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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

THE QUEEN

v

RICHARD SAMUEL HAZLEY

_____

Before: Stephens LJ, Treacy LJ and McCloskey LJ

_____

Mr Greene QC with Mr Lannon (instructed by Patterson & Rocks, Solicitors) for the Applicant
Mr McClean (instructed by the Public Prosecution Service) for the Respondent

_____

Stephens LJ (delivering the judgment of the court)

Introduction

[1] On 19 September 2019 following a jury trial at Downpatrick Crown Court before His Honour Judge Miller ("the judge") Richard Samuel Hazley ("the applicant") on majority verdicts (10:1) was convicted of 14 counts of indecent assault on a male contrary to section 62 of the Offences Against the Person Act 1861. Those counts all related to offences committed on various dates between 1993 and 1999 in respect of the injured party prior to his seventeenth birthday. We anonymise the injured party as BH. The applicant, who was refused leave to appeal against his conviction by the single judge, Horner J now renews his application before this court.

[2] On 5 December 2019 on Count 1 the applicant was sentenced to a custody probation order of two years with one year in custody and one year on probation. On Count 2 a consecutive custody probation order was imposed of two years with one year in custody and one year on probation. In relation to counts 3 – 14 sentences of two years imprisonment were imposed concurrent to the sentences imposed on counts 1 and 2. The overall effective sentence was two years in custody and two years on probation. The applicant was also disqualified from working with children and vulnerable adults indefinitely and placed on the Sex Offenders Register for a period of ten years. The applicant has also appealed with the leave of the single judge against the sentence imposed.

[3] Section 16(1) of the Criminal Appeal (Northern Ireland) Act 1980 provides that "a person who wishes … to obtain the Court's leave to appeal, shall give notice of … his application for leave to appeal, in the prescribed manner *within twenty-eight days from the date of the conviction*, … appealed against or, in the case of an application for leave to appeal against sentence, from the date on which sentence was passed …." The applicant was convicted on 19 September 2019 so that the 28 day period for an appeal against conviction expired on 19 October 2019. In relation to an appeal against conviction Forms 2 and 3 together with a skeleton argument were not received in the Court of Appeal office until 31 December 2019. As this was outside the 28 day period the applicant not only seeks leave to appeal but also seeks an extension of time of some 2 months in relation to his appeal against conviction. The sentence was passed on 5 December 2019 so that the appeal against sentence has been brought within the 28 day period.

[4] The notice of appeal against conviction asserted that the learned judge erred:

> "(a) In ruling that a *Makanjuola* or *care* warning was not appropriate in this case.
>
> (b) In failing to give a *Makanjoula* or *care* warning.
>
> (c) By summing up inadequately in respect of the lack of independent evidence.
>
> (d) In summing up on '*myths and assumptions*' in a confusingly over-technical way and/or an unbalanced way in respect of the quality and reliability of the complainant's evidence. This was not balanced by a *Makanjuola* warning.
>
> (e) The convictions are unsafe because of the large number of inconsistent and implausible aspects of the complainant's evidence."

In the skeleton argument dated 30 December 2019, compiled by junior counsel for the applicant one finds the applicant's grounds of appeal against conviction conveniently summarised in a concise paragraph under the rubric of "Conclusion":

> "It is respectfully submitted that it is *at least arguable* that a *Makanjuola* warning should have been given in this case and that such a warning could have made a material difference to the 10/1 majority verdict on each count. Additionally, the absence of such a warning could not counterbalance the charge in respect of 'Myths and Assumptions' … (emphasis added).

[5] On Sunday 21 June 2020 just prior to the hearing of the appeal on Tuesday 23 June 2020 counsel on behalf of the applicant sought to amend the notice of appeal by adding:

> (f) Failing to give a direction on bad character issues.

[6] It is a feature that paragraph (3) in both the notice of appeal dated 31 December 2019 and the proposed amended notice of appeal dated "June 2020" (in fact 21 June 2020) did not refer to the facts of this case but rather must have been copied from some other notice of appeal. This paragraph should not have been included and we ignore it.

[7] On 23 June 2020 we heard both the appeal against conviction and the appeal against sentence. On 26 June 2020 we dismissed the appeal against conviction with reasons to follow which we now deliver.

[8] Also on 26 June 2020 in relation to the appeal against sentence we delivered an ex tempore judgment holding that the applicant had failed to establish that the overall sentence of 4 years was manifestly excessive. However, given wholly exceptional circumstances in relation to that appeal we altered the sentences so as to achieve an effective sentence in which the probation period was three years and the custodial element was one year.

