Judicial Communications Office

1 February 2019

COURT DISMISSES APPEAL AGAINST CONVICTION

Summary of Judgment

The Court of Appeal today dismissed an appeal against conviction by a father accused of sexually assaulting his two year old son. The names of the appellant, the victim and his mother and all other parties referred to at the trial have been anonymised to protect the victim's identity.

The appellant (anonymised by the court as "QD") was convicted on 28 September 2018 on one count of sexual assault on a child under 13 and was sentenced to five months in prison. The child who was the victim of the offence was QD's son (anonymised by the court as "Jack") who was aged 2 years and 7 months at the time. Jack's mother (anonymised by the court as "MC") was living apart from QD but on the night in question he had been babysitting his son while MC worked. MC claimed that when she came home Jack described a sexual assault committed on him by QD. MC said that when she challenged QD he said "You knew who I was, it was not going to change, and if you accept that we would be together". She said this was a reference to events that had occurred in 2008 when QD admitted he had been watching child pornography on her computer saying that normal sex did nothing for him. MC made no report to the police at that time, saying that she was frightened of QD.

The matter came to light when another woman ("AP") who was living with QD in England made a report that in July 2015 he had used her laptop to show her pornography involving young children. He also admitted that he had had sex with his 3 year old son. AP reported this to the police in England which led to the PSNI contacting MC. Her statement led to QD being charged with four offences:

- Count 1: Rape of a child under 13;
- Count 2: Sexual assault of a child under 13. The particulars of the offence being that QC intentionally sexually touched Jack with the evidence being that at the end of May 2011 QD and Jack played with their penises and that QD ejaculated over Jack;
- Count 3: Possessing an indecent photograph or pseudo photograph of a child;
- Count 4: Rape of a child under 13 – this count was added during the course of the trial.

The trial judge withdrew the first and fourth counts from the jury. QD was convicted on Count two and found not guilty on Count 3. The evidence of QD at trial was that no incident took place at all. He claimed to have stayed overnight and there had been no conversation with MC about the disclosure made by Jack. He claimed he continued to see MC and Jack until November 2011.

The application to admit the hearsay evidence of MC and the trial judge's ruling

At the date of the trial and for some time before it Jack had no recollection of any of the events that occurred at the end of May 2011 so he could not give any direct evidence. The prosecution applied to the trial judge to admit the hearsay evidence of MC as res gestae[1] or as being "in the interests of justice for it to be admissible". The judge considered that this was a statement purportedly made

[1] Res gestae is defined as a spontaneous declaration made by a person immediately after an event and before the mind has an opportunity to conjure a false story.

by Jack "immediately" after an offence may have taken place. He also considered that Jack was then of an age where it was highly unlikely that he would have been in a position to invent or collude in any way with an allegation relating to an assault of this nature, or even that Jack would have understood exactly what was going on. The judge also noted that MC could be cross examined on the evidence and that it was not the sole evidence against QD but rather that it was supported by the admission made by QD to MC and the purported admission by QD to AP. The trial judge ruled that the hearsay statement of MC was admissible both as res gestae and "in the interests of justice".

The prosecution's bad character application

On 19 June 2017, the prosecution gave notice of its intention to adduce evidence of QD's bad character so that the evidence of AP could support the evidence of MC on the basis that QD had an interest in sexual acts involving young children and a propensity to possess child pornography. In the event the application was not moved before the trial judge. The Court of Appeal said it appeared to them that there were strong grounds upon which such an application could have been made as evidential support for an abnormal interest in children:

> "AP and MC were not known to each other and yet there were striking similarities between their evidence with, if their accounts were accepted, attempts by QD to corrupt both of them so that he could indulge a propensity not only for possessing child pornography involving visualising children's involvement in sex but also for committing sexual acts involving young children. No explanation was given to us as to why that application was not moved. In the event far from the evidence of AP being used as bad character evidence on Counts two and three the judge ruled that her evidence should be completely ignored by the jury in relation to those counts."

