Neutral Citation No [2018] NICA 39 | *Ref:* **TRE10768**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **26/10/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

R

-v-

SC

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Before: Stephens LJ, Deeny LJ & Treacy LJ

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TREACY LJ (giving the judgment of the court)

Introduction

[1] Having been refused leave to appeal against his conviction by the Single Judge the applicant renews his application before this court. We heard the case on Wednesday and reserved our decision until today.

Background

[2] On 26 January 2018 following a jury trial at Antrim Crown Court before His Honour Judge Marrinan the applicant was unanimously convicted of 6 counts of indecent assault on a female.

[3] The offences dated back to 1977/78. The complainant is the daughter of a woman (since deceased) who was in a relationship with the applicant at the time. The offences are alleged to have occurred in the complainant's bedroom when she was 10-11 years or possibly 12 years of age.

[4] The complainant did not report the matter to the police until November 2015, some 37 years after they had taken place.

[5] The complainant's ABE interview on 17 December 2015 formed the basis of her evidence during the trial. She was also extensively cross-examined before the jury.

[6] The applicant was interviewed on 17 May 2016 and denied any sexual abuse had taken place. He also gave evidence denying that any such abuse had taken place.

[7] Evidence of the applicant's bad character was placed before the jury. As the Learned Trial Judge observed to the jury when dealing with his bad character evidence "it will have taken your breath away to some extent given the seriousness of the bad character evidence". An agreed statement of facts regarding his bad character was read to the jury.

[8] Although not in the book of appeal the court was provided by the crown with a copy of the agreed statement of bad character. On 7 September 1987 the applicant pleaded guilty to two specific counts of incest on his daughter EB on a date unknown between 1 September 1984 and 19 December 1986. He also pleaded guilty to one count of indecent assault on the same daughter between the same dates. This latter count was a sample count to reflect the fact that this behaviour occurred on "numerous" occasions.

[9] The applicant was also convicted on 14 February 2017 at Antrim Crown Court of 38 counts of sexual abuse including indecent assault on a female/gross indecency with or towards a child/incitement to commit an act of gross indecency and rape. The complainant in that case was his daughter, HB. She was 9 years of age when the sexual abuse started. The offending behaviour occurred between 1974-June 1984 and therefore encompasses the entire period of the alleged offending behaviour in the present case. Further details of these counts are set in paras 7-12 of the agreed statement of facts.

[10] In dealing in cross-examination with the first set of offences to which he had pleaded guilty with the benefit of qualified lawyers, the applicant told the jury that he had only admitted these offences first, because a police officer threatened to warm his ears if he didn't confess and secondly, that he was an alcoholic at the time, was desperate for a drink and would do anything to get out of the police station.

[11] In relation to the 2017 contested trial the applicant maintained that the jury was lied to and that the jury swallowed the lies of his daughter HB.

[12] The jury was invited to consider whether these previous convictions established a propensity to commit the offences with which they were concerned.

[13] Both sets of previous convictions involved crimes against two young girls who were his own daughters; sexual crimes, in some cases more serious e.g. incest and rape. The crimes against HB were also contemporaneous with the sexual assaults against the complainant in the present case.

[14] The jury was reminded that what the applicant was convicted of in 2017 was said by the prosecution to have a bearing on the defendant's explanation in this case. The Trial Judge reminded the jury of one example which bore a similarity to the details of an allegation made by the complainant in the present case (see p32 of the transcript of the Trial Judge's charge to the jury).

[15] The jury heard and saw the complainant and the applicant give evidence and be cross-examined for a significant period of time.

[16] In this appeal there is no criticism of the Judge's charge to the jury which was full, fair and balanced.

[17] Against the above background and set in that context we come to consider the grounds of appeal relied upon before this Court.

Grounds of Appeal

[18] The grounds of appeal relied upon before the single judge and initially before us related to two areas namely material non-disclosure and a note received by the judge from the jury.

[19] The ground of appeal relating to the jury note was, in our view, correctly abandoned before us and we therefore do not propose to say anything further about that aspect.

[20] In relation to the grounds of appeal relating to non-disclosure the genesis of this complaint is the content of the victim impact report from Dr Patterson served after conviction for the sentencing hearing.

[21] There were two matters contained in that report of which the defence were unaware and which were the subject of complaint before the single judge and before us. One related to GP records relating to an alleged assault on the complainant and her mother by the applicant in July 1979 when the complainant was seen by her GP apparently at the request of social services. This is referred to in para 4.6 of Dr Patterson's report.

[22] The ground of appeal in respect of non-disclosure of the GP records was advanced before us without the prosecution, defence or the court having had sight of the relevant material. In order to understand and analyse the potential impact, if any, of this non-disclosure on the safety of the conviction, the Court directed the provision of this material. We are grateful to the PPS for the speedy manner in which this and related requests from the court were dealt with thus enabling the court to complete the hearing of the appeal on the allotted day.