Procedure for the hearing of the appeal

[9] The hearing of both appeals was conducted by video link in the context of the prevailing Covid-19 pandemic. While hearings of this kind will, predictably, become increasingly common place, they are sill in their infancy in this jurisdiction. One of the clearest emerging lessons is that the maximum co-operation of legal representatives is of fundamental importance.

The questions to be addressed and the task of this court on appeal

[10] The questions for the court are, in summary:

> (a) Whether to extend time as regards the application for leave to appeal against conviction.
>
> (b) Whether to permit amendment of the applicant's grounds of appeal.
>
> (c) Subject to (a) and (b), the determination of the application for leave to appeal against the convictions and if leave is granted then determination of that appeal.

[11] Before considering the various grounds of appeal we set out the task to be performed by this court when determining an appeal. That task has been clearly and

authoritatively expounded by Kerr LCJ in *R v Pollock* [2004] NICA 34 after a review of the relevant authorities. At paragraph [32] of his judgment the Lord Chief Justice set out the following principles to be distilled from the authorities:

> "1. The Court of Appeal should concentrate on the single and simple question '*does it think that the verdict is unsafe*'.
>
> 2. This exercise does not involve trying the case again. Rather it requires the court, where a conviction has followed trial and no fresh evidence has been introduced on the appeal, *to examine the evidence given at trial and to gauge the safety of the verdict against that background*.
>
> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
>
> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has *a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence*, it should allow the appeal" (emphasis added).

Those are the principles which we will apply.

Background

[12] The applicant, who was born on 3 November 1965 is now 54 years of age. He is a teacher. He taught in a primary school which BH attended and then became a principal of a small primary school. He had to take some time off work due to chronic fatigue syndrome which was diagnosed in 2001. In 2008 he decided to go into private tutoring developing his own business as a self-employed tutor.

[13] BH, who was born in 1982, is now 37.

[14] In 1991 the applicant then a primary school teacher was teaching Primary 6 at the school which BH attended. BH was in the applicant's P6 class. BH then received private tutoring from the applicant for the transfer procedure examinations at the applicant's house. BH continued to have contact with the applicant from P7 right into BH's 20s. BH began staying over at the applicant's house regularly (about every week or fortnight) from about age 11 onwards.

[15] BH's evidence in relation to count 1 was that he stayed overnight in the applicant's house alone, aged about 11 and that the sleeping arrangement was that he slept in the applicant's bed. The specific incident the subject of count 1 was BH's evidence that whilst he was asleep he became aware of something. He stated that he

could feel that the applicant had his hand down BH's pants and was touching his penis. BH stated that he pretended still to be asleep and turned over onto his front in bed.

[16] BH's evidence in relation to count 2 related to an incident involving him showering after which he stated that the applicant dried him and whilst doing so asked BH to pull back his foreskin. BH stated that could not do this. Shortly after this incident occurred the applicant raised with BH's parents concerns that the applicant had a problem with his foreskin which led to BH having an operation which resolved this problem. The applicant accepted that he had spoken to BH about his foreskin but explained this on the basis of a change in child welfare and care policies leading to sensitive discussion with boys and girls reaching puberty about the various issues that can arise and the appropriate way with which to deal with them. On this basis the applicant stated that he felt that it was appropriate to discuss this with a 13 or 14 year old child.

[17] Counts 3-14 were all specimen counts. They all related to showering incidents when BH was staying with the applicant. BH's evidence was that he stayed overnight with the applicant every fortnight or every week from about age 11 and that the applicant would insist on him showering every night. BH stated that when he was in the shower, the applicant would be in the bathroom and he would wash BH's back and front in the shower. BH gave evidence that the applicant would then watch as BH washed his own privates. BH stated that after the showers, the applicant would dry him, back and front and put talcum powder on him. He also stated that the applicant would not dry BH's private parts but rather he would watch BH doing this.

[18] The specimen counts on the indictment reflect this behaviour taking place on a weekly basis over approximately 4 years, when BH was aged about 12 to about 16.

[19] The background to the circumstances in which BH first made a complaint to the police involved an exchange of texts between him and the applicant. The applicant messaged BH:

> "*Happy Birthday, (BH)! Have a good one.*"

BH replied:

> "Glad u msg'd. Bad news 4 u. After years of mental torture, attempted suicide and basically a ruined life im finally gonna face my demons. I want you to know that although u helped me in many ways, there were many inappropriate things you done sexually that have left me mentally scarred. I am receiving the professional help now and prepared to make sure u pay for it and that it never happens to anyone else"

The applicant replied:

> "I am shocked by what you are saying. I would never ever have wanted to do or say anything that would have caused you distress"

To this BH replied:

> "Well you did. I think a person in your job and position should know exactly where the line is."

