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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

R

-v-

PAUL DUNLEAVY

Desmond Fahy QC and Bobbie-Leigh Herdman (instructed by John J Rice & Co) for the Appellant
Neil Connor QC and Rosemary Walsh (instructed by the PPS) for the Prosecution

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Before: Treacy LJ, Horner J and Huddleston J

<u>TREACY LJ</u> (*delivering the judgment of the court*)

Introduction

[1] Following the refusal of the Single Judge, Scoffield J, the appellant renews his application for leave to appeal against conviction and sentence.

Reporting Restrictions

[2] Given the nature of the offences, automatic anonymity attaches to each of the complainants. The appellant himself was previously named in the press in connection with the index offences, however HHJ Fowler imposed reporting restrictions on 13 December 2019 which, on 26 August 2020, he directed would remain in place.

Background

[3] The background to the offences is helpfully summarised in the ruling of the Single Judge which we have substantially adopted. The appellant is a member of the Congregation of Christian Brothers and was convicted of 39 counts relating to the sexual abuse of six complainants, all of whom were male students at two primary schools at which the appellant was either a teacher or Principal. Allegations of two complainants arising from the Abbey Primary School, Newry related to the

timeframe of 1966-1973, when the appellant was a teacher at the school. Allegations from four complainants arising from St Aiden's Primary School, Belfast related to the timeframe 1973-1976, when the appellant was Principal of the school. Of the 39 convictions 32 were unanimous and 7 were by a majority. The appellant was acquitted of one count relating to a seventh complainant arising from St Aiden's Primary School.

[4] The first allegation against the appellant was made by EB on 10 October 1997 and it is relevant background to the subject of the appeal that the appellant was thereafter referred to the Granada Institute by the Christian Brothers, although the precise date of this referral is unknown. EB was a complainant in this trial.

[5] The Granada Institute was a body set up in 1994 to provide therapy and counselling to clergy and members of religious orders who sexually offended against children and/or were alleged to have done so. It is common case that the appellant attended the Granada Institute for a period of over a year following the allegation of EB. Following the complaint of sexual abuse by EB the appellant was referred to the Granada Institute by the Christian Brothers. It is also accepted that there are no notes or records of any kind in existence in respect of the appellant's attendance at the Granada Institute or in respect of its admissions and treatment policies. The Granada Institute was under the control of the St John of Gods organization.

[6] The statement of Dr Randall, Consultant Psychologist, was served as additional evidence shortly before the trial (his statement is dated 6 January 2020 and the trial started on 15 January 2020). In that statement it was asserted that it was a condition to attending group therapy that the alleged perpetrator admit that they had sexually abused a child or engaged in sexually inappropriate behavior with a child. In effect the prosecution were now seeking to advance at a late stage the contention that the appellant had made a confession to having sexually abused one of the complainants. On receipt of this additional evidence the appellant made a detailed application pursuant to section 8 of the Criminal Procedure and Investigation Act 1996 seeking, inter alia, documents relating to the terms of reference of the therapy sessions referred to in the statement of Dr Randall and the notes, clinical files and group notes relating to the appellant. In a written response to the section 8 application the PPS referred to an email from Conor McCarthy, Group CEO of St John of Gods, dated 17 December 2019:

> "We confirm that we have no records pertaining to that period [1998-2000]. All files pertaining to that period have been destroyed in accordance with our data protection obligations."

The appellant denied he had sexually assaulted EB or anyone during police interview, denied it in his defence statement and gave evidence to the same effect. He also denied in evidence that he had made any admissions to sexual abuse whilst attending the Granada Institute.

[7] A further allegation of sexual abuse was made against the appellant on 24 July 1998 by DB, who was not a complainant in this trial. The appellant continued to attend the Granada Institute after the allegation made by DB. The remainder of the complainants in this trial reported their allegations for the first time from 2000 onwards, after the appellant had ceased attendance at the Granada Institute.

[8] During the appellant's tenure as Principal of St Aiden's Primary School, Belfast between 1973 and 1976, a teacher at the school by the name of ED was sexually abusing pupils and later pleaded guilty to multiple criminal charges in respect of that abuse. Two of the complainants in this trial had also alleged abuse against ED, namely MG and MS. The first prosecutions of ED appear to date back to November 2000. It came to the appellant's attention, during the course of the trial, by virtue of a BBC news report, that the trial judge had prosecuted ED in his first prosecution in November 2000, stating in his submissions at the sentencing hearing that the abuse was "a daily occurrence" and became progressively more serious.

