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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

AB

Before Campbell and Higgins LJJ and Weatherup J.

CAMPBELL LJ

[1] This is an appeal brought by the prosecution, under Article 17 of the Criminal Justice (Northern Ireland) Order 2004 against a ruling given by Her Honour Judge Loughran, on 12 December 2006, staying proceedings in the retrial of the respondent. Leave to appeal was granted by the judge.

[2] At an earlier trial the respondent was convicted by the jury on five counts; attempted buggery, inciting a child to commit an act of gross indecency, indecent assault, and two counts of gross indecency against a child. The jury was unable to reach a verdict on three counts of buggery and two further counts of indecent assault on a child and it was on these counts that it was intended to retry the respondent.

[3] After it heard the appeal the Court stated that it would be allowed and that reasons would be given at a later date.

[4] To protect the identity of the complainant she will be referred to in this judgment as "the child" as although she is now 22 years of age she was between 8 and 9 years of age at the time when the alleged offences occurred. The respondent we shall refer to as AB for the same reason.

The background facts

[5] The trial judge in her decision has provided us with a detailed description of the circumstances in which the offences are said to have occurred and she has given us, with

her customary clarity, the reasons for her ruling. This has been of considerable assistance and permits us to deal briefly with the background facts.

[6] At the relevant times AB, who was then the boyfriend of the child's older sister and is the father of her sister's child, was between 16 and 17 years of age. The offences are said to have taken place in the child's bedroom in her home.

[7] The first incident occurred after AB had emerged from the lavatory and the child had shouted "boo" at him. He followed her into her bedroom and there he undid his belt, took down his trousers and underpants and asked her to touch his erect penis and then to suck it. She refused to do either of these things. The jury returned a unanimous verdict that he was guilty of the offence of inciting a child to commit an act of gross indecency.

[8] The child alleged that a few days later AB came into her bedroom and placed her hand on his penis and he began to use it in a rubbing action which he told her to continue after he took his own hand away. He then asked her to suck his penis and when she refused to do so he took hold of her head and forced his penis into her mouth and then began to move it in and out of her mouth. The jury returned a verdict of guilty by a majority of the offence of gross indecency with a child but was unable to reach a verdict on a further count of indecent assault which was based on the allegation of oral sex.

[9] The jury failed to reach a verdict on a count of indecent assault which was grounded on an allegation of repeated acts of oral sex during the period that she was abused.

[10] Count 9 was of indecent assault which was said to have occurred when the child was in bed and almost asleep. AB removed her nightdress and he opened her legs, which she held clenched together, and kissed her between her legs. The jury, by a majority, returned a verdict of guilty.

[11] The child alleged that AB made her masturbate him most nights after the occasion described in paragraph [8] above, when he placed her hand on his penis and began a rubbing action. The jury, again by a majority, returned a verdict of guilty of gross indecency with a child.

[12] After the child told her sister about AB's behaviour he did not enter her room for a few days. When he returned he said that he knew that she had told about him and that he was going to hurt her more. The judge then sets out in her ruling an extract from the child's evidence- in- chief describing how AB attempted to put his penis in her anus. When he was unable to insert his penis fully he told her to put her fingers into her anus so that it would not be so painful the next time. On a count of attempted buggery (amended during the course of the trial from a count of buggery) the jury returned a verdict of guilty, by a majority.

[13] The evidence of the child on the two counts of buggery was that on at least ten or more occasions AB made her kneel on her bed and she could feel his penis in her bottom

which she found painful. The jury was unable to reach a verdict on these two counts. On a further count of buggery, in which the child alleged that AB made her hold on to a radiator and sit on her hunkers while he penetrated her anus, the jury failed to reach a verdict.

[14] AB denied any inappropriate behaviour towards the child and he said that she resented his relationship with her older sister who had become like a mother to her after their own mother left home in 1992. He did recall the child making two separate allegations in 1993 that he had "flashed" at her and although she was not believed it was decided, after the second of these allegations was made, that he would no longer visit the family home.

