to be that the important and significant features of the case outlined above could not be explored before a jury and those features were critical to the question of the reliability of the boys' evidence. The Crown did not seek to rely upon C and it was said that it would be suicidal for the defence to open up before the jury the fact that another boy of a similar age, with the applicant acting in the capacity of a father, had made similar allegations of sexual abuse. It was said that no direction given to a jury by the trial Judge could overcome the prejudice created. Thus the defendant had been placed in an impossible position and no fair trial was possible. The trial rested entirely upon the single question of the credibility of the two young boys. The testing of that reliability before the jury could not take place.

[9] His Honour Judge Fowler QC rejected the application for a stay for abuse of process. Having reviewed some of the authorities he concluded –

"Applying the above principles to the facts of the instant case, it will be a matter of tactics whether or not the defence decide to reveal to the jury the details of [C's] allegations. Full disclosure of the circumstances surrounding the disclosure by [C] has

been given to the defence and they are in a position to make an informed decision in this regard. By not exposing this issue to the jury it is hard to see any prejudice to the defendant. However, if the defence, for tactical reasons, wish to explore this matter to attack the credibility of the complainants, absent any significant unexplained delay, then any prejudice this may give rise to can be dealt with by the trial process and proper direction given to the jury.

I am not satisfied that the defence have established on the balance of probabilities that this is one of those 'wholly exceptional' cases to the point where it can be said this case is readily identifiable as one necessitating a stay. I am not satisfied on the balance of probabilities that the defendant cannot receive a fair trial or that it would be unfair to put him on trial. I am not satisfied to the required standard that there are exceptional reasons why this trial should not proceed and reject the existence of any other unfairness which would impinge on the defendant's right to a fair trial either common law or under Article 6 ECHR."

[10] The trial Judge having rejected the application to stay the proceedings, the trial proceeded. The allegations of C were presented to the jury as the agreed admissions between prosecution and defence set out above. Prosecution Counsel did not raise the C allegation or cross-examine the applicant on the C allegations. Defence Counsel raised the issue in cross examination of the prosecution witnesses.

[11] The trial Judge gave directions to the jury on the evidence of M and the complainants and directed the jury that C's allegations against the applicant were of no assistance in relation to the charges against the applicant and must not be held against the applicant. The jury convicted the applicant.

[12] The applicant makes no criticism of the trial Judge's directions to the jury. On this appeal the applicant contends that this is an exceptional case where the Court should have granted a stay and the convictions are unsafe. The submissions of Counsel for the applicant were in the following terms. There were two young witnesses who were initially asked by their mother about improper behaviour by the applicant and denied any such improper behaviour. Further they were spoken to by a social worker about the applicant and no improper behaviour was alleged. There was hostility between M and her new partner and the applicant. Allegations had been made against the applicant concerning the child of the applicant's new partner, C. The complainants were repeatedly questioned by their mother thereafter. The defence was placed in an impossible position. The defence was not

making a tactical decision as there was no option. The C allegations had to be raised to explain why the mother had questioned the children about sexual matters. Not to do so would have left the jury in the dark as to why the mother had questioned the children about sexual matters and would have led to speculation on the part of the jury as to why the mother had acted in that way. Regardless of any direction given to the jury to disregard prejudicial material the fact of another boy having made a complaint of a sexual nature being placed before the jury was suicidal.

[13] The approach to an abuse of process application was outlined in Attorney General's Reference (No. 1 of 1990) [1992] 1 QB 630 as follows -

(1) It is for the defence to establish on the balance of probabilities that the continuation of proceedings would amount to an abuse of process of the court.

(2) A permanent stay of proceedings should be the exception rather than the rule.

(3) No stay should be imposed unless the defendant shows on the balance of probabilities they will suffer serious prejudice to the extent that no fair trial can be held or that it would be unfair to place him on trial.

(4) The trial process itself is equipped to deal with the bulk of complaints which have founded applications for a stay.

[14] This appeal raises the interaction between fairness and safety. Before this Court the issue is the safety of the convictions. The appeal will be allowed if this Court considers the convictions are unsafe. Before the trial Judge the issue on an abuse of process application is one of fairness. There are two bases for a stay for abuse of process, namely that it would be unfair to place the accused on trial or that no fair trial could be held. If it were to be found in any appeal that an abuse of process application ought to have been granted on the basis that it was unfair to place the accused on trial then the conviction could be expected to be regarded as unsafe. If it were to be found in any appeal that an abuse of process application ought to have been granted as no fair trial could have taken place then the conviction could be expected to be regarded as unsafe. That is not to say that every unfairness renders a conviction unsafe. The accused is entitled overall to a fair trial. A breach of the minimum standards of fairness in Article 6 of the European Convention on Human Rights could be expected to render the trial unfair and any conviction unsafe.

