Neutral Citation No: [2025] NICA 34	*Ref:* **TRE12798**
	ICOS No: **20/089362**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **20/06/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

CD

Mr Stephen Toal KC with Ms Laura Smyth (instructed by KRW Law LLP) for the Appellant
Mr Neil Connor KC with Ms Geraldine McCullough (instructed by the PPS) for the Crown

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Before: Treacy LJ, Colton J and Kinney J

TREACY LJ

Section 1 of the Sexual Offences (Amendment) Act 1992 (as amended) applies in this case and the complainant is therefore entitled to anonymity.

Introduction

[1] This is an appeal against conviction by CD ('the appellant').

[2] The appellant was convicted on 29 counts of sexual abuse by unanimous jury verdict at Newry Crown Court on 28 October 2021. He was sentenced by HHJ Kerr KC ('the judge') on 20 December 2021 to 20 years imprisonment.

[3] By way of Order dated 29 April 2024, the Single Judge granted the appellant leave to appeal against conviction on one ground, namely that the judge erred in failing to properly direct the jury concerning the appellant's right to silence. In particular, the judge failed to direct the jury that they 'should not find the defendant guilty only, or mainly because he did not give evidence' as per the Northern Ireland Crown Court Bench Book and Specimen Directions (3rd edition 2010.)

[4] The appellant contends that, as a result of the judge's failure to direct the jury properly concerning the appellant's right to silence, the convictions against him are unsafe and should be overturned.

History of the proceedings

[5] The appellant was committed to Newry Crown Court on 27 January 2021 on 17 complaints of alleged sexual offending. On being returned, an indictment containing 52 counts was filed with the court, upon which the appellant was arraigned on 2 March 2021. He pleaded not guilty to all counts. During the course of the trial this Bill of Indictment was amended on two occasions on foot of applications by the prosecution, ultimately leaving 32 counts to be determined by the jury.

[6] The appellant was convicted of 29 counts on the indictment, with 'not guilty by direction' verdicts returned on three counts. He was sentenced on 20 December 2021 to a total of 20 years' imprisonment.

Factual background

[7] The appellant is now aged 67 years and the victim in this case was his stepson, AB, now aged 48 years. During the period AB was sexually abused, he was aged between 8 years and 26 years. The appellant was aged between 25 and 45 years during the same period.

[8] In his 20s, the appellant met the victim's mother whilst on a trip to Scotland. She had three children, the eldest of them being AB. They later married and had two further children. The abuse suffered by the victim began in Scotland. The prosecution case accepted by the jury was that the appellant groomed the victim. AB was isolated from his family by the appellant suggesting that his mother did not love him or care for him. As a result of this manipulation as a very young child, the sexual abuse continued after AB became an adult. Any apparent consent by AB to sexual behaviour, including buggery as an adult, was vitiated by years of predatory grooming by the appellant.

[9] While the sexual abuse of AB first commenced in Scotland, the counts on the indictment commenced in Newry at the first house in which the family lived. The abuse involved the appellant getting the victim to masturbate him and to perform oral sex on him. Two specimen counts (1 and 2) in the Bill of Indictment represent this offending. The family then moved back to Scotland but later returned to a different house in Newry. At this second house (in the same area as the first house) the appellant had the victim kiss him, masturbate him, perform oral sex on him and allow him to masturbate the victim. Eight counts on the indictment (counts 3-10), represent this offending. The victim was between 12 and 14 years of age during this offending.

[10] The next defined period of sexual abuse occurred at another address, also in Newry, when AB was between 14 and 16 years old. At this address, the victim was

subjected to buggery by the appellant. He was also masturbated by the appellant, made to masturbate the appellant and to perform oral sex on him at this location. These offences are represented by a specific count of buggery and three specimen counts of indecent assault (counts 11-14).

[11] The family then moved to a further address in Newry. At this time AB had turned 16 years of age. The offending at this address included buggery and indecent assault, including specific counts of the victim sitting on the appellant's lap while the appellant masturbated him. Further instances of buggery and associated indecent behaviour involved the victim climbing into the bath with the appellant, sitting on his penis and then being masturbated by the appellant. Further offending involved the appellant performing oral sex on the victim during this time. These offences were represented by a mixture of specimen and specific counts on the indictment (counts 15-32). AB gave evidence that during his time living at this address the appellant had manipulated and persuaded him that his mother hated him, and that he thought he was in a relationship with the appellant.