[23] On examination of the GP records it transpired that these records did not undermine the prosecution case or strengthen that of the defence. On the contrary,

its contents appear to materially corroborate the complainant's account of the assault she claimed was perpetrated on her and her mother. The note also records the GP's note of the complainant's injuries.

[24] Unsurprisingly, Mr Irvine QC on behalf of the applicant, wisely abandoned this aspect of the appeal.

[25] We observe that it is unfortunate that these medical records were not sought by the prosecution not least of all because they could have made an application to have them received in evidence as part of the prosecution case.

[26] The sole remaining ground of complaint related to the non-disclosure of the complainant's allegation recorded in para 4.12 of Dr Patterson's report that the complainant at the age of 16 had been raped and the offender prosecuted in court.

[27] The defence contended that there has been a material irregularity in the conduct of the trial by reason of the non-disclosure in advance of the trial or during the course of it, of the fact that the complainant had been raped together with all supporting documentation in relation to it.

[28] In the present case the 37 year delay in the complainant reporting the matter to the police and her professed reasons for the delay were the subject of close scrutiny by defence counsel in cross-examination before the jury.

[29] Such material, Mr Irvine submitted, may well have served the basis of a more extensive cross-examination of the complainant regarding her credibility and truthfulness as a witness and could potentially have had a direct bearing on her allegation of sexual abuse.

[30] In responding to the defence written argument the prosecution at para 5 of their skeleton argument said:

> "Prosecution counsel was not aware of the fact that the complainant had been raped at aged 16 and the offender prosecuted. This only came to counsel's attention on receipt of the victim impact report. Enquiries have been made with the Directing Officer who has indicated that she was aware of this at the time of directing on the case and considered it for the purposes of both Primary and Secondary Disclosure. She considered that it did not undermine the prosecution case as the offender had pleaded guilty and therefore the allegation made by the complainant had been accepted as truthful. The email correspondence between the PPS and the applicant's solicitor has been included in the applicant's skeleton argument".

[31] The reference to the email correspondence is interesting. In respect of the complainant's rape at aged 16 the PPS in its email of 16 February 2018 stated as follows:

> "In respect of the allegation that the IP was raped and the offender was prosecuted and convicted, I was aware of this but did not consider that this met the test for disclosure as the offence occurred many years after the allegations against your client (sic) and as the complaint resulted in a conviction, this is not a matter which undermines the credibility of the IP in any way. This was a matter which was considered for disclosure and was not considered to meet the test for disclosure".

Accordingly, a decision was taken by the PPS that no documentation of any sort was to be provided to the defence in advance of the trial or during the trial in relation to this issue.

[32] Furthermore, at para 9 of the PPS skeleton argument they stated that in respect of the previous "rape" that the applicant may have had further questions in relation to why the complainant did not feel able to report the sexual abuse by the applicant which occurred when she was a child when she proved herself capable of reporting a rape at a later stage. The prosecution in that paragraph also submitted that the later unrelated complaint of rape "which was admitted by the perpetrator" did not involve sexual abuse by an adult on a child nor was the perpetrator linked in a familiar way to any members of the complainant's family.

[33] At para 10 of the PPS skeleton argument it is stated that the Directing Officer considered that the fact that the 1984 complaint was made and that the accused pleaded guilty reflected that the complainant was a credible witness which, in turn, meant that, the previous allegation was not disclosable in respect of the pre-1984 offences.

[34] The PPS in its skeleton argument repeated its submission at para 11 that to make an allegation of rape against a contemporary is an entirely different matter to making an allegation of child sexual abuse. They reminded the court that during her cross-examination the complainant did refer to the fact that, amongst other things, as an explanation for the delay in reporting that she didn't want the stigma brought upon her brother of having a paedophile as a father.

[35] The PPS at para 12 also submitted that the fact that the perpetrator of the rape pleaded guilty could have been viewed by the jury as strengthening the reliability and credibility of the complainant which was the view taken by the Directing Officer when she took the decision not to disclose this matter to prosecution counsel and to the defence.

[36] It was only when this court directed and were provided with the available material relating to the 1984 matter that a somewhat different picture emerged.

[37] It is clear from the documentation furnished that, contrary to the case being made by the PPS, the complaint of rape was not admitted to by the alleged perpetrator nor did he plead guilty to rape.

[38] Based on the complainant's account in 1984, charges of rape, unlawful carnal knowledge of a girl under 17 and indecent assault were directed. A contemporaneous note from WPC Hayes records that on 11 June 1984 the defendant in that case was convicted of attempted unlawful carnal knowledge and indecent assault for which he received an effective sentence of 9 months imprisonment. The defendant in that case was a 24 year old who was known to the complainant. We are informed that his conviction for these lesser offences (to which the issue of consent was irrelevant) was following a plea of guilty.

[39] The contemporaneous documentation reveals that Constable Collins and Reserve Constable Suitters had found the applicant in a distressed state. They helped her into the nearby police centre and Con Collins took her aside and asked her what was wrong. He then reported the matter to Ballymena police and requested the assistance of a WPC after he ascertained that she had been allegedly raped.