[15] This Court approaches the present appeal on the basis that, if the Court is satisfied that it was unfair to try the applicant or if the trial of the applicant was

unfair by reason of the matters relied on by the applicant to advance the application for a stay for abuse of process, the convictions will be treated as unsafe. In any event, should there be any basis on which the Court considered a conviction to be unsafe that conviction would be quashed.

[16] A number of instances of abuse of process applications were referred to by Counsel. The Court refers to four of those instances. First, R v JAK [1992] Crim. LR 30, where the trial Judge acceded to the application for a stay of proceedings on the ground of abuse of process where there had been lengthy delay. JAK had earlier been acquitted of sexual offences against his daughter. Later JAK was brought to trial on a count of rape of his sister, which had occurred some 20 years earlier when she was 11 or 12 years old. She stated that she had been emboldened to make her complaint on hearing of the complaint made by JAK's daughter.

[17] On the application to stay the proceedings for abuse of process it was concluded that the period of delay *of itself* and the agreed absence of any evidence capable of corroborating the complaint led to an inference that a fair trial would be impossible. In addition the defence would be unable to explore the reasons for the complainant's delay in making her allegation without the circumstances of the daughter's allegations being adduced in evidence and thus the jury would be denied the opportunity of evaluating her explanation for the delay.

[18] Second, R v MJT (unreported, 27 March 2000), where the Court of Appeal of England and Wales quashed convictions after an abuse of process application had been refused where there had been lengthy delay and loss of documents. One complainant alleged rape some 20 years earlier and the other complainant alleged rapes some 15 years earlier. The first complainant had earlier made a contemporaneous complaint of a sexual offence and at trial no evidence was offered and the appellant was discharged in 1986. The police destroyed all the case documents as a matter of routine. 11 years later the appellant's daughter made complaints that were later withdrawn. This led to the complaints that were the subject of the charges. The appellant contended that he was prejudiced by the destruction of the documents and by the inability to investigate the delay of the two complainants' delay in making their complaints as it was asserted that to do so would result in the disclosure of the withdrawn allegations.

[19] The trial Judge stated that the difficulties of the defence could be addressed in the trial process by control over the evidence and in particular by directions of law to the jury. The trial Judge directed the jury that they had no evidence from either complainant explaining the delay in making the complaints or why they had come forward when they did and they were urged not to speculate.

[20] The Court of Appeal agreed that for the defence to open up the topic of the timing of the complaints would have been suicidal. The Court concluded that the police action in destroying the papers could not be dealt with by control over the

evidence or directions to the jury. The absence of the documents left an unacceptable question mark over the safety of these convictions.

[21] Third, R v Eric G [2001] EWCA Crim. 2528, where the trial Judge rejected an abuse of process applications and the Court of Appeal dismissed the appeal, an instance where there had been no delay. The appellant was charged with sexual offences against a young boy. At Christmas 1999 the boy was told by his mother that the appellant had abused his uncle and the boy was asked by his mother if the appellant had abused him. He said that he had not. In March 2000 the boy surprised his mother with a lesbian lover and some hours later reported to his mother that the appellant had abused him in 1998. The defence case was that the boy had a special relationship with his uncle and only made his complaint to support his uncle. However, it was contended that if that case were to be put to the boy in cross-examination it would have revealed to the jury the complaint by the uncle, which would have been very prejudicial to the appellant. In the event defence counsel did cross-examine the boy to reveal the complaint made by the uncle. Directions were given to the jury by the trial judge about which the appellant had no complaint.

[22] The Court of Appeal stated:

“It was of course a forensic dilemma. It presented those who were appearing on behalf of the defendant with a difficulty. But that does not mean, in our judgment, that in this case, it could conceivably have been appropriate to stop the trial.

In our judgment anyone who believes in the integrity of trial by jury must accept that a jury is capable of declining to draw adverse inferences when instructed not to do so.

The jury, having learnt about the complaint made by Uncle David and later withdrawn, were invited and properly invited by the judge to disregard any prejudicial effect of that information and only use it for the purpose for which it had been led before them by the defence, namely to explain or seek to explain why the complainant made his complaint, when he did.