[15] Following the first trial the prosecution indicated that it intended to proceed on those counts on which the jury had been unable to reach a verdict. It was left to the respondent to decide if he wished to be sentenced before the retrial commenced and at his election he was sentenced. It was following this that he applied for the retrial to be stayed. He did not appeal against his conviction or the sentence passed.

The grounds advanced on behalf of AB in support of the application before the judge

[16] The right under article 6 of the European Convention on Human Rights to a fair trial formed the basis for the submissions before the judge that to permit the retrial to proceed would be an abuse of process. It was argued that a further trial would be unfair and oppressive and contrary to common law and that no public interest would be served by a retrial on these counts.

[17] It was submitted that at a retrial AB would no longer be able to rely on inconsistencies in the evidence of the child on the counts on which he had been found guilty and that this would compromise his defence. If he disclosed that there had been an earlier trial and exposed the inconsistencies in the child's evidence on those counts on which he had been found guilty, an acquittal on the remaining counts could lead to inconsistent verdicts.

[18] The evidence on the counts on which AB had been found guilty was, it was argued, so inextricably linked with the evidence in support of the counts on which he was to be retried that it would be impossible to keep them apart. For example the child distinguished in her evidence at the first trial between the degree of penetration in the attempted buggery and in the counts of buggery. On the counts where he was said to have placed the child's hand on his penis and to have made her rub it with her hand, the jury convicted him of indecent assault but could not reach a verdict on the allegation that he forced his penis into her mouth. To lead evidence of this last aspect of the incident without the earlier part emerging would, it was said, present difficulty.

[19] The credibility of the child was central to the defence at the trial as it would be at a retrial. It was submitted that as AB had been found guilty already by a jury of attempted buggery, gross indecency and indecent assault it was not in the public interest for another

jury to determine such issues. Lastly this is an historic case and this is another factor to be taken into account.

The submissions on behalf of the prosecution

[20] The prosecution relied on the principle that each count is a separate indictment and that AB can therefore be tried on the counts on which no verdict had been reached. Further, that there is sufficient evidence on those counts to warrant a retrial and that there is a public interest in deciding if AB is guilty of the outstanding counts which include buggery for which the maximum sentence is life imprisonment.

[21] The prosecution considered that it was feasible to conduct a retrial in such a way as to avoid any reference to the earlier trial or to the convictions resulting from it. Counsel informed the trial judge that it was not the intention of the prosecution to bring the convictions to the attention of the jury unless counsel for AB cross-examined the child on an answer that she gave in relation to a count on which the jury has already reached a verdict.

[22] The risk of inconsistent verdicts was regarded by the prosecution as not unusual as a defendant is frequently convicted on one count and acquitted on others. Finally the prosecution suggested that the application by the defence was premature as there was no basis on grounds of procedure or evidence at this stage for concluding that AB would not receive a fair trial.

The judge's decision

[23] Having considered a number of leading authorities on abuse of process the judge stated succinctly the guidance that she derived from them in these terms:

> (i) this is a jurisdiction to be exercised sparingly and only if any unfairness demonstrated by the defendant cannot be cured within the trial process by the exercise of the discretion of the trial judge
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> (ii) the core right established by the common law and by article 6 of the European Convention on Human Rights is to a trial which is and is seen to be fair
>
> (iii) the court must recognise the need for a fair balance between the general interest of the community and the personal right of the individual. In the present context, the general interest of the community, which is represented by the prosecution, is in the achievement of justice through the determination of the outstanding counts on the indictment and the personal right of the defendant is to a trial in which he can conduct a fair and proper defence.

[24] The judge concluded (as was conceded by the defence) that there was a sufficiency of evidence on the counts of buggery. She found that it could not be reasonably concluded that there was no public interest in a retrial on the counts of

buggery where the sanction on conviction would be a considerably longer period of imprisonment than that already imposed. There was no criticism by the defence of the prosecuting authority beyond the decision to proceed with a retrial on the outstanding counts.