[12] When AB was 25 to 26 years old the family moved again. AB secured a job, met his future wife, and decided to end the sexual abuse he had endured since he was a child. It was 2013 when he first disclosed the abuse perpetrated by the appellant to his wife. A few days later he told his mother, who discouraged him from reporting the matter to police. There was also evidence that in or about this time, he confided in two friends that the appellant had sexually abused him.

[13] Subsequently, in 2018, AB was arrested and interviewed by police in relation to possession of indecent images of children. It was during these interviews and in a prepared statement given to police that AB complained of the sexual abuse inflicted upon him by the appellant. He later recorded an ABE interview with police, outlining in some detail the nature of the abuse he suffered at the hands of the appellant. In March 2019, the appellant was interviewed by police under caution and denied any wrongdoing. To the contrary, he claimed to have a good relationship with AB.

Previous convictions

[14] The appellant has 51 previous convictions for road traffic offences, burglary, theft and assaults on the police. He has no previous sexual offences appearing on his record, and the last conviction noted against him was in 2011.

Pre-sentence report

[15] The appellant is now in his late sixties and he separated from his wife (AB's mother), approximately 13 years ago. He has a history of alcohol abuse. In terms of health, he has arthritis, cholesterol problems, anxiety and reported suicidal ideation in the custodial setting. While in prison he has been referred to mental health services. He denies any inappropriate sexual tendencies and continues to deny the offending of which he has been convicted. Probation assessed the appellant as posing a high risk

of reoffending, and as a moderate to high priority case for supervision and intervention. He was not considered a serious risk of harm to the public.

The issue in this case

[16] The single judge granted the appellant leave to appeal on one ground only, namely that the judge failed to properly direct the jury concerning the appellant's right to silence. The essence of this alleged failure was that the judge failed to direct the jury that they '*should not find the defendant guilty only,* ***or mainly*** *because he did not give evidence*' as per the Northern Ireland Crown Court Bench Book and Specimen Directions (3rd edition, 2010). [Emphasis added].

The legal framework

[17] Article 4(3) and (4)) of the Criminal Evidence (Northern Ireland) Order 1988 provides as follows:

> "(3) If the accused—
>
> (a) after being called upon by the court to give evidence in pursuance of this Article, or after he or counsel or a solicitor representing him has informed the court that he will give evidence, refuses to be sworn; or
>
> (b) having been sworn, without good cause refuses to answer any question, paragraph 4 applies.
>
> (4) The...jury, in determining whether the accused is guilty of the offence charged, may—
>
> (a) draw such inferences from the refusal as appear proper;
>
> (b) on the basis of such inferences, treat the refusal as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the refusal is material."

[18] Also relevant is Article 2(4) of the Order which states:

> "(4) A person shall not be...convicted of an offence *solely* on an inference drawn from such a failure or refusal as is mentioned in Article...4(4) ..." [our emphasis]

Relevant case law

[19] Paragraph F.20.9 of Blackstone [2025] notes that the case law since 1988 establishes that convictions should not be based mainly on adverse inferences either. It states:

> "In *Murray v UK* [1996] 22 EHRR 29, there was a very strong statement that it would be incompatible with the accused's rights to base a conviction 'solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence or to give evidence himself'; see also *Condron v UK* (2001) 31 EHHRI (1). In *Beckles v UK* (2003) 36 EHRR 13 (162), the ECtHR confirmed that the correct principle was that a conviction based solely or mainly on silence ... would be incompatible with the right to silence."

[20] The legal position that convictions should not be based solely or mainly on adverse inferences drawn from a defendant's silence is reflected in the Northern Ireland Crown Court Bench Book and Specimen Directions (3rd edition 2010). Para 4.22 of the Bench Book advises that judicial directions on this point should include the following:

> "however, you should not find the defendant guilty only, or mainly, because he did not give evidence ..."

The judge's charge

[21] The relevant part of the judge's initial charge in this case reads as follows:

> "Now I'm going to move on now, if I can, to an important matter in this case and that is this: the defendant has not given evidence in this case. That is his right. He is entitled not to give evidence, to remain silent and to make the prosecution...prove his guilt beyond reasonable doubt. Two matters arise from his not giving evidence. The first is that your duty under your oath is to try this case according to the evidence. And you will appreciate the defendant has not given any evidence at trial, to undermine, contradict or explain the evidence put before you by the prosecution…
>
> The second is that you heard him being told, through his counsel and me that it's for you to decide whether or not it's proper to hold the defendant's failure to give evidence against him when deciding whether or not he's guilty.