[23] Fourth, R v MacKreth [2009] EWCA Crim. 1849, where the trial Judge rejected an abuse of process application and the Court of Appeal dismissed the appeal where there had been lengthy delay and loss of some documents. The appellant was convicted of sexual offences against children in a care home some 25 years earlier. In 1977 he had been acquitted of similar allegations and all documents had been lost or destroyed. The appellant contended that there ought to have been a stay of the

proceedings as an abuse of process because of the delay and the absence of documents. The appellant relied on the defence dilemma of whether to explore the previous trial and the earlier investigations with the complainants and to challenge them as to their involvement in or contamination by those events.

[24] The trial Judge considered any prejudice from the disclosure of the earlier events would be small and could be dealt with by directions to the jury. There was no complaint about the directions given to the jury.

[25] The Court of Appeal considered that it was open to the defence to calculate that the earlier events did the appellant no undue harm and thus to expose them. However, if the view was that exposure represented unacceptable dangers, then the fact that it remained completely hidden from the jury could hardly be accounted for as prejudice. The Court emphasised the extent of the documentation that had survived. The conclusion was that nothing in the appeal suggested that the trial Judge was mistaken in the view that the trial would not become unfair if the jury were to learn of the earlier events.

[26] What emerges is that the grant of a stay for abuse of process is exceptional. It is not exceptional where the defence has been placed in a difficulty about examining the reasons for complaints where that might elicit evidence of other allegations against the accused. Absent any issue of delay or the loss of documents or the loss of other evidence or other prejudice, the defence difficulty can be expected to be dealt with by control of the evidence and appropriate directions to the jury. The defence has a choice whether to challenge the complainants in a manner that reveals other allegations to the jury or to leave the matter hidden from the jury. If the defence elects to challenge the complainants in a manner that might lead to unfavourable evidence, then consideration could be given as to how some evidence might not be adduced before the jury. If the result is a gap in the evidence or that unfavourable evidence has been adduced, then appropriate directions may be given to the jury. There should be faith in the jury system that they will respect the directions of the trial Judge. The above approach is not to say that the presence of delay or the loss of documents or the loss of other evidence or other prejudice should necessarily result in a stay being granted. As always, the issue of the grant of a stay is fact specific.

[27] In the present case, a stay of proceedings having been refused, the defence adopted a course that involved the complaint of C being adduced in evidence. The trial Judge's directions to the jury addressed the defence case as developed in the cross-examination of A and B and M and the history of the complaint against the applicant by C.

[28] The trial judge directed the jury –

“I must warn you and direct you that the fact that [C] has made allegations against [the applicant] provides you no assistance in this case in coming to decide whether or not [the applicant] has committed the alleged offences in

this case. It does not provide any support for the prosecution case at all. You must not hold the allegation concerning [C] against [the applicant] and you must not speculate or be drawn into speculation about it. This is particularly so since it is agreed between the prosecution and the defence that the PSNI carried out an investigation following the disclosure by C that his mother's partner, [the applicant], had sexually abused him. That C during his ABE, achieving best evidence video, did not disclose any criminal offences, that [the applicant] was interviewed under caution by the PSNI during which he denied any inappropriate behaviour towards [C] and that the PPS the Public Prosecution Service directed no prosecution in this matter. This matter was placed before you with the sole purpose of giving you the background information as to why [M] was questioning the boys and for no other reason. I direct you that it does not provide support for the prosecution case and I direct you that it must not be held against [the applicant]."

[29] The present case does not involve delay or loss of relevant documents. The defence had a choice to make as to the approach to the circumstances of the disclosures by the complainants. A course of action was adopted by the defence that led to the complaint of [C] being disclosed to the jury. That course of action need not have been adopted. While not adopting that course of action would have left unexplained the mother's repeat questioning of the complainants, the jury would have been directed not to speculate about the reasons. Rather, the defence elected to put the complaint of [C] before the jury in their challenge to the credibility of the evidence in support of the charges. The complaint of [C] did not result in any charges against the applicant. It was not unfair to place the applicant on trial in the circumstances. There is nothing in the circumstances of the present case that indicates that the trial of the applicant became unfair by reason of the complaint of [C] being revealed to the jury. The trial Judge gave appropriate directions in the circumstances. Counsel for the applicant makes no complaint about the directions to the jury.

[30] This Court agrees with the approach of the trial Judge in rejecting the application for a stay. This is not a case where it was unfair to place the applicant on trial. Nor was it a case where a fair trial could not have been held. In the event this Court is satisfied that there was a fair trial of the applicant.

[31] This Court is satisfied that the convictions are safe. The application for leave to appeal is refused.