[20] On 23 January 2017 BH, then aged 34 made a telephone report to the PSNI regarding sexual assaults on him by the applicant in the period 1994 – 2001 when BH was aged 11 – 19 years.

[21] On 31 January 2017 the applicant was arrested and was interviewed by police under caution. A striking feature of that interview was the applicants response to the most simple questions as to the sleeping arrangements when BH was staying overnight in the applicant's house. Mr Greene accepted that these were not complex questions and that the applicant was attended by a solicitor during the interview with whom he consulted in advance of the interview. In the interview the following exchange took place:

> **"Did he ever sleep in your room?**
>
> He may have chosen to nip in or something, but it was never you know. He had his option, but if he was maybe choosing to have a bit of conversation or something he'd have nipped in, but he had his own room there
>
> **Did he sleep in with you ever?**
>
> Trying to…
>
> I am going to make no comment to that because I am not, you know, I am not sure what you would call it, the best way to explain it would be
>
> **Would he had ever slept the whole night in your bed?**
>
> Again I am going to make no comment because it depends, you know just."

Mr Greene accepted that all that was required from the applicant was a simple denial that BH "ever slept in (the applicant's) room" or "ever slept the whole night in (the applicant's) bed." Mr Greene also accepted that the age and education standard of the applicant was such that he should have been able to provide simple

answers to these simple questions. In short that the applicant, a mature school teacher when asked in effect the question "Did BH as a child sleep in the same bed as you throughout the night?" did not simply say that this was false.

[22] The applicant's answers to these questions are in contrast to those given by him at the trial. During his evidence in chief the applicant was asked as to whether BH had ever slept in the same bed as the applicant. In reply the applicant was emphatic that BH never slept in his bed. A major component of the applicant's cross examination focused on the evidence that the applicant had failed to deny during the police interview that BH ever slept in the applicant's bed or in the applicant's room. The jury had the benefit of seeing that exchange as it took place whereas we only have the transcript. However, even on paper the exchange highlights that the applicant had difficulty with for instance that part of his reply during interview that BH had an *option*. More decisively the cross examination highlighted that (a) the applicant accepted that there was nothing difficult to understand in order to answer the question whether BH ever slept in his bed and (b) in reply to that question the applicant said "I'm going to make no comment because it *depends*, you know, just" without any indication of what it depends on. We consider that at interview and at trial the applicant never explained what it depended on.

[23] We have considered the explanations which the applicant was able to offer at trial for failing to simply deny these allegations during the police interview. He stated that "I just felt that I'd answered the question – I didn't know where the detective was pushing me and where it was going and I just felt … I had answered." It is obvious that no comment was not an answer to these questions so we consider that no credence could be given to that part of his explanation. It is equally obvious that the detective was not pushing him but rather was asking simple questions. We consider that no credence could be given to that part of his explanation. In short at trial we consider that there was no credible explanation for the applicant's failure to simply deny that BH ever slept in the applicant's bed.

[24] We consider that this was a most compelling exchange and a particularly significant part of the evidence at the trial. We also consider that the applicant's failure to mention the matters which he later relied on in his defence substantially undermined the credibility of his account. The obligation on this court is to examine all the evidence given at trial and to gauge the safety of the verdict against that background, see *R v Pollock*. We consider this to be a central component of the evidence at trial significantly influencing our view of the safety of the verdicts. In turn this means that the applicant has a considerable task in seeking to establish that the time for lodging an appeal against conviction should be extended as this depends on whether the merits of the appeal against conviction are such that it would probably succeed, see paragraph [41] below.

[25] On 14 June 2017 the applicant was again interviewed by the police under caution. On this occasion he was asked about his involvement in BH's showers. He replied "Nothing further to add" to all questions about the subject, referring to his

first interview, even though he had not been asked anything about this in that earlier interview.

[26] The Bill of Indictment is dated 15 February 2019. The dates of the offences given in the Bill of Indictment were between 1 August 1994 and 20 December 2001. BH was aged 11 on the first of these dates and 18 on the last.

[27] The applicant was arraigned and pleaded not guilty to all 14 counts.

[28] The defence statement is dated "… March 2019" and is unsigned. It is couched in bland, un-particularised and perfunctory terms. In it the applicant makes no positive case of any kind. Of note, in common with the police interviews, it contains no denial that the applicant ever slept with BH. It stated that the "defendant will rely on the content of his PACE interview" but in that interview the applicant had in effect made no comment in answer to the question as to whether he had slept with BH. There is no indication that this document was amended subsequently.