Grounds of appeal

The grounds of appeal against conviction were:

- **Hearsay evidence of MC**. The grounds contend that:
  - The trial judge erred in admitting the hearsay evidence of MC and, in particular, failed to give any or adequate consideration to Jack's competence to give evidence and ought to have excluded the hearsay evidence;
  - The trial judge, having permitted the hearsay evidence to be admitted, failed to direct the jury properly on how they should approach it. It was suggested that the jury should have been directed that they should exercise caution in evaluating the significance of what MC reported her son saying and that they were required to assess the reliability of the utterances from Jack and to evaluate to potential difficulties inherent in placing reliance upon the utterance of a 2 year and 7 month old child. It was also suggested that the jury may had been inadvertently left with the impression that if they accepted the mother's account of what her son had said they should go on to convict QD without scrutinising Jack who was the maker of the statement.
- **Counts 1 and 4 and the evidence of AP**. The grounds contend that:
  - **Severance** - An application to sever Count 1 from the indictment was made on the basis that although the offences were properly joined in the indictment, QD would be prejudiced and embarrassed in his defence of Counts 2 and 3 by the inclusion of the offence of rape of a child. The trial judge identified the issue as being whether the court could properly deal with any potential prejudice by way of direction ruling that in the

exercise of discretion that he had no doubt that this could be done. He declined to sever Count 1 and the appellant claimed that he erred in doing so.

- **Discharge of the jury** – The Court of Appeal was not informed of the precise reasons for an application at the close of the prosecution case to withdraw Counts 1 and 4 from the jury and to discharge the jury. It assumed that it was on the basis of the lack of particularity in the disclosure allegedly made by QD to AP when considered in combination with the evidence of MC. The trial judge acceded to the application and withdrew Counts 1 and 4 from the jury. The appellant claimed that the judge had erred in not discharging the jury after he had withdrawn Counts 1 and 4.
- **Directions** – The appellant contended that the trial judge failed to adequately direct the jury in respect of the evidence of AP that it should form no part in their consideration of verdicts on Counts 2 and 3, and in particular, that there should have been a robust direction to the jury to ignore the evidence of AP in its entirety. Further it was suggested that the jury demonstrated by their questions that they had not followed the trial judge's direction but had actually evaluated the evidence of AP.

The admission of the hearsay evidence

The Court of Appeal discussed whether the hearsay evidence was admissible as res gestae. It noted that the primary question which a judge must ask himself is "can the possibility of concoction or distortion be disregarded?" It said that in applying that primary question to the facts of this case the possibility of concoction could be disregarded by virtue of the innocence of Jack rather than by any close connection between the events in question and the making of the statement:

> "The theory that the spontaneity of the utterance is some guarantee against concoction does not sit easily with a consideration of the evidence of a child as young as Jack as it is his innocence rather than the events which leads to a disregard of concoction. The same applies to distortion in that a child as young as Jack is disinterested having no desire to distort. In addition on the facts of this case an assessment as to whether to disregard the possibility of distortion depends on an assessment of the simple, open nature of the questions asked by MC and of the simple replies made by Jack with both questions and answers taking place within a short period of the events having occurred."

The primary question was developed by the House of Lords by stating that to answer it "the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity". The Court of Appeal said the facts of this case are that Jack did not appreciate what had occurred so that he did not know that it was unusual:

> "Far from being startled he was happy and there is no sense of him finding it dramatic as opposed to novel or something not previously experienced. We do not consider that on the evidence his thoughts were dominated in the sense of perceiving something unusual and seeking an explanation. The concept of reasoned reflection could not be applicable given his age and innocence. We emphasize that there can be situations in which the hearsay evidence of a young child should be admitted as res gestae but on

> the facts of this case we do not consider that the judge was correct to rule that Jack was emotionally overpowered by what had occurred. We conclude that the hearsay evidence ought not to have been admitted as res gestae."

The 2004 Order also permits the admission in criminal proceedings of a statement not made in oral evidence in the proceedings as evidence of any matter stated if, as far as this case is concerned, the court is satisfied that it is in the interests of justice for it to be admissible. In deciding whether such a statement should be admitted, the court must have regard to the following factors (and to any others it considers relevant):

a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);
c) how important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;
d) the circumstances in which the statement was made;
e) how reliable the maker of the statement appears to be;
f) how reliable the evidence of the maker of the statement appears to be;
g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
h) the amount of difficulty involved in challenging the statement;
i) the extent to which that difficulty would be likely to prejudice the party facing it.

In considering factors (e) and (f) it is not permissible to reason that the jury may assess matters relating to reliability: the judge is specifically required to make an assessment.