[9] ED was mentioned at this trial in the evidence of MG as it was alleged that the appellant had removed MG from ED's class on a weekly basis in order to sexually abuse him in a maintenance storeroom. It was also noted that MS had initially contacted the PSNI in June 2000 to make a complaint against ED but also made a complaint against the appellant as well while he was at the police station. It was agreed that MS would omit the name of ED during his evidence to the jury when giving his explanation of his first report to police.

Grounds of Appeal against Conviction

[10] The appellant seeks leave to appeal against the convictions delivered by the verdict of a jury on 6 February 2020 on three grounds:

(i) The evidence of Dr Patrick Randall was wrongly admitted;

(ii) The judge and jury did not hear relevant evidence from Br John Burke which directly contradicts the evidence of Dr Patrick Randall; and

(iii) The learned trial judge improperly failed to recuse himself from continuing to hear the trial when asked to do so on 28 January 2020.

Ground 1: The evidence of Dr Patrick Randall was wrongly admitted

[11] The admissibility of the evidence of Dr Randall was first challenged on the basis that it amounted to bad character evidence pursuant to Article 3 of the Criminal Justice (Evidence) (NI) Order 2004 ("the 2004 Order"). The appellant contended that there was a lack of certainty as to whom the alleged admissions of abuse related, that the content of the statement of Dr Randall was therefore prima facie defendant's bad character evidence and required an application before it could

be admitted. Article 3 of the 2004 Order provides that "references in this Part to evidence of a person's "bad character" are to evidence of, or a disposition towards, misconduct on his part, *other than*, evidence which (a) has to do with the alleged facts of the offence with which the defendant is charged, or (b) is evidence of misconduct in connection with the investigation or prosecution of that offence." The trial judge rejected the defence argument of uncertainty in an oral ruling on the basis that EB's evidence was the only allegation in existence at the time of the appellant's entry into the Granada Institute and that Dr Randall's evidence was that an admission would be required from the appellant to be permitted entry to the group therapy programme. We note that during the course of his evidence as part of the *voir dire*, the appellant accepted that he had been referred to the Granada Institute due to the complaint that had been made by EB. A complaint from another boy (who was not a complainant in these proceedings) only arose some 9 months later.

[12] The prosecution position that the initial referral to the Granada Institute concerned the complainant EB was accepted by the appellant. We consider that the trial judge was therefore, entitled to reject the submission that Dr Randall's evidence regarding admissions to child abuse amounted to bad character evidence. There was no failure on the part of the prosecution to make an application under the 2004 Order as this was plainly evidence that was to do with the facts of the offences concerning the complaint that had been made by EB.

[13] Following the judge's ruling on the bad character point the court held a *voir dire* in order to determine the defence application to exclude the evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE"). We accept the prosecution submission that Dr Randall was unequivocal regarding the fact that an admission to child abuse had to have been made by any individual before they could participate in the group programme. Dr Randall stated that:

> "It was important that the person admitted that they had sexually abused a child and this would have been from the outset. If someone denied the complaint, they would not have proceeded to the group therapy sessions as this would be destructive of the group process. There is an ethos of admission in the group and it can shut down other people making admissions if someone is brought who denies the complaint."

[14] Dr Randall indicated he knew for a fact that the appellant would have made an admission at the outset; he asserted that this was compulsory. He stated that the appellant's position would not have been maintained in the group if he had not made admissions. He went onto say:

> "We couldn't keep him in the group at all if he were not to make an acknowledgement or admission, nor would it – it wouldn't be ethical, treatment wise, because we would be treating somebody for a disorder that they don't have and under such circumstances, not ethical for us to continue with the treatment."

[15] It is common case that Dr Randall was not able to provide the detail of the specific admission made by the appellant. He did however recall that the appellant attended the group programme for approximately a year on a weekly basis between the hours of 10am and 3pm and he would have been present at these meetings save for times when he was on annual leave. His evidence that it would simply be unethical to continue with the programme with an individual who has made no admissions is significant. Similarly, his evidence that it would have been destructive to the rest of the group if an individual maintained denials of wrongdoing cannot be ignored.

