

# Judicial Communications Office

27 January 2020

## COURT DISMISSES APPEAL IN HISTORIC SEX CASE

### Summary of Judgment

The Court of Appeal<sup>1</sup> today dismissed an application for leave to appeal against conviction in a case of historical sexual offences committed by a stepfather on his stepdaughter when she was aged between eight and seventeen years old.

The application for leave to appeal against conviction was brought by “BJ” (“the Applicant”) whose name was anonymised in the judgment to protect the identity of the complainant. He was convicted on a majority jury verdict of seven counts of rape, five counts of indecent assault and three counts of common assault. The counts relate to actions on dates between 1982 and 1991 in respect of his stepdaughter (“KC”) who was under the age of seventeen at the relevant times (“the under 17 counts”). The Applicant was found not guilty by unanimous jury verdicts in relation to 12 other counts of rape in respect of KC which were said to have occurred between 1991 and 2007, after her seventeenth birthday (“the over 17 counts”).

The Applicant submitted the following grounds of appeal:

- The jury incorrectly decided the case in a way that was contrary to clear and unequivocal evidence which suggested that KC’s mother only started working night shifts from November 1994. It had been suggested that this evidence fundamentally undermined the prosecution case on the basis that KC’s mother would have been in the family home on the night that all the offences apart from one were alleged to have occurred.
- The trial judge erred by failing to give a *Makanjuola* warning to the jury regarding the inconsistencies and what were alleged to have been lies in KC’s evidence.
- The trial judge erred by refusing a defence application to cross examine KC about an account she gave to her half-sister in 1998/1999 as to the circumstances in which KC first had sexual intercourse and lost her virginity at the age of 14 or 15 which, if correct, meant that KC’s evidence of losing her virginity through rape by the Applicant at the age of 12 could not be correct.
- The closing speech by Crown Counsel contained a number of inappropriate comments that sought to “excite the minds” of the jury and as such any verdict from them could not be regarded as safe.
- The trial judge erred in the management of the trial by creating a situation that led to pressure being exerted on the jury to make a decision by allowing the deliberations to stretch to a period of four days.

#### **The night shift ground of appeal**

The Applicant sought to submit fresh evidence which had not been given at trial. This was an HMRC document setting out the employment and tax records of KC’s mother and an affidavit

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<sup>1</sup> Lord Justice Stephens delivered the judgment of the court. The panel was Lord Justice Stephens, Lord Justice Treacy and Sir Donnell Deeny.

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sworn by KC's mother explaining the attempts made prior to the trial by her to obtain her employment records from 1994. The Court of Appeal noted that the admission of fresh evidence in criminal appeals is a matter of discretion<sup>2</sup>. Evidence will be admitted if it is necessary or expedient in the interest of justice and each decision will be case and fact specific.

The Court said it was important to distinguish between the evidence in the HMRC letter and the evidence contained in the affidavit of KC's mother. It said the letter would have been admissible at the trial but it did not deal with the question as to whether KC's mother worked night shifts for her employers and that there was no reasonable explanation why it could not have been obtained prior to the trial commencing. The Court then commented on the affidavit. It said it would afford a ground for allowing the appeal as for the first time it was being asserted that KC's mother may have been at home at night when the alleged abuse occurred and that the jury might have formed the view that KC's account was incorrect calling into question her credibility. Again, however, the Court held there was no reasonable explanation for the failure to adduce this evidence at the trial. The Court declined to admit either the HMRC letter or the affidavit of KC's mother finding that it was not necessary or expedient in the interest of justice to do so.

KC was cross examined at the trial about the date upon which her mother started working night shifts and whether she had worked night shifts for any other employer. The Court held that the evidence of KC that her mother only started working night shifts in 1994 was not categorical and that it was open to the jury to accept that a young girl of 8 or 12 years of age was confused as to the identity of her mother's employer but was correct in her assertion that her mother was not in the home when she was physically and sexually abused. The Court dismissed this ground of appeal.