[29] The trial was conducted between 16 and 19 September 2019. The jury comprised 11 members for reasons which are immaterial.

[30] BH's evidence at trial was to the effect that the latest date upon which the offending occurred was in 1999. This prompted an application by the prosecution to amend the indictment. The significance of this is that on the basis of the amended indictment all of the 14 offences were alleged to have occurred prior to BH's 17th birthday so that consent was not an issue for the jury. In turn the applicant asserted at trial that this was an inconsistency in BH's evidence and that BH had deliberately altered his evidence so as to avoid any issue of consent.

[31] At trial BH not only gave evidence about the offences but also stated that on occasions when he and the applicant were together in the applicant's car if the need for BH to urinate arose the applicant would provide BH with a bottle and would observe BH during the act of urinating. He also stated that the applicant had a so-called "*special drawer*" in a spare bedroom in the applicant's house which contained pornographic material, condoms and KY jelly. In this context BH stated that the applicant:

> "*… would talk to (BH) about masturbation and to practice putting on the condoms. No penile touching or exposure occurred although the applicant encouraged the latter to no avail.*"

There was also evidence from BH that the applicant "… encouraged [BH] as a young boy to masturbate in his spare room." There was no objection at the trial to this evidence being led and on appeal it was accepted by Mr Greene that it was admissible.

[32] Features of the evidence given at trial against which we must gauge the safety of the verdict is that the case against the applicant depended solely on the evidence of BH and that the applicant was of good character with no previous criminal convictions.

[33] Prior to closing speeches counsel on behalf of the applicant sought a ruling from the judge that a *Makanjuola* warning would be included in the judge's charge to the jury. In response the judge firmly stated that this was not a *Makanjuola* case.

[34] At the conclusion of the judge's charge to the jury there were no requisitions on behalf of the applicant. For instance there was no suggestion that there ought to have been a bad character direction or that the judge had not fairly and appropriately outlined the matters advanced on behalf of the applicant as being inconsistent or implausible or lies in BH's evidence or that the judge's charge in relation to myths and assumptions was confused or over technical or unbalanced.

[35] On 19 September 2019 by a majority verdict of 10/1 the applicant was convicted of all 14 counts. His sentencing, scheduled to be conducted on 25 October 2019, was delayed at his request based on representations about his psychological state.

[36] On 5 December 2019 the applicant was sentenced in the terms noted in [2] above.

Extending Time

[37] As we have indicated the appeal against conviction was brought outside the 28 day period specified in section 1(1) of the Criminal Appeal (NI) Act 1980. However section 16(2) provides that "the time for giving notice of appeal or of application for leave to appeal may be extended at any time by the court." The principles governing an extension of time have been set out by this court in *Davis – v – Northern Ireland Carriers* [1979] NI 19, *R – v – Brownlee* [2015] NICA 39 and [2017] NI 71, *R – v – Harte and Roberts* [2016] NICA 57 and *R – v – BZ* [2017] NICA 2. The requirement that notice of an application for leave to appeal against conviction is required to be given within 28 days is one of the many aspects to the principle of finality, see *R v Guinness (Patrick Anthony)* [2017] NICA 47. As Jackson LJ stated in *R v Smith* [2013] EWCA Crim 2388:

> "The need for finality in litigation is a basic principle, which applies in all areas including criminal justice."

The question as to whether time should be extended impacts not only on appellants but also on victims and on the wider community. There is an obligation on an applicant for an extension of time to set out fully and openly the explanation for failing to comply with the 28 day time limit. It is not sufficient to approach the issue

as to an extension of time on a cursory basis in the belief that the only hurdle is whether there is a valid ground of appeal. That is to ignore the interests of the victim and the public in finality.

[38] The application for time to be extended in this case was couched in less than comprehensive terms in Form 1. In paragraph (2) of that form it was asserted:

> "The delay in appealing against conviction arose because the applicant was so pre-occupied with simply coping with life's challenges (his health, his conviction, isolation, etc) that he did not have the presence of mind to issue instructions to appeal against conviction. His mind-set has to be viewed in the context of his pre-existing clear record."