[16] As to the issue of confidentiality arising from the engagement between the appellant and the Granada Institute it is clear that the confidentiality of the group programme was limited in that information would be shared with a participant's superiors as well as other members of the Institute. In any event, as the trial judge observed, referring to Archbold 2020 paras 12-21, no legal privilege arises out of the relationship between a patient and a doctor. The authority of *R v McDonald* [1991] Crim LR 122 underlines that the assessment has to be made by the trial judge, balancing the interests of the prosecution as well as the defence. The appellate court also reiterated the principle that the exercise of a judge's discretion will not normally be interfered with unless he has erred in law or the exercise of his discretion is so unreasonable as to be perverse.

[17] The appellant argues that the absence of notes and records emanating from his admission to the group programme and its meetings deprived him of any objective means of challenging the evidence of Dr Randall. We do not accept that the absence of notes and records was so prejudicial to the appellant that the evidence should not have been admitted. In his charge to the jury, the judge listed the records that might – at one stage – have been available but now no longer existed. He reminded the jury that the defence case was that the suggestion the appellant made admissions is wrong and unsupported by documentary evidence. The judge reminded the jury that they had to be "sure" the defendant did make admissions before they could take any account of this evidence. We are satisfied that that the judge properly warned the jury about the absence of any notes and they would have been under no illusion that notes would have existed at some point but these were no longer available.

[18] We agree that the evidence of Dr Randall once admitted was likely to be highly probative. It is however not clear to the court how or why such important

evidence surfaced so late in the day only being served by way of additional evidence in the teeth of the impending trial. It is also unfortunate that the destruction of relevant records was never pursued. There was no application for an adjournment in light of the significance of Dr Randall's evidence or the late revelation that the documents had been destroyed "in accordance with our data protection obligations." There was no abuse of process application regarding the destruction of documents. Indeed, the Article 76 PACE application focussed on their unavailability simpliciter.

[19] Dr Randall's evidence demonstrated that the appellant had made admissions when the complaint was initially made by EB and had participated in a group programme for approximately a year on foot of these admissions. The appellant on the other hand positively asserted that he had never made any admissions whatsoever. This case concerned the jury's assessment of the credibility and the reliability of each of the complainants and the appellant. Where there was evidence that the appellant had made admissions to child abuse on foot of specific allegations being made by one of those complainants that was clearly relevant and probative in relation to that particular complainant. Indeed, it went beyond being relevant and probative to the particular complainant's case as the judge's directions to the jury demonstrate. The evidence that admissions were made but denied by the appellant was a matter that was clearly relevant and probative to the appellant's reliability and credibility as a witness. Indeed, the prosecution submitted that it was wholly proper for the jury to hear this evidence when considering the appellant's stark denials to the complaints being made against him.

[20] The decision to admit the evidence of Dr Randall took place without the judge receiving the fullest assistance we would like to have seen. Before this court detailed additional submissions and a substantial body of relevant case law not opened to the trial judge were examined. The limited material put before the trial judge has meant in our view, for reasons which we develop below, that the judge was effectively deprived of the opportunity of taking into account relevant matters of considerable importance to any fair and proper assessment of the Article 76 issue. These developments, largely court driven, form an important part of the context for our consideration of the Article 76 issue.

[21] Strictly speaking Article 76 (section 78 of the Police and Criminal Evidence Act 1984) does not involve the exercise of a discretion because, if a court decides that admission of the evidence would have such an adverse effect on the fairness of the proceedings that it ought not to admit it, it cannot logically exercise a discretion to admit it: see *Chalkley* [1998] QB 848 at p.874 and Blackstone [2022] at para F2.7. In *Boxhall* [2020] EWCA Crim 688 the court said that although sometimes described as a discretion, it is more properly characterised as an evaluative decision in ensuring that there is a fair trial in accordance with article 6 ECHR. The Court of Appeal is ordinarily loathe to interfere with the decisions of judges under Article 76. But it will intervene if the judge's decision is made in a *Wednesbury* unreasonable manner. In the present case, through no fault of the judge, highly relevant case law, high

public policy considerations and additional written and oral arguments have been advanced. We cannot say whether any of this would have led to a different decision. Nor, however, can we exclude the possibility that had these relevant materials been placed before the court that the evaluative exercise might have resulted in a different decision. If the Court of Appeal does intervene it will make its own determination – see Blackstone [2022] para F2.7 and the cases cited therein.

[22] It is common case that no privilege attaches to communications between a patient and his doctor. The case law indicates that whether such evidence is to be admitted is a matter for the discretion of the trial judge with which an appellate court will be 'loth to interfere.' Thus, the judge's decision to admit the evidence of Dr Randall, having heard the evidence adduced as part of the *voir dire*, and then having heard detailed submissions advanced on the appellant's behalf should not be lightly disturbed. However, as the appeal before this court developed additional submissions and case law were presented which were not opened to the lower court.