The 2004 Order further provides that certain hearsay statements are inadmissible if they were made by a person who did not have the required capability at the time when he made the statement. A factor which is required to be considered by the judge is how reliable the maker of the statement appears to be. The Court of Appeal considered that the maker of a statement would not be reliable if it appeared to the court that he was a person who was unable to understand questions put to him which are part of the hearsay evidence or if he was unable to give answers to those questions which could be understood. This does not, however, mean that a judge is bound to reach a conclusion on all of the above factors or that a proper investigation of all of them is required which would be a lengthy process. All that is required is the exercise of judgement in the light of the factors specifically identified, together with any others considered by the judge to be relevant. An exercise of this judgement at trial will be interfered with on appeal only if it has involved the application of incorrect principles or is outside the band of legitimate discretionary judgment.

The Court of Appeal commented that even if the hearsay evidence was admissible under the 2004 Order, it further provides for the court's general discretion to exclude the evidence. In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if the statement was made otherwise than in oral evidence in the proceedings, and the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence. Although this matter was not specifically argued before the Court of Appeal, it considered that it explicitly extends to an assessment of the value of the evidence.

Another exclusionary power is contained the Police and Criminal Evidence (Northern Ireland) Order 1989 ("the 2009 Order") which provides that in "any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." If the hearsay evidence is admitted under the 2004 Order and not excluded under that Order, or under the 1989 Order, then the 2004 Order enables the judge after the close of the case for the prosecution to direct the jury to acquit the defendant if he is satisfied that the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe.

The Court of Appeal examined cases where the equivalent provisions were considered in England and Wales. It said that in looking to see whether the hearsay evidence is so unconvincing that any conviction would be unsafe, a judge must consider its strengths and weaknesses, the tools available to the jury for testing it, and its importance to the case as a whole. It was also stated that the issues may be confronted either at the end of the prosecution case or at any time thereafter. Whether this arises, and, if it does, when, must depend on the circumstances of each individual trial and counsel and the judge should keep this question under review throughout the trial. However, an application may often best be dealt with at the end of all the evidence. Case law also stated that the "true position is that in working through the statutory framework in a hearsay case …, the court is concerned at several stages with both the extent of risk of unreliability and the extent to which the reliability of the evidence can safely be tested and assessed. Factors bearing on that analysis include the disinterest of the maker of the statement which may reduce the risk of deliberate untruth; independent dovetailing evidence which may reduce the risk both of deliberate untruth and of innocent mistake; the availability of good testing material concerning the reliability of the witness which may show that the evidence can properly be tested and assessed; and the presence of independent supporting evidence which may have the same effect.

The Court of Appeal said that in this case the hearsay evidence was not spontaneous or unprompted but was in reply to simple, open, non-leading questions from MC. It agreed that there was no opportunity for the jury to assess Jack or to see Jack responding to any questions. However, there was no issue at trial in relation to Jack's ability to understand the questions put to him by his mother and there was no suggestion that his mother misunderstood the replies given by him or that Jack was confused in relation to the nature of his replies. The trial judge proceeded on the basis that the possibility of concoction or distortion by Jack could be disregarded given his age and innocence. There was no challenge to that part of the trial judge's ruling in the Court of Appeal or at trial. The possibility of concoction or distortion by MC could be tested by cross examination and in that respect the Court said it was satisfied that there was sufficient means to test and assess what MC said had occurred. Furthermore the hearsay evidence did not stand alone. It was supported by the evidence of MC that QD was nervous leaving the flat in a rush as soon as she returned and by the evidence of MC as to the admission made by QD when the account given by Jack was put to him that evening. The Court considered that evidence if accepted was powerful supporting evidence. It said the trial judge appreciated that this supporting evidence came from the same witness who was recounting the hearsay evidence but agreed that given this additional material, there was, sufficient support for Jack's statement to MC to be admissible under the 2004 Order and for it not to be excluded under that Order or under the 1989 Order.

The Court of Appeal noted that there was no application on behalf of the appellant at the conclusion of all the evidence to direct the jury to acquit the defendant. The Court said that if there had been then the only matter which had changed since the trial judge's initial ruling in relation to the hearsay evidence was that there was no longer support for that evidence from the evidence of AP. This lack of support was brought about because the prosecution had not pursued the bad character application and the trial judge had ruled that the evidence of AP could not be used in support of Counts two and three. No explanation was provided for not bringing the bad character application. In any event the Court of Appeal considered that there was sufficient support for the hearsay evidence in the other respects which it had identified and considered that the hearsay evidence was correctly admitted. It dismissed this ground of appeal.