## **The *Makanjuola* ground of appeal**

The Court summarised some of the inconsistencies and/or alleged lies in KC's evidence identified by counsel for the Applicant at paragraph [43] of its judgment and noted that it was a matter for the trial judge's discretion whether or not to give a warning to the jury in respect of the unsupported evidence of an alleged accomplice or complainant in a sexual case ("a *Makanjuola*" warning") and that the nature of the warning and whether or not to give it would depend upon the circumstances of the case, the issues raised and the content and quality of the witness's evidence. The Court noted that historic sex cases where there is no independent evidence are difficult to defend and that this was a factor to be taken into account by the trial judge in the exercise of his discretion as to whether to give a warning and the nature of the warning to be given.

It was suggested that the trial judge misdirected himself in law by ruling that a *Makanjuola* warning could only apply if there were lies or if the lies were accepted by the complainant. The Court said that, given the nature and number of the potential inconsistencies in KC's evidence, all members of the panel would have given a warning urging caution particularly given the historic nature of the counts. However, it was not prepared to state that the decision of the trial judge was unreasonable as he had been immersed in the trial and was in a far better position to form a discretionary judgement than the members of the Court of Appeal working from transcripts of the evidence. The Court said that even if a warning ought to have been given it did not consider the verdicts to be unsafe as the alleged inconsistencies and/or lies were extensively explored in cross-examination, put before the jury in the defence closing speech and referred to by the judge in his charge to the jury.

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<sup>2</sup> Section 25 of the Criminal Appeal (Northern Ireland) Act 1980

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Furthermore, it was open to the jury to form the view that the inconsistencies did not undermine the prosecution case. The Court dismissed this ground of appeal.

## **The sexual behaviour ground of appeal**

There was no written application for leave to cross-examine KC about her conversation with her half-sister (“IJ”) or for leave to adduce evidence from IJ about the conversation. No explanation was given to the trial judge as to why the application was made orally at trial. The issue identified on behalf of the Applicant was whether KC first had intercourse in 1998/1999 and if the jury had relied on the evidence of IJ to that effect then the Applicant could not have had sexual intercourse with her step father at the earlier date contained in count 3. The Court considered whether the refusal of leave might have the result of rendering unsafe a conclusion of the jury. It said that leave ought to have been granted to ask questions in cross-examination and for evidence of the conversation to be adduced by IJ. The issue then was whether the verdicts are unsafe. The Court said that no explanation had been provided as to why this evidence was not adverted to until the first day of trial. It also took into account the persistent lies told by the Applicant to the police and in his defence statement that he had never had sexual intercourse with KC. Also the Applicant had accepted that he was sexually attracted to KC when she was 19 and it was understandable that given her evidence the jury took the view that he was also sexually attracted to her prior to that. The Court concluded that the evidence did not lead to a significant sense of unease about the correctness of the verdicts and dismissed this ground of appeal.

## **The closing speech ground of appeal**

The Applicant abandoned this ground of appeal.

## **The jury pressure ground of appeal**

The jury was sent out to consider its verdict on 23 May 2019. It continued to deliberate the following day and continued after the Bank Holiday weekend on 28 May. At approximately 2.30 pm on 28 May, the jury indicated that they had unanimous verdicts on the over 17 counts. The following day at approximately 2.30 pm, counsel informed the trial judge that there were concerns as to the length of time involved in the deliberations on the remaining counts. The judge indicated to counsel that he was minded to stop the jury if verdicts had not been reached by the end of the next day. At 2.45 pm, the jury indicated that it had reached majority verdicts on the remaining counts.

The Court considered that the trial judge was carefully monitoring the time the jury was spending on its deliberations. The trial involved 27 counts that had to be considered individually. The Court considered that the jury were given adequate time, with adequate and appropriate directions. It did not consider that they were put under any pressure. Rather it was of the view that the jury was carefully and appropriately managed by the trial judge and the length of the deliberations was indicative of the care taken by the jury in coming to their verdicts. The Court dismissed this ground of appeal.

## **Conclusion**

The Court considered the grounds of appeal both individually and cumulatively and concluded that the verdicts were not unsafe and did not engender a significant sense of unease. It dismissed the appeal.

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## NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston  
Judicial Communications Officer  
Lord Chief Justice's Office  
Royal Courts of Justice  
Chichester Street  
BELFAST  
BT1 3JF  
Telephone: 028 9072 5921  
E-mail: [Alison.Houston@courtsni.gov.uk](mailto:Alison.Houston@courtsni.gov.uk)