[23] Substantial case law was opened before us as to when patient-doctor communications should be excluded as unfair. That case law makes clear that there are no hard and fast rules to guide the trial judge in determining the application but that '… the Crown will only seek to adduce evidence of what a defendant has said to a doctor on rare occasions and in exceptional circumstances when the issue being tried is non-medical' [*R v McDonald* (1991) Crim L. R. 122)] and that the overarching consideration is that the trial be conducted fairly.

[24] By way of preamble it is very important to note that, as we shall see, certain themes reoccur across the judgments on this point. The judges who have previously exercised their discretion as to whether patient-doctor communications should be admitted into evidence have been particularly alive to:

- the defendant's expectation of confidentiality at the point of the utterance;
- the duties of the doctor figure;
- his relationship to the defendant and the trial process; and
- the proximity of the utterance to the trial.

These considerations have all borne upon the fairness (or otherwise) of the later admission of the utterance into evidence.

[25] In *R v Payne* [1963] 1 All ER 848, the defendant was examined by a doctor at a police station and was told by a police officer that it was not part of the doctor's role to examine his fitness to drive. When the defendant was tried for offences including driving when unfit due to drink, the doctor gave evidence that the defendant had been unfit to drive through drink. The Court of Appeal concluded that, while the evidence was admissible, the trial judge should have excluded it in the exercise of

his discretion because if the defendant had realised that the doctor was likely to give that evidence, he may have refused to subject himself to examination.

[26] In *McDonald*, the defendant was arrested having admitted to killing a man. After his arrest he was examined by a psychiatrist with a view to determining his fitness to plead. During that examination he made a statement that contradicted evidence that he had given to the police. The psychiatrist gave evidence of that statement and on appeal. It was found on appeal that the admission of that evidence would not have such an adverse effect on the proceedings that the court ought not to have admitted it.

[27] In *R v Elleray* [2003] EWCA Crim 553, during an interview with probation officers with a view to compiling a pre-sentence report upon the appellant's pleading guilty to indecent assault, he made confessions to having raped the victim of the indecent assault. This evidence was subsequently used by the Crown to initiate a further prosecution for rape. It was argued that that confession evidence should not have been admitted as the appellant had been denied the protections afforded to defendants when in police custody.

[28] Delivering the judgment dismissing the appeal, Lord Woolf made the following observations:

> "… A probation officer is under a duty to prepare a report which clearly and frankly sets out the probation officer's view, in particular in relation to sexual offenders, as to the degree of risk to the public that an offender constitutes. In order to do this in many cases they have to ask questions of an offender as to the precise circumstances in which the offender came to commit the offence to which he may have already pleaded guilty, or in relation to which there may be an agreed basis of facts between the prosecution and the defence. If in the course of that interview the offender volunteers an admission of committing the particular offence or some other offence which is relevant to the tasks of the probation officer in preparing their report for the court, they cannot ignore what they have been told. They are under a duty to provide a full and frank report which includes those details. Usually there will be little risk or any danger of action being taken in relation to an offender in consequence of anything said to the probation officers or anything said in a report. However, as this case illustrates, there can be a situation where that can arise.
>
> … the fact that the evidence may be admissible in criminal proceedings does not mean that the fact that the

admission was made in the course of an interview between an offender and a probation officer should be ignored. It is clearly important that there should be frankness in the exchanges between a probation officer and an offender as this furthers the role of the probation officer in the sentencing exercise. If it were to be the practice that the prosecution regularly rely upon what is said by an offender to a probation officer as evidence for further prosecutions then clearly this would have an adverse effect upon this need for frankness. Indeed, a situation could soon arise where probation officers would be hampered in performing their important duty to assist the court in determining the correct sentence for offenders. So, in the case of an admission the prosecution should first carefully consider whether it is right to rely upon evidence provided by a conversation between a probation officer and an offender and only rely upon it if they decide it is in the public interest so to do. … In deciding whether to exclude the evidence it is perfectly appropriate for the court to have in mind the contrast between the position that exists where an offender is interviewed by the police and that which exists when the offender is interviewed by a probation officer. The court should bear in mind the need for frankness between the offender and the probation officer; the fact that there may not be a reliable record of what was said, that the offender has not been cautioned; and that the offender has not had the benefit of legal representation.