Test for Disclosure

[40] In R v Hadley & Ors [2006] EWCA Crim 2544 the court stated:

> "27. The question we have to consider is whether the convictions are unsafe. ... we should approach the matter by asking ourselves, first, whether the material in question should have been disclosed, and if so, whether the failure to disclose it renders the convictions unsafe. It does not necessarily follow that because the first question is answered in the affirmative the second must also be answered in the same way ..."
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> 33. When considering the potential impact of the undisclosed material it is necessary to bear in mind that individual items of evidence cannot be treated in isolation but have to be considered in the context of the other evidence in the case, including the rest of the undisclosed material … It is important to emphasise, however, that the question for us is not what we ourselves would make of the undisclosed material, but whether it is capable of affecting the mind of a reasonable

jury properly directed. In *R v Alibhai* the court said in paragraph 57:

> '… in a case where a complaint is made of non-disclosure of documents, it is not always necessary for an appellant to demonstrate that the disclosure of the material *would* have affected the outcome of the proceedings. As was observed in *R v Ward*, (1993) 96 Cr App Rep 1 at page 22:
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> > "Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence."

We accept that in many cases it would suffice for an appellant to show a failure on the part of the prosecutor to meet disclosure obligations so that it is reasonable to suppose such failure *might* have affected the outcome of the defence.' (emphasis added).

34. A similar statement of principle is to be found in *R v Smith* [2004] EWCA Crim 2212 in which Latham L.J. said in paragraph 17:

> 'Moore in his evidence during their trial asserted that he had not expected any reward. The documents which have now been disclosed would have provided significant cross-examination material which could have undermined that assertion. Whether or not it would have done so is not a matter about which we can speculate. The appellants were entitled to disclosure of that material which could have had an effect on the verdicts of the jury.'

35. We accept and adopt those statements of the law which we think must follow from the fact that the appellant is entitled to succeed if he can satisfy the court that the failure to disclose the material in question renders his conviction unsafe. For that purpose it is sufficient for him to satisfy the court that it was capable of affecting the jury's mind, not that it must have done so. In those circumstances it is both unnecessary and

> undesirable to embark on a lengthy discussion of the evidence itself and the inferences that might be drawn from it. Unless the Crown can satisfy us at this stage that the material was not capable of assisting the defence, exactly what can and cannot be seen in the videos, what inferences can be drawn from them and from any discrepancies which may be shown to exist between the videos themselves, the blue book and the schedule and to what extent, if at all, they affect the credibility of the prosecution witnesses are all matters for the jury at any trial that may take place in due course. It is sufficient for present purposes to say that we are wholly unpersuaded that the undisclosed material was incapable of assisting the defence case; on the contrary, we are satisfied that, depending on the view the jury took of it, it was capable of assisting the appellants' case and of undermining the case of the prosecution. It ought therefore to have been disclosed."

[41] The approach in Hadley was followed in this court in R v A [2017] NICA 68 at paras [26] and [28].

[42] In summary, the overarching question for the court is whether the convictions are unsafe. In answering that question the authorities mandate the following approach:

(i) Should the material in question have been disclosed?

(ii) Does the failure to disclose render the conviction unsafe? For this purpose it is sufficient for an appellant to satisfy the court that the undisclosed material was *capable* of affecting the jury's mind not that it must have done so.

[43] In relation to the first question posed in Hadley the prosecution accepts that material regarding the 1984 offences ought to have been disclosed. It is also accepted that the failure to disclose this material may have given rise to further questions in cross examination as to why she did not feel able to report the sexual abuse while she was a child and to contrast that with what transpired in 1984.

[44] Whether or not further cross-examination of the complainant based on this material would have undermined her evidence is a matter of speculation since we cannot possibly know what she may have said when questioned about these matters or measure its impact on a reasonable and properly directed jury.

[45] We are satisfied that the cross examination arising out of the material which the prosecution acknowledge should have been disclosed was *capable* of affecting the jury's mind but not that it must or would inevitably have done so.

[46] We are not persuaded that the material was incapable of assisting the defence case. We consider that depending on the view the jury took of the complainant's response in cross examination when questioned about this material that it was capable of assisting the defence case and of undermining the prosecution case bearing in mind that the complainant was the sole prosecution witness of fact to these offences.

[47] In addition to the above the court has two further reasons for unease about the conviction:

(i) The failure to disclose those references in the GP records indicating that the complainant engaged with NEXUS after she had made her complaint to the police. The defence were unaware of this and had they been they would almost certainly have sought third party disclosure. Since we have not ourselves seen these records we do not know what impact, if any, they might have had.

(ii) It does appear that the defendant (but not his counsel) did suggest compensation as a possible motive for the complainant's allegations of indecent assault. In these circumstances the jury should have been directed that this was a relevant matter for them to consider as a possible motive. To the contrary, they were specifically directed that they should not enter into speculation about motive. The court was informed that post-conviction the complainant has now made an application for compensation, as is her right.

[48] In light of these matters we share a sense of unease about the conviction and for the above reasons we allow the appeal.