> What proper inferences or conclusions can you draw from the defendant's decision not to give evidence? You may think the defendant would have gone into the witness box to give you an explanation for, or an answer to the case against him. However, you may draw such a conclusion against him only if you think it's a fair and proper conclusion and you're satisfied about two things. First the prosecution's case is such that it clearly calls for an answer by him. And second, that the only sensible explanation for his silence and failure to give evidence is that he has no answer to the charges, or none that would bear examination. It's for you to decide whether it's fair to draw those inferences."

[22] The appellant concedes that this part of the charge was in accordance with the majority of the specimen direction given in the Northern Ireland Crown Court Bench Book but argued that it missed out one important paragraph of the specimen charge. That paragraph reads:

> "However, you should not find the defendant guilty only, or mainly, because he did not give evidence … But you may take it into account as some additional support for the prosecution's case …"

[23] The appellant's counsel requisitioned the judge about this omission.

[24] The next day the judge made a supplemental charge to the jury on this point. He said:

> "Now, the next matter is dealing with the fact that the defendant failed to give evidence. I told you yesterday about the rules that should be applied to that decision. In other words, you must decide the strength of the prosecution case and whether you consider it's a case that requires an answer.
>
> You must consider, members of the jury, whether, in your view, the **only reason** that the defendant is not giving evidence is either because he has no answer or not an answer that would stand up to cross examination. You must then consider, in your view, whether you consider it proper or fair or reasonable to draw inferences against him from his failure to give evidence, which can include the inference that he's guilty. But what you must not do - what you must not do, members of the jury, is just decide bluntly that because he didn't give evidence that therefore he's

> guilty. That would not be a proper interpretation of the law. In other words, you can't just say to yourself, 'he didn't give evidence, therefore he's guilty.' What you must do is go through the procedure that I have described to you."

[25] Defence counsel was satisfied that the additional direction dealt adequately with the 'only' aspect of the alleged omission but requestioned him again in relation to the phrase 'or mainly' which he considered had still not been addressed. The judge responded: 'I consider I've adequately directed them enough', and the charge was not revisited again.

[26] The question for this court then is whether the judge's omission of the words 'or mainly' is fatal to the jury verdicts on the 29 counts of which he was convicted.

The relevant test

[27] In an appeal against conviction the role of the Court of Appeal is to decide whether or not the verdict is unsafe. The test to be applied is found in *R v Pollock* [2004] NICA 34:

> "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 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."

The parties' arguments

[28] The appellant asserts that a direction was given in this case that was contrary to the principles in *Murray v UK*. In that case, the ECtHR held that it would be incompatible with article 6 to base a conviction 'solely or mainly' on the failure to testify. The court said at para 47:

> "it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal ... to give evidence himself.

[29] The appellant asserts that in the present trial a direction was given that was contrary to this principle, and that therefore this trial 'violated article 6 ECHR and is an unfair trial in accordance with the law.' In support of this proposition they rely on Lord Woolf CJ in *R v Togher* [2001] 1 Cr App R 33, where he said:

> "we consider that if a defendant has been denied a fair trial it will almost be inevitable that the convictions will be regarded as unsafe ..."

[30] The prosecution asserts that the omission of a part of the recommended direction is not necessarily fatal to the verdicts in the present case. In support of this they rely on *Blackstone* 2025: F20. 9 which states that in cases such as this one:

> "the omission of the direction is not necessarily fatal if the prosecution evidence taken apart from the inference is overwhelming (Adeyinka [2014] EWCA Crim 504)."

[31] The prosecution says that in the present case the prosecution evidence was overwhelming, and therefore the omission of part of the specimen direction is not fatal in the context of this case. They say that the omission of the words 'or mainly' from the judge's direction on the appellant's right to silence should be considered in the context of the totality and weight of the evidence before the jury, together with the 'fulsome directions' provided to the jury on the standard of proof.

Consideration

[32] It is clear that the judge did not specifically direct jurors that they could not convict 'mainly' on the basis of inferences derived from his failure to give evidence in his own defence. However, it is important to look very carefully at what he did tell the jurors, and what his direction would have required them to do if they were to follow it faithfully.

[33] In his first direction to them he reminds them of the effect of their oath/affirmation:

> "Two matters arise from his not giving evidence. The first is that your duty under your oath is to try this case according to the evidence."