… returning to the facts of this case, we are conscious here that once the appellant had disclosed that he had committed rape on more than one occasion, in order to perform that responsibility of protecting the public the probation officers could not ignore what the appellant had said. They had to include the admissions in their report. It clearly was relevant to the degree of risk that the appellant constituted.

…

In the circumstances of this case we cannot say that it was wrong or unfair for the prosecution to have decided to prosecute the appellant for the offences of rape. We cannot criticise the judge for the conclusion to which he came as to the admissibility of the evidence of what was said to the probation officers."

[29] *R v H* [2018] EWCA Crim 2868 concerned a prosecution application to admit as fresh evidence an admission made by the defendant to a case manager at a youth offender organisation during the defendant's appeal against his murder conviction. The court did not allow the evidence to be adduced. Bean LJ said:

> "53. First, it would in our view be contrary to public policy to breach the confidentiality of discussions of the kind save for very good reason. Such discussions are not subject to privilege in the sense that something a defendant or appellant tells his lawyers would be; and the internal rules of Camden Social Services (or any other local authority's officers) are not binding on the courts; but we regard them as well drafted, sensible and worthy of respect. There is a distinction between disclosure necessary to avoid imminent future criminality (in particular a threat to someone's life or safety) and the obtaining of admissions to past offences. It would be extremely unfortunate if convicted defendants (whether young or adult) were deterred from speaking with those charged with their supervision or rehabilitation until any appeal against conviction had been dealt with."

[30] In *McGeough* [2015] UKSC 62, the defendant had made a written application for asylum in Sweden and that application was subsequently used as the basis for a conviction for membership of a proscribed organisation. The Supreme Court found:

> "… the information which the Swedish authorities provided was properly and legally supplied. When the authorities in this country obtained that material, they had a legal obligation to make appropriate use of it if it revealed criminal activity on the appellant's part."

[31] The court went on to conclude that there was:

> "… nothing intrinsic to the material nor in the circumstances in which it was provided that would support the conclusion that admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

Consideration

[32] In the instant case, the admission was made to a doctor in a therapeutic setting and was far removed both in time and in context from a trial process that developed many years later. No charges had yet been made against the appellant.

The doctor was not involved in the care of the appellant in the course of his detention or during the trial process. He had no duty to report any admissions made to him to any party – which contrasts with the position of the probation officer in *R v Elleray* and the psychiatrist in *R v McDonald.*

[33] To the contrary, the appellant was specifically advised that the content of the group was confidential (save for certain information being communicated to his superiors within his brotherhood). The appellant was thus unwittingly misled. Neither the appellant nor any other member of the group therapy would have subjected themselves to such an exercise had they been aware of the true situation.

[34] The admissions were made in a therapeutic setting with the aim of assisting group members to come to terms with their sexual abuse of children in order to prevent further abuse. Dr Randall facilitated these sessions, and his duty was to the group members, not to any future court. He was not involved in any process that was connected with the criminal justice system. Trust was fundamental to the operation of the group such that all members were obliged to acknowledge their sexual abuse of children before being allowed to attend. It is clearly of vital importance that there be frankness in the exchanges in this therapeutic setting. If the prosecution can generally rely on what was said in this therapeutic setting it is obvious that it will fundamentally undermine this and analogous processes designed to rehabilitate, supervise and protect. The danger of such action being taken will frustrate the important public policy objectives that underlie such treatments.

[35] In our view, it is simply incompatible with the aim, function, structure, and express or implied undertakings as to confidentiality of this therapeutic group that the matters discussed therein could properly (save in some exceptional circumstance) be adduced in evidence in a criminal trial. The chilling effect of the threat of such an outcome would render the group inaccessible to many potential candidates, thus undermining its capacity to meet its important goal. Further, if a group did get up and running with such a threat hanging over it, the quality of disclosure, discussion and trust which are the foundation of the therapeutic work would surely be impaired beyond use. It would in our view, in the circumstances of the present case, be contrary to public policy to breach the confidentiality of these therapeutic discussions save for very good reason - Bean LJ drew a distinction in *R v H* between disclosure to avoid imminent criminality (e.g. to avoid a threat to someone's life or safety) and the obtaining of admissions to past offences.

[36] For the above reasons, we allow the appeal on this ground.

