Judicial Communications Office

EMBARGOED UNTIL AFTER DELIVERY ON 23 FEBRUARY 2024

23 February 2024

COURT PROVIDES GUIDANCE ON THE REWATCHING OF ABE INTERVIEWS

Summary of Judgment

The Court of Appeal[1] today dismissed an application for leave to appeal against conviction on the ground that the trial judge erred in allowing the jury to rewatch the majority of the complainant's achieving best evidence ("ABE") interview and failed to balance the risk of the jury attaching disproportionate weight to the replayed video.

The applicant, referred to in the judgment as LT, was found guilty by a jury in 2022 of 21 counts of sexual abuse against his step-daughter. These were five counts of rape, four counts of gross indecency with or towards a child; two counts of causing or inciting a child under 13 to engage in sexual activity; one count of sexual assault of a child under 13; one count of sexual assault of a child under 13 by penetration; one count of sexual activity with a child family member involving penetration; one count of sexual activity with a child family member (non-penetrative); one count of adult inciting child family member to engage in sexual activity; 4 counts of sexual activity with a child family member (non-penetrative); two counts of sexual assault. He was sentenced to 16 years' imprisonment. He sought to appeal his conviction on various grounds including that the trial judge erred in allowing the jury to rewatch the majority of the complainant's achieving best evidence ("ABE") interview and failed to properly balance the risk of the jury attaching disproportionate weight to the video by reminding the jury in detail of the cross examination of the complainant from his notebook.

During their deliberations the jury presented two notes to the court. The first note stated:

> "Dear Judge
>
> Would it be possible to get a copy of [the complainant's] transcript? As when listening to her ABE it was hard to hear the evidence towards the end, and a few bits are unclear.
>
> Kind regards
> The jury"

The second note was similarly addressed and signed with the body of the note stating:

> "Could we please listen to the last half of the first interview and the whole second interview?"

[1] The panel was Lord Justice Treacy, Lord Justice Horner and Mr Justice Kinney. Lord Justice Treacy delivered the judgment of the court.

The word "listen" was underlined.

The jury did not have the transcripts of the ABE interviews when listening to and watching the complainant's evidence-in-chief. This prevailing practice is underpinned by a concern that the provision of a transcript might distract the jury from observing the witness when giving her evidence. In accordance with this practice, the judge refused the jury's initial request to be given a transcript of the complainant's ABE to consider in the jury room. Instead he invited the jury to identify the portions of the ABE evidence they wished to hear again. The jury asked to view again the last 37 minutes of the first ABE and all of the second ABE. The judge had discussed the notes from the jury with the prosecution and defence senior counsel and neither raised any objection to responding positively to the jury's request to listen again to the ABE evidence or to the manner in which was replayed. The Court of Appeal said that in these circumstances the applicant's contention that the trial judge erred in allowing the jury to listen again to the ABE rang distinctly hollow:

> "They [the defence] expressly or at least impliedly consented to and approbated the approach adopted by the judge, a position arrived at after he had consulted with counsel for both the prosecution and the defence in the absence of the jury. No party objected."

The applicant also alleged that the trial judge failed to properly balance the risk of the jury attaching disproportionate weight to the evidence they had just reheard. The judge was referred to the case of *R v Rawlings and Broadbent* [1995] 1 WLR 178 which emphasized that the jury should guard against the risk of giving the video disproportionate weight simply for the reason that they are hearing it a second time, that they should bear in mind the other evidence in the case, and the judge should, after the tape has been replayed, remind the jury of the cross-examination and re-examination of the complainant, whether the jury ask him to do so or not. The Court of Appeal said the following guidance can be derived from the case law:

- The decision whether to grant the jury's request to replay the video is a matter for the judge's discretion;
- The judge must have in mind the need to guard against unfairness deriving from the replay of only the evidence in chief of the complainant;
- Usually, if the jury simply want to be reminded of what the witness said, it would be sufficient for the judge to remind them from his own note;
- If the circumstances suggest that how the words were spoken is important to them, the judge in his discretion may allow the relevant part to be played;
- It would be prudent where the reason for the request is not stated or obvious for the judge to ask the jury whether they wish to be reminded of something said in which case he may be able to do so from his own note or whether they wish to be reminded of *how* the words were said;
- Replay after retirement should only be permitted in open court with the judge, counsel and defendant present;

- The judge should direct the jury to guard against the risk of giving the ABE video disproportionate weight, and should bear well in mind the other evidence in the case;

- If replayed, the judge should remind the jury of the cross-examination and re-examination from his notes.