[39] The information provided in this paragraph does not condescend to the level of particulars required in relation to an application to extend time. For instance there is no information as to the contact between the applicant and his solicitor, as to what was required from the applicant apart from a simple instruction that he wished an appeal to be lodged, as to whether the solicitor put in place measures to obtain instructions from the applicant and if so on what dates, as to whether the solicitor tried to obtain instructions but failed to obtain them, as to the solicitors own assessment of the applicant's mental state during the 28 day period or what was meant by "etc." Initially Mr Greene was not able to answer the question as to when the applicant first saw his solicitor after his conviction on 19 September 2019. That question being seen in the context that at the public's expense those appearing for the applicant at trial have an obligation to give advice as to the merits of an appeal which obligation is not dependent on the applicant seeking such advice. However, the applicant did attach to paragraph (4) of Form 1 a copy of the report of Dr Best, Consultant Psychiatrist dated 21 October 2019 based on an interview with the applicant on 9 October 2019 together with a letter from Dr Best also dated 21 October 2019 commenting on the applicant's GP notes and records. The report and the letter record that the applicant has suffered from chronic fatigue syndrome since 2001 and from depression since 2015. This led the applicant to recount that before BH's allegations were made the applicant struggled with activities of daily living and simple tasks around the house. The applicant also stated that the position deteriorated prior to the trial as a consequence not only of the prospect of having to face these allegations but also as a consequence of the loss of his business as a tutor, the death of his father in December 2018 and the death of his mother in April 2019. The applicant recounted to Dr Best that it was a very difficult time leading up to the trial and he became depressed so that his GP increased his anti-depressant. On examination by Dr Best on 9 October 2019 the applicant looked depressed and anxious. He recounted that he had had thoughts of ending his life.

[40] The medical report from Dr Best addressed the general mental condition of the applicant with a view to the sentencing exercise rather than specifically

addressing issues in relation to an extension of time. We consider that the report establishes that the applicant would have difficulties in giving instructions to his solicitor. However, it did not address the question as to whether the applicant did or did not see his solicitor after his conviction on 19 September 2019. Furthermore, it did not contain any opinion from Dr Best as to whether despite the applicant's difficulties he was or was not capable of talking to or of giving instructions to his solicitor as to lodging an appeal. That is also to be seen in the context that the applicant was able to give an account to the probation officer for the purpose of the pre-sentence report though we do not have the dates of the interviews. Finally, the medical report does not explain what attempts his lawyers made to obtain instructions particularly given that they knew of the applicant's personal circumstances.

[41] The lack of evidence as to what occurred between the applicant and his solicitor led us to make enquiries of Mr Greene. He informed us that advices as to an appeal and information as to the period of time within which an appeal must be lodged were given to the applicant on 24 September 2019. He also said that at that time his instructing solicitor formed the view that the applicant appeared low in mood and not fit to give instructions. No basis was set out on which the solicitor formed that view. Mr Greene was unable to state what special measures were then put in place by his solicitor to obtain instructions such as seeking the assistance of some trusted member of the applicant's family so as to ensure that the applicant was able to make up his mind within the 28 day period. There was no information as to whether the solicitor returned to the applicant before the end of the 28 day period. Mr Greene went on to state that the period of time within which an appeal is to be lodged was well known and that grounds of appeal should have been settled but were not. This appears to have been an acceptance on behalf of the legal team rather than on behalf of the applicant. Mr Greene referred to minds not being focussed but did not specify whether this was the mind of the applicant or of the members of the legal team. The lack of any contact by the applicant with his solicitor after 24 September 2019, the lack of any contact by the solicitor with the applicant during the same period and the clear indication to the applicant that the notice of appeal had to be lodged within 28 days leads us to infer that applicant had initially taken a decision not to appeal. This means that the application for an extension of time falls within paragraph [8](vi) of *Brownlee* so that in order to obtain an extension of time the merits of the appeal would have to be such that it would probably succeed.

[42] In order to determine the application to extend time we will first consider whether the merits of the appeal against conviction are such that it would probably succeed.

The application to amend the notice of appeal

[43] As we have indicated the applicant's proposal to amend the grounds of appeal was notified on 21 June 2020 in advance of the scheduled hearing on 23 June 2020. The question as to whether to grant an application to amend also requires

consideration of any explanation for the delay in advancing the proposed amended ground of appeal and of the merits of the proposed amended ground of appeal.

[44] The explanation for the delay in advancing this proposed amended ground of appeal was set out by Mr Greene in a skeleton argument dated 21 June 2020. In paragraph (3) it was stated that "present senior counsel was not trial counsel and was not instructed in this appeal until previous senior counsel passed papers on 17 June 2020." It was also stated that "the issue raised in this additional ground emerged upon consideration of all (the) papers and in preparing for the full hearing." In paragraph (4) it was "accepted that it is for the court to consider whether there is any merit in the ground raised so as to permit it to be added to the grounds and argued out of time and *that a summary consideration of this might prevent the ground being argued at all*" (emphasis added).