Additional matters

[37] Further, as noted earlier, it is not clear why the evidence of Dr Randall surfaced so late in the day only being served by way of additional evidence in the

teeth of the impending trial. More importantly the relevant records were destroyed and the implausible reason given for their destruction was never pursued.

[38] As noted by Lord Woolf in *Elleray*:

> "… so in the case of an admission the prosecution should first carefully consider whether it is right to rely upon evidence provided by a conversation between a probation officer and an offender and *only rely upon it if they decide it is in the public interest so to do. …*"

In the present case it is not apparent that any such exercise was carried out by the prosecution in light of the case law discussed above.

[39] In deciding whether to exclude the evidence Lord Woolf enumerated a number of factors that the court should have in mind:

- the contrast between the position that exists where an offender is interviewed by the police and that which exists when the offender is interviewed by a probation officer;

- the court should bear in mind the need for frankness between the offender and the probation officer;

- the fact that there may not be a reliable record of what was said;

- that the offender has not been cautioned;

- and that the offender has not had the benefit of legal representation.

To that list we repeat that in the present case the relevant records had been destroyed without any proper explanation record and in circumstances where the appellant complained about what he said was the resultant unfairness.

Ground 2: The evidence of Brother John Burke

[40] An application to adduce fresh evidence was made pursuant to Section 25 of the Criminal Appeal (Northern Ireland) Act 1980 which provides that:

> "(1) For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice—
>
> (a) ….

…

(c) receive any evidence which was not adduced at the trial.

(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—

(a) whether the evidence appears to the Court to be capable of belief;

(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

[41] *R v Ferris* [2020] NICA 60 sets out guidance in relation to the application of this section and underlines that the test is whether the admission of the evidence is necessary or expedient in the interests of justice.

[42] We heard the evidence of Br Burke *de benne esse*. We can deal with his evidence shortly. We do not consider that his evidence is of any assistance to the appellant. As noted by the Single judge his evidence relates to the approach of the referring body, rather than the admitting body. His evidence emphasised the wholly separate and distinct role of the referrer as compared with that of the treating Institute. He understood the limits of his role and what he could and could not speak to. He acknowledged that he could not say what was said or not when a person got to the Granada Institute. He agreed that the initial assessment at the institute determined what happened thereafter. He also acknowledged that he was not in a position to dispute (the evidence of Dr Randall) that an admission of guilt is required for group therapy sessions and that Dr Randall was best placed to give evidence about what happened in the Granada Institute. In short, we do not consider that his evidence directly contradicts that of Dr Randall or that it is capable of undermining the evidence of Dr Randall. Accordingly, we do not consider that the test for admission of the evidence under section 25 is satisfied and we refuse to admit it. We also note that in answer to a question from Huddleston J, Br Burke said that a person had a free choice whether to go or not to the Granada Institute whereas the appellant had said in evidence that he had no option but to attend.

Ground 3: Failure to Recuse

[43] This ground was faintly pursued. For the reasons given by the Single judge, particularly at para [24] we consider that this ground is wholly without merit. The trial judge in his written reasons has set out very clearly why he refused to recuse himself.

[44] We accept the submission that there is simply no room for the suggestion that there was apparent bias. There was no suggestion that the appellant had offended with or with the knowledge or acquiescence of Daniel Eccles and the name simply featured as part of the prosecution case because he was a teacher of one of the complainants during the currency of abuse at the hands of this appellant. It was quite apparent that the judge had not made any connection between the earlier case he prosecuted some 20 years ago and the name Daniel Eccles in the current case.

[45] The main point advanced appears to be that the timing of the decision was just prior to the judge's determination regarding the admissibility of Dr Randall's evidence. In this regard, whilst it is clear that the judge did accept Dr Randall's evidence that it was a pre-requisite to participation in group therapy work that the appellant had to admit he had sexually abused a child, the learned judge explained his reasons for this finding. However, the purpose of the *voir dire* was to determine if the jury should hear the evidence of Dr Randall and ultimately, it was a matter for the jury as to whether any admissions were made. The judge properly reminded the jury that the standard of proof in relation to determining whether any such admission was made was beyond a reasonable doubt. It is notable that there is no criticism of the judge's charge to the jury at the conclusion of all the evidence in the case.

[46] In view of our conclusion that the appeal is allowed on ground one it is unnecessary to address the grounds of appeal against sentence.

Conclusion

[47] In summary the court allows the appeal on the sole ground that the evidence of Dr Randall ought to have been excluded as unfair.