The court noted that in this case trial judge gave a warning to the jury. Defence counsel raised no objection or requisition to the terms of the warning delivered to the jury. The court considered that in the context of this case the warning given by the trial judge was sufficient. It said it could be seen that the trial judge in his direction to the jury after replaying the ABE specifically reminded them of two important matters:

- That the ABE was only *part* of the evidence in the case. He reminded them that they had heard evidence from other prosecution witnesses (mother and siblings) and defence witnesses (applicant and his daughter). He informed them that the entirety of the evidence had to be considered, and they could not give the video any unbalanced weight to the detriment of the other evidence they had heard.
- He reminded the jury that what they had reheard was the complainant's evidence in chief. He referred to the fact that she had been cross examined, to the issue of discrepancies and inconsistencies and how those matters should also be taken into account. His concluding remark was "…the importance is [to] look at all the evidence in the case." This followed on from his charge the previous day [to which no objection was raised] wherein he dealt with the defence case regarding inconsistencies; financial motives; mothers agenda driving allegedly false allegations; and the defence closing speech dealing with inconsistencies.

The court said it is incumbent on counsel to raise the matter with the trial judge if they consider the requirements have not been met so that, if required, the matter can be remedied in trial. The jury in this case was sent home overnight. Despite having overnight to reflect, the defence again did not raise any complaint or objection the next morning before the jury proceeded to continue with their deliberations. The court did not consider that any unfairness had resulted from the procedure adopted nor did it consider the conviction unsafe.

Contamination and collusion warning

The applicant also complained that the trial judge erred in failing to direct the jury about the risks of contamination/collusion in respect of the evidence of the other family members and the complainant. This was not raised by the defence in closing. The defence case was expressly put as one of deliberate fabrication. The court, however, held that the trial judge did deal with the issue of collusion even though the word was not expressly mentioned, nor indeed was it expressly mentioned in the defence closing. It said the judge referred to the defence case that the other children were being "put up to this … [because it was] all coordinated by the mother". The judge mentioned the criminal injury scheme, issue of motive and mother's role and reminded the jury "now remember of course, at all times his case is that these things never happened."

Prior to charging the jury the trial judge discussed with counsel the matters to be included in his charge. The applicant did not identify the need for a direction on contamination or collusion. No requisitions were made by the defence following the charge nor after the ABE was replayed.

Conclusion

The Court of Appeal concluded that the grounds of challenge are devoid of merit and that the convictions are safe. The appeal was dismissed.

Postcript

The court added a note of caution as a postscript to its judgment. It noted the prevailing practice whereby jurors listen and watch the ABE evidence in chief without the benefit of the transcript. It said it may appear unusual that the jury who must ultimately decide the question of guilt or innocence, is less well equipped than the judge and the lawyers who, unlike them, do have access to the transcript when listening to the ABE evidence in chief. The court said it is vitally important that, well before a jury trial starts, the technical quality of the ABE recording to be used is road tested to ensure that a jury will be able to follow the evidence in chief. One way of circumventing problems that might arise from the quality of the recording or the ability of the jury to follow the recording, might be to have the video with subtitles. If that was feasible, the jury would still be able to observe the demeanour of the witness, and the added safeguard of the subtitles would ensure that they could also grasp the content of the evidence given:

> "In a well-prepared trial this should not have been necessary as the quality of the recording, and any editing, should have been established long before the trial. If a witness was giving evidence in chief in court in the ordinary way and could not be properly heard the judge would take simple steps to ensure the witness could be properly heard - such as 'speak up', 'move the microphone closer', 'slow down, the judge has to take a note' etc. Those safeguards are not possible with a pre-recording. If the judge, jury or lawyers consider that the recording is of poor quality, inhibiting the jury from properly hearing the evidence in chief, steps will have to be taken to rectify the problem. This will likely involve discussions with counsel about the appropriate way forward. The problem should not arise in trial if the appropriate steps have been taken well before the trial."

The court noted that there may be a concern that although the ABE constitutes the evidence in chief it may be received in a different way. This may be because the judge and the lawyers receive the evidence with pre-knowledge. They also listen to the ABE in court armed with a transcript which ensures they do not lose the thread. This contrasts with the way in which the ABE may be received by the jury, particularly if the quality is poor, and they are trying to follow it without the benefit of a transcript or subtitles. The court said it may be thought anomalous that the jury, the ultimate decider of guilt or innocence, is placed in an arguably worse position to understand the central evidence, than are the judge or the lawyers who are not responsible for this grave responsibility.

The court said the reticence about providing the jury with the transcript can only be justified if we are certain the jury can hear and understand the evidence. If the concern is that the provision of a transcript to the jury distracts them from observing the witness, there is no alternative to a good quality ABE which the jury can properly hear.

Judicial Communications Office

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://www.judiciaryni.uk/).
2. This was the second of four recordings under the pilot on filming the delivery of judgments by the Court of Appeal in Northern Ireland.

ENDS

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

Debbie Maclam
Judicial Communications Officer
Lady Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Debbie.Maclam@courtsni.gov.uk