Materials available to this court on the hearing of the appeal

[45] The trial materials available to this court increased significantly during the pre-hearing phase. Ultimately they included in particular transcripts of the injured party's evidence in chief and cross examination, transcripts of the applicant's evidence in chief and cross examination, the judge's direction ruling, his ***Makanjoula*** ruling and his charge to the jury. The court also received the text of prosecuting counsel's opening address to the jury, provided in response to the proposed amendment of the applicant's grounds of appeal.

The applicant's case in relation to the appeal against conviction

[46] At the hearing of the appeal Mr Greene concentrated on two central grounds:

(a) A *Makanjoula* or care warning ought to have been included by the judge in his charge to the jury given what were asserted to be the inconsistencies and lies in BH's evidence; and

(b) The judge ought to have but failed to direct the jury in relation bad character evidence as to urinating into a bottle and as to the special drawer.

We will consider the inter-related grounds of appeal in paragraph [4] (a) – (c) under the central ground as to whether a *Makanjoula* warning ought to have been a feature of the judge's charge to the jury

[47] We will first consider each of the two central grounds of appeal and then we will consider the remaining grounds as set out in paragraph [4].

Makanjoula warning

[48] We will illustrate by summarising some of the matters advanced as being inconsistent or implausible or lies contained in the evidence of BH and which it is

suggested ought to have led the judge to include a *Makanjoula* warning in his charge to the jury.

[49] The first illustration relates to BH borrowing money from the applicant to purchase a car and the repayment of that loan by instalments. At trial there was an issue as to when BH had purchased the car and when he had been repaying the loan. In BH's evidence in chief he stated that the repayments were made in 2001 when BH would have been aged 18 or 19 which meant that he would have purchased the car in or around 2001. However, it was clear from the bank records that the repayments were being made in 2005 and 2006 when BH was aged 23 or 24 so that the car would have been purchased in or around 2005. In cross examination BH admitted that the dates he had given were incorrect. On behalf of the applicant it was asserted at trial that it was inconceivable that BH could not and did not remember the approximate date of purchase of his first car. Furthermore, that the correct dates undermined BH's assertion that as he got older he tried to distance himself from the applicant and had completed this process by 2001 when aged 18 or 19. If BH had obtained a loan from the applicant in 2005 then this demonstrated that BH had friendly dealings with the applicant for a longer period than he had asserted. On this basis it was suggested BH's intention in giving the wrong dates was to give a false impression to the jury about the date contact with the applicant diminished or finished. It was suggested that the only realistic explanation for the discrepancy was that BH lied about the dates in an attempt to bolster the credibility of his case by giving the impression that as soon as he reached sufficient adulthood, he terminated contact with the applicant. We note that this issue was fully explored during the trial. The issue was whether BH was confused as to his dates, if so whether this undermined his credibility, whether BH was deliberately tailoring his evidence by giving a false account. All this was for the jury to consider. The issue is whether a decision by the judge not to give a *Makanjoula* warning in his charge to the jury on the basis of this either alone or in combination with other matters was *Wednesbury* unreasonable and if so whether in view of the lack of a warning the verdicts are unsafe.

[50] A second illustration relates to the use by BH of the words "railroaded" and "manipulated." BH stated that he had been railroaded or manipulated into being in the applicant's presence. However, at trial BH accepted that he often cycled the two miles from his own house to the applicant's house to be in the applicant's company. He accepted in evidence that this was inconsistent with being 'railroaded' or 'manipulated' and inconsistent with BH's claim of trying to dodge the applicant. This is put forward as an inconsistency but that submission completely overlooks that it is for the jury not BH to determine whether BH had been groomed or manipulated. The issue of consent does not arise in relation to a person under the age of 17.

[51] A third illustration relates to BH's age when his visits to the applicant and when assisted showering ended. In his statements to the police in effect BH claimed to have visited the applicant's home until he was 19 or 20. In BH's evidence to the

jury he gave the impression that the visits ended when he was much younger. He said in evidence in chief to a question from the judge that he was 16½ at the outside "to be sure" when the applicant stopped helping him shower when previously he had asserted that he was 17 or 18 when the applicant stopped helping him shower. It is suggested on behalf of the applicant that BH was deliberately tailoring his evidence (i.e. lying) to fix the date of the alleged offending to a time when he was under 17 so as to avoid any questions as to why at age 17 he continued voluntarily be in the defendant's company and allow himself to be showered.

[52] A fourth illustration relates to the issue surrounding BH's foreskin. BH stated in evidence that he witnessed a conversation between the applicant and BH's mother and/or father as to BH's foreskin which led to the circumcision operation. This was inconsistent with BH's assertion in his police statement of 27 April 2017 where he stated "I don't know how he broached the subject with my parents but I had an operation for that."