[34] He then tells them there are two matters they must be satisfied about before they can draw any inference at all from the defendant's silence. These matters are, in the judge's own words:

> "First the prosecution 's case is such that it clearly calls for an answer by him."

[35] Here, the judge has directed them in effect that, before they can consider drawing any inferences they must evaluate the prosecution evidence with a view to deciding whether or not it 'is such that it clearly calls for an answer.'

[36] Again, this part of the direction requires jurors to consider the prosecution evidence before they take any other step. This is not the same as saying in terms that they cannot convict "mainly" on an inference drawn from silence, but it does achieve substantially the same effect as such a statement. It requires that each juror must be satisfied on the basis of the evidence they have heard that there is a strong enough case against the defendant to require an answer from him. Consideration of the strength of the prosecution case is therefore the first obligation a juror must discharge and the outcome of that consideration governs which options may be open to them next. In this sense their consideration of the evidence is identified as the first and governing task they must conduct when considering the potential impacts of the defendant's failure to give evidence. Being the first and the governing consideration gives it priority over any consideration that might arise from an inference based on the defendant's decision not to give evidence.

[37] This pre-condition displaces the possibility that jurors might convict 'mainly' on an adverse inference because it requires them to be personally satisfied about the strength of the prosecution evidence before they can even contemplate potential inferences. It is a logical consequence of applying this process that any effects arising from an inference could only ever be secondary or subsidiary considerations.

[38] The second pre-condition that he directs the jurors to apply also reaffirms the primacy of the evidence in the case. This pre-condition requires jurors to be satisfied that:

> "the only sensible explanation for his silence and failure to give evidence is that he has no answer to the charges, or none that would bear examination."

[39] This limb of his direction again emphasises the need for jurors to be satisfied that the evidence against the defendant is strong - so strong that it leaves no room for a viable answer to be raised.

[40] Taken together these pre-conditions that the judge directed the jury about have the effect of ensuring that they should evaluate the prosecution case as the first and 'main' step in their decision-making process.

[41] In his supplementary charge in response to the defence requisition he expressly rules out the possibility that jurors would use inferences as the 'main' reason for convicting the defendant. On this occasion he says:

> "But what you must not do - what you must not do, members of the jury, is just decide bluntly that because he didn't give evidence that therefore he's guilty. That would not be a proper interpretation of the law, In other words, you can't just say to yourself, 'he didn't give evidence, therefore he's guilty.' What you must do is go through the procedure that I have described to you."

[42] The 'procedure' referred to is the one described above, which makes satisfaction with the strength of the prosecution evidence a pre-condition for any consideration of potential adverse inferences. By its nature this 'procedure' makes it impossible for an adverse inference to be the 'first' or 'primary' or 'main' reason for a decision to convict.

Conclusion

[43] We consider that the terms of the charge to the jury issued by the judge in the present case were sufficient to comply in principle with the requirements for an adequate charge. We reach this conclusion mindful of the value and the importance of Bench Books and Specimen Directions, and conscious that compliance with their helpful recommendations remains the easiest away to ensure that cogent and consistent judicial charges are issued in all jury trials. Best practice will always be for judges to use the terms recommended in specimen directions, especially where those terms are terms-of-art derived from applicable case law.

[44] But we are mindful too of the sage advice of Lord Bingham in the case of *Randall v The Queen* [2002] 1 WLR 2237, where he said:

> " [28]…It is not every departure from good practise which renders a trial unfair. Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, were appropriate, they are the subject of a clear judicial direction. It would emasculate the trial process and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practise."

[45] We are aware that, in the same case, Lord Bingham also stressed the importance of defendants' article 6 rights where he said:

> " [28] But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practise is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however, strong the grounds for believing the defendant to be guilty."

[46] In our judgment the departure of the trial judge from the precise wording recommended in the Crown Court Bench Book did not bring this case into the condemned category identified by Lord Bingham. We are reminded of the words of Lord Lane CJ in his foreword to the 1984 edition of the English specimen directions, the equivalent of our Crown Court Bench Book, where he noted that specimen directions - 'should not be regarded as a magic formula to be pronounced like an incantation.' He further said:

> "They are not intended to limit the freedom of the trial judge to direct the jury as he thinks fit - providing he does so in accordance with the law."

[47] In the current case we are satisfied that the trial judge did charge the jury 'in accordance with the law', even though his charge did not take the recommended form. For all these reasons, we consider that the convictions in the present case are safe, and we dismiss this appeal.