The directions in relation to the hearsay evidence

One of the principal safeguards designed to protect a defendant against unfair prejudice as a result of the admission of hearsay evidence is the requirement for the judge to direct the jury on the dangers of relying on hearsay evidence. The Court of Appeal emphasised that the terms of the direction in relation to hearsay evidence should be discussed with counsel prior to closing submissions. Furthermore it is the obligation of counsel to request such a discussion setting out precisely the suggested terms of the judge's direction.

The Court commented that although the directions should be crafted for each particular case, the jury should ordinarily be directed by the judge to scrutinize the evidence with particular care; to take into consideration that the statement was not made on oath; to consider the lack of opportunity to see the witness's statement tested under cross-examination; and to consider the lack of opportunity to observe the demeanour of the person making the statement. Furthermore where the credibility of the absent witness has been the subject of a challenge under the 2004 Order, the jury need to be reminded of the challenge and of any discrepancy or weakness revealed.

In this case, the trial judge directed the jury that the account given by Jack to MC was hearsay evidence carefully explaining what was meant by this. He emphasised that this description was "very important when you are dealing with a case to have that clear in your mind." He also emphasised that there was no direct evidence whatsoever of any sexual assault on Jack. The trial judge stated that Jack was the only person who could give the direct evidence but that he was not a witness. He told the jury that MC did not witness the assault and she would have no idea an assault took place if it was not for what Jack had told her. He directed the jury that they were determining the case on what MC says she was told by Jack, and that this part of his direction was "of fundamental importance." The trial judge explained the handicap the defence faced through not having had the opportunity to cross examine Jack and said the jury therefore was not in a position to assess, having heard the cross-examination, how strong they thought the complaint was. In relation to the evidence of MC the trial judge reminded the jury as to the inconsistency between her earlier account that Jack was naked when she returned from work and her evidence that he was in his pyjamas. The judge also directed the jury to bear in mind that children can misunderstand what is happening when it comes to sexual things and that a child's description may be misleading.

The Court of Appeal considered that the jury were under no misapprehension that they had to assess not only the reliability of the evidence of MC but also the reliability of the statements made by Jack. It did not consider that the jury were left with the impression that if they accepted MC's account of what Jack had said they should go on to convict QD without scrutinising Jack as the maker of the statement. It noted that the direction did not use the word demeanour but it

considered this to be implicit. The Court said the omission of a direction does not necessarily render a trial unfair or give rise to a concern as to the safety of a conviction: "This was a short trial and given the comprehensive nature of all the directions given by the judge we do not entertain any concerns about the overall sufficiency of the directions and the safety of the conviction."

Refusal to sever Count one

The Court of Appeal said it would only interfere with the exercise of a discretion refusing to sever if it could be shown that the judge took into account irrelevant considerations, or ignored relevant ones, or arrived at a manifestly unreasonable decision. It considered that it was well within the judge's discretion to refuse to sever count one and dismissed this ground of appeal.

Refusal to discharge the jury

Following the grant of a direction on Counts one and four the defence unsuccessfully applied for the jury to be discharged on the grounds that they would not be able to discharge their duty faithfully, having heard evidence from AP on counts no longer before the jury. The trial judge indicated that he had considered this aspect himself, and rejecting the application, indicated that the jury would be properly charged as to what they may take into account in support of the remaining charges. The judge then gave what the Court of Appeal considered to be an emphatic direction that the jury were not to take into account the evidence of AP in relation to Counts two and three and that "her evidence is not in the case." The Court said that if the application for bad character evidence had been pursued successfully by the prosecution that was a direction which would not have been given. In any event it considered that given that clear direction the trial judge could not be faulted for not discharging the jury. It dismissed this ground of appeal.

Directions in relation to the evidence of AP

The Court of Appeal said the initial direction to the jury was not as emphatic as the direction given to the jury in relation to the evidence of AP in response to a question from the jury some 45 minutes after they started their deliberations. However, there was no requisition in relation to the initial direction and after the emphatic direction the jury continued to deliberate for three and a half hours (or two and a half hours if one hour is taken off for lunch). The Court said it had no concerns about the sufficiency of the judge's directions in relation to AP and those directions could have been overly generous to QD.

Conclusion

The Court of Appeal was satisfied that the conviction is safe and dismissed the appeal.

NOTES TO EDITORS

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

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