[25] The judge was not persuaded that it would impossible for the trial judge to regulate a retrial so that any reference to the attempted buggery in the evidence on the counts of buggery could be avoided. As for the argument that it would be difficult to put before the jury the evidence on oral sex without any reference being made to the gross indecency with a child, on which AB had already been found guilty, the judge found some merit in it but she considered that it was for the trial judge to keep the evidence on these two counts apart.

[26] When she turned to consider the effect of the verdicts reached by the jury in the first trial on AB's ability to defend himself the judge decided that a retrial would be unfair. The factors to which she made particular reference were;

- the previous good character of the defendant
- the fact that all 10 counts on the indictment were considered by a jury who were directed as to the good character of the defendant
- the fact that in a retrial there would be a very real prospect of the convictions by the first jury being disclosed to the second jury
- the fact that the defendant would have to decide how to conduct his defence of the outstanding five counts weakened by the knowledge of the prospect of his bad character being so disclosed
- the fact that in the retrial the defendant would not have the benefit of the good character direction.

[27] In reaching the decision that it would be unfair for AB to be retried the judge said that she had balanced the public interest, including the interest of the complainant in the determination of the remaining counts on the indictment, with the interest of AB.

The prosecution case on the appeal

[28] Mr O'Donoghue QC (who appeared with Miss Brady for the prosecution) submitted that there would be no insuperable difficulty in presenting the evidence on the counts where it was said that the facts were intertwined with those on which AB had already been convicted. The prosecution could lead evidence of the fact of the other incident without any reference being made to the conviction. If the trial judge decided that this evidence should not be given it would still be possible for the prosecution to proceed on the outstanding counts without making any reference to the other incident.

[29] The position of the prosecution with regard to reliance being placed by the prosecution on previous convictions at the retrial was reiterated by Mr O'Donoghue. He confirmed that at present the prosecution did not intend to apply to adduce evidence of AB's bad character based on the convictions at the first trial. However, it reserved the right to reconsider the position in the event of something arising in the course of the retrial which would justify an application for leave to admit this evidence.

[30] Before making such an application counsel for the prosecution would be required to make an assessment as to whether it could affect the fairness of the trial. If it was decided to proceed with the application it could be opposed by counsel for the defendant and the trial judge would be obliged under the Criminal Justice (Evidence) (Northern Ireland) Order 2004 to ensure that it would not make the trial unfair.

[31] It was submitted by the prosecution that a retrial takes on a dynamic of its own and that at the stage of a preliminary application the court should not anticipate how the evidence could develop. AB could secure a fair trial even though he felt that his ability to attack the credibility of the complainant was inhibited.

The respondent's case on the appeal

[32] It was submitted by Mr Lyttle QC (who appeared with Mr Gibson) on behalf of AB that as there was no evidence against him other than that of the child his only line of defence was to question her veracity and motive for making allegations against him. Her credibility was the cornerstone of his defence. If his ability to attack it was circumscribed then he was left defenceless. A decision would have to be made in advance as to whether an attack should be made on the credibility of the child and it would not be possible to know if there was a real prospect of the convictions being admitted in evidence. Although on some of the grounds in the Criminal Justice (Evidence) (Northern Ireland) Order 2004 the judge has discretion as to whether to admit previous convictions this is not so on all grounds. The judge was in the best position to decide if it would be an abuse of process to allow a retrial on the remaining counts as she had been the judge at the first trial.

[33] Mr Lyttle submitted that an additional difficulty for the defence was the lapse of time between the alleged incidents and the charges being laid against AB. This was compounded by the fact that some of the outstanding charges were non-specific. He contended that the learned trial judge had carried out the correct balancing exercise: by taking into account the interests of justice in the wider sense, taking full account of the public interest in convicting the guilty, in deterring crime and maintaining confidence in the criminal justice system. In doing so she had not misdirected herself in law in taking account of AB's interests nor had she misapplied the law. She had made an informed and dispassionate assessment and come to a balanced decision that counsel said should be upheld.