[53] In *R v BJ* [2020] NICA 5 this court referred at paragraph [45] to what was said by Lord Taylor in *R v Makanjuola* [1995] 2 Cr. App. R 469 as to the options for a trial judge in the exercise of discretion. Lord Taylor stated that:

> "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.* We stress that these observations are merely illustrative of some, not all, of the factors which the judges *may* take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury"(emphasis added).

It can be seen that no special warning may be required and thereafter there is a range of different warnings that can be given from *urging* caution at one end of the spectrum via a stronger warning to at the other end of the spectrum suggesting that it would be wise to look for some supporting material before acting on the impugned witness's evidence. Stating that the jury should have regard to the need for caution is not *urging* caution. As Girvan LJ stated in *R v A* [2014] NICA 2 at paragraph [21] "every jury in any case must exercise caution in weighing up the evidence of a case." Urging caution involves warning the jury to judge the degree of inconsistency and the extent of the importance of any inconsistency. Thereafter, the jury should be directed to ask itself how the inconsistencies affect the reliability of any of the witness's evidence and if the jury concludes that the witness has been

inconsistent on an important matter the jury should treat the separate accounts "with *considerable* caution."

[54] It is a feature of this case that until requested to do so those on behalf of the applicant did not specify in this court the exact caution which it was suggested ought to have been given by the judge in his charge. The response was the judge should have included a warning in his charge to the jury "to exercise extreme caution."

[55] The judge in the exercise of discretion considered that no special warning was required. However, his charge did include the following:

> "So, ladies and gentlemen, in this case it is agreed that the sole evidence really against Mr Hazley comes from the mouth of (BH). So, therefore you must look at his evidence with **clear – with clear scrutiny** …
>
> When he spoke to [the police] … in February 2017 (BH) had said that the showering incidents would have continued when he was 17 or up to when he was 17 or 18, but he told you from the witness box that he was 16 ….
>
> There was a suggestion well, are you in effect trying to tailor your evidence so as to convince you, members of the jury, that he was still a child at the time rather than, as he had originally asserted, that it was still continuing at a time when he was an adult and therefore that consent becomes a very live issue. Does that impact upon your assessment of his credibility? ….
>
> And there is the issue of the missing, in inverted commas, messages …. is it the case that he has been economical with the truth so far as that is concerned or is it something to do with the way that technology works? ….
>
> [Regarding BH's alleged attempted suicide] …. In the text message which he sent to Mr Hazley (BH) described it as a suicide attempt; in his evidence he said well, it was more of a cry for help. Now does that exaggeration – is that an exaggeration, is it a lie, is it something that goes to the heart of the credibility of (BH)? ….
>
> [Regarding the circumcision issue] … you may feel that (BH) was less than clear in his recollection of how that came about in terms of the conversation between Mr

> Hazley and his mother, whether he was present, whether he was not ….
>
> The inconsistencies that the defence have highlighted in their cross examination and which … they have emphasised in their submissions to you … and the fact that I haven't mentioned [others] doesn't mean that you should not take them into account ….
>
> What you need to consider, however, ladies and gentlemen, **with care** is whether or not (BH) has given an inconsistent and/or implausible account of events …
>
> So how do you approach the evidence of (BH)? Each alleged inconsistency and implausibility needs to be examined with a view to making a decision whether it has significance in relation to the accuracy, reliability and truthfulness of his accounts as a whole … if you are left in doubt about the reliability or indeed the truthfulness of his accounts because the suggested inconsistencies and implausibilities cannot be satisfactorily explained, you must find the defendant not guilty. In this regard, ladies and gentlemen, you look at what (BH) said happened; you look at the core details of his accusations against Mr Hazley; and you measure the accuracy or otherwise of those accounts and the details of those accounts within the context of the inconsistencies or alleged implausibility to which reference has been made" (emphasis added in bold and underlined).

[56] "Clear scrutiny" and "with care" is no more than what is required of a jury in every case. We consider that the judge having said that he was not giving a *Makanjoula* warning did not do so. The questions then become first whether it was *Wednesbury* unreasonable not to have done so and second whether on an examination of the evidence at the trial despite the lack of a warning we consider that the verdicts are unsafe.

[57] In relation to the first questions we repeat and emphasise what this court stated in *R v BJ* at paragraph [46] that "historic sex cases where there is no independent evidence are difficult to defend." That is a factor to be taken into account in the exercise of discretion in such cases as to whether to give a *Makanjuola* warning and as to the nature of the warning to be given.