Decision.

[34] Kerr LCJ in *R v Murray and others* [2006] NICA 33 stated the fundamental principle to be applied when considering an abuse of process application. Referring to the opinion of Lord Bingham in *Attorney General's reference 2/2001* {2004] 2AC 77 the Lord Chief Justice said at paragraphs 24 and 25:

> "[24] The first thing to observe is Lord Bingham's acceptance of the proposition that this category extends beyond those cases where there has been bad faith, unlawful action or manipulation by the executive. Secondly, the examples that he gives of other cases (gross delay and breach of a prosecutor's professional duty) are merely illustrative of the type of situation that will warrant this course. Thirdly, he considers that while it is not profitable to attempt to list all types of case where this disposal will be appropriate, this type of case will be obviously recognisable – no doubt because of their exceptional quality. Finally, he makes an emphatic statement that where any lesser remedy to reflect the breach of the defendant's convention right is possible, a stay will *never* be appropriate.
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> [25] We do not consider that Lord Bingham sought to confine this category of cases to those where to allow the trial to continue would outrage one's sense of justice. It is absolutely clear, however, that he considered that such cases should be wholly exceptional – to the point that they would be readily identifiable. The exceptionality requirement is, in our judgment, central to the theme of this passage of his speech and it is not surprising that this should be so. Where a fair trial of someone charged with a criminal offence can take place, society would expect such trial to proceed unless there are exceptional reasons that it should not."

[35] Having been convicted on the evidence of the complainant of crimes of a sexual nature that occurred at a time in the past, AB claims that he cannot obtain a fair trial on other counts on which the jury was unable to reach a verdict at the original trial. Provided that there is nothing to prevent him from receiving a fair trial there is no exceptional reason why the retrial should not proceed.

[36] We agree with the judge that any potential evidential difficulties which may arise can be fairly and properly dealt with within the trial process which will be controlled by

the trial judge.

[37] The concerns expressed by the judge about a fair trial are twofold: that AB will not have the benefit of the good character direction which he had at the original trial and if the credibility of the complainant is attacked by him he will run the risk of having his earlier convictions put before the jury.

[38] As to the first of these concerns AB lost the right to a good character direction by reason of convictions against which he has not appealed. The only distinction to be made between his position and that of any other accused with convictions for offences of a similar nature is that the complainant is the same person. We do not regard this as making a retrial unfair.

[39] Although circumspection may be required by the defence in deciding upon the approach to be adopted when faced with a risk of the earlier convictions being admitted in evidence, this is a difficulty faced by many accused with a criminal record. Furthermore, as the prosecution has outlined there are several lines of protection available to a defendant the most important of which is contained in article 6 (3) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. It provides that if a defendant makes an attack on another person's character (under article 6(1) (g)) the court must not admit the evidence, if on an application by the defendant to exclude it, it appears to the court that 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. Article 6(1)(g) provides the single ground upon which the prosecution say that they may seek to adduce evidence of bad character and the fact that there are other grounds under the Order upon which such evidence may be admitted and where this protection is not available is therefore irrelevant. We consider that this protection avoids any danger of an unfair trial.

[40] When the judge considered the prosecution submission that the application to stay the proceedings was premature she said that the "dilemma for the defendant is the radical problem of how to conduct his defence from the outset of the trial." She regarded this as giving rise to unfairness as it would be "oppressive for the defendant to have to consider pleading guilty in order to avoid his convictions by the first jury being disclosed to the second jury." As we have said, it is far from certain that the convictions of AB would be admitted in evidence and we do not agree that such a possibility would require AB to consider pleading guilty on this account and so create unfairness.

[41] As we were satisfied, that there were no exceptional circumstances that would justify staying these proceedings nor anything to prevent a fair trial taking place having also considered and rejected the existence of any other unfairness, we exercised the powers given to us under article 26 (a) of the Criminal Justice (Northern Ireland) Order 2004 and reversed the ruling and allowed the appeal.