[58] We do not consider that it is necessary to further address the first question as we are of the view even if a warning ought to have been given we do not consider the verdicts to be unsafe. The alleged inconsistencies and/or lies were extensively

explored in cross-examination, carefully and extensively put before the jury in the defence closing speech and referred to by the judge both clearly and robustly in his charge to the jury. Furthermore, there is what we consider to be the outstanding feature of this case which was the significant evidence at trial in relation to which we have set out our conclusions at paragraph [24].

Bad character evidence

[59] The evidence as to urinating into a bottle, the special drawer and encouragement to masturbate can all be seen as conditioning or grooming BH to accept that this type of conduct involving a mature teacher and BH who was a young pupil as being acceptable. For instance conditioning BH to the concept that exposing his penis in the presence of a trusted teacher in order to urinate into a bottle in a car was acceptable. At trial there was no objection to this evidence being given. Also at trial there was no suggestion on behalf of the applicant that a bad character application should be made and none was made. Furthermore at trial there was no suggestion prior to closing speeches to the judge that bad character directions should be given and there was no requisition to the judge when one was not given. Mr Greene correctly accepted that the evidence was admissible at trial either as evidence which had to do with the alleged facts of the offences within Article 3 of the Criminal Justice (Evidence) (Northern Ireland) 2004 ("the 2004 Order") or alternatively as bad character evidence under Article 6(1)(d) and Article 8(1)(a) as demonstrating the applicant's propensity of a sexual interest in BH, a young boy. Relying on *R v Reynolds* [2010] NICA 15 Mr Greene submitted that in practice nothing of legal significance depends upon by which of the two routes the evidence was admissible. Again, relying on *Reynolds* he submitted that where evidence of bad character of this nature is adduced, whether it falls within Article 3(a) or Article 6, it is incumbent on the trial judge in directing the jury to properly assist them in dealing with that evidence.

[60] The judge in his charge to the jury did not highlight this evidence to the jury and indeed did not even mention it at all in his charge. In this way the judge did not bring this evidence to the attention of the jury. That could be seen as an advantage to the applicant but on the other hand the judge gave no directions to the jury assisting them in dealing with it and the evidence that had been given.

[61] We proceed on the basis that the judge ought to have assisted the jury in his charge in relation to this evidence. The question thereafter becomes whether we consider that the verdicts are unsafe. In order to arrive at that conclusion we would have to think that the verdicts are unsafe having examined the evidence given at trial so that we had a significant sense of unease. We consider the outstanding feature of this case was the significant evidence at trial set out in our conclusions at paragraph [24]. On the basis of that significant evidence and the lack of any requisition we consider that in particular circumstances of this case and given the lack of any reference at all to this evidence in the judge's charge that there is no significant sense of unease about the verdicts. We refuse to permit the amendment

to the notice of appeal, we refuse to extend time and we refuse to grant leave to appeal in relation to this ground of appeal.

The remaining grounds of appeal

[62] One of the remaining grounds of appeal asserts that the judge erred by summing up on "myths and assumptions" in a confusingly over-technical way and on an unbalanced way. The judge's charge included a relatively brief passage on myths and assumptions. In essence, the judge warned the jury to put aside any preconceived ideas they may have held in relation to sexual assaults, perpetrators or victims. They were directed to base their decisions solely on the evidence heard and the law as explained to them. Mr Greene did not advance any oral submissions to support this ground of appeal. We consider that he was correct not to do so. The judge's aim was to concentrate the jury on the evidence and a consideration of the facts of this case rather than approaching their decision on the basis of pre-conceptions. We refuse to extend time or to grant leave to appeal in relation to this ground of appeal.

[63] In relation to the other remaining ground of appeal that the convictions are unsafe because of the large number of inconsistent and implausible aspects of BH's evidence we have given consideration to all of the matters advanced as being inconsistent or implausible. The judge directed the jury at some length in relation to the issues of inconsistency and implausibility and from the verdicts delivered, it appears that the jury believed BH's evidence and did not think that any of these matters were fatal in relation to any of the counts. It is sufficient to state that having considered all of the matters advanced as being inconsistent or implausible the jury were entitled to come to that conclusion. This ground of appeal does not give rise to any significant sense of unease about the correctness of the verdicts. We refuse to extend time or to grant leave to appeal in relation to this ground of appeal.

Conclusion

[64] Applying the principles set out by Kerr LCJ in *R v Pollock* [2004] NICA 34 we consider that none of the matters raised on behalf of the applicant, either separately or in combination give rise to any significant sense of unease about the safety of the convictions. We decline to extend time in which to lodge an application for leave to appeal against conviction. We also decline to amend the notice of appeal and we refuse the application for leave to appeal against conviction.