Neutral Citation no. [2005] NICA 29

Ref:	**NICF5297**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered:	**15/06/05**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

B

Before: Nicholson LJ, Campbell LJ and Sheil LJ

NICHOLSON LJ

Introduction

[1] The applicant B was convicted on ten counts of gross indecency with a child, seven counts of indecent assault and one count of buggery, by a jury at a trial before His Honour Judge McFarland (the judge) at Ballymena Crown Court on 13 January 2004. The counts in the indictment identified the alleged victim as M (the complainant). There were majority verdicts of 11-1 on the first seven counts, 10-2 on the remaining counts. On one count of buggery, the 18th count, the jury disagreed. The offences were alleged to have occurred between 1978 and 1987.

Application for stay of proceedings

[2] On 28 November 2003 before the commencement of the case an application was made to stay the proceedings on the grounds that they were an abuse of process. It was argued that a fair trial was not possible. This application was rejected by the judge. At the close of the Crown case a further application was made and refused. The judge indicated that he would keep the matter open and, therefore, no application was made at the close of the case.

Ground of Appeal

(1) Refusal to stay proceedings

[3] Mr Dermot Fee QC who appeared for the applicant, submitted to this court that, whatever be the proper approach as to the timing of such an application, the trial ought to have been stayed as a fair trial was not possible either before the case commenced, at the close of the Crown case or when all the evidence had been heard. At the time of the alleged offences the complainant would have been between six and fifteen years of age; the applicant would have been between thirteen and twenty two years of age. The first complaint to the police was made in 2002 when the complainant was thirty years of age. It was submitted that no explanation had been given as to the reasons for the delay. The applicant had been interviewed and strongly denied any involvement in the offences. The delay had given rise to prejudice and unfairness. The approach adopted in R v Derby Crown Court ex parte Brooks (1984) 80 Cr.App.R. 164 at 168 was:

> "It may be an abuse of process if (a)… or (b)… on the balance of probability the defendant has been or will be prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable…"

The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution. Mr Fee also referred to Attorney General's Reference (No. 1 of 1990) (1992) 95 Cr.App.R. 296 at 302 and Tan v Cameron [1992] 2 AC 205 in which Lord Mustill stated at p. 225:

> "…whether, in all the circumstances, the situation created by the delay is such as to make it an unfair employment of the powers of the court any longer to hold the defendant to account. This is a question to be considered, in the round, and nothing is gained by the introduction of shifting burdens of proof, which serves only to break down into formal steps what is in reality a single appreciation of what is or is not unfair."

This approach was accepted as correct by Carswell LCJ (as he then was) in Re DPP's Application [1999] NI 106 at 116.

[4] It was submitted to this court that the memory of the applicant and his witnesses to recall accurately events of the distant past, the difficulty in tracing witnesses, the imprecise nature of the complaints which prevented the applicant from providing alibi evidence or from showing that the account

was incorrect, the fact that there was a group of boys who, if the complaint had been made at a reasonable time could have come forward, the change in the lay-out of the applicant's home, the death of the applicant's father, the age of his mother whose recollection has been dimmed, the lack of medical evidence, the lack of corroboration or support, the inconsistencies in the complainant's evidence and other matters dealt with in detail by Mr Fee QC rendered the trial unfair.

[5] In reply Mr Hunter QC on behalf of the Crown submitted that this was a typical case of the historical abuse of a child, involving a course of conduct comprising a series of offences committed by an older upon a younger person, giving rise to an indictment with numerous counts of sexual offences of different types and varying gravity, with specific and specimen charges. Inherent in a case of this character there is delay with the associated effect on recollection, absences of witnesses, changes in material locations. The case was not in any way exceptional and, according to the criteria laid down in Attorney General's Reference (No. 1 of 1990) an application was correctly refused. At the close of the Crown case, when Mr Fee QC renewed his application for a stay there were some inconsistencies in the evidence of the complainant which was a feature owing to variation in memory very common in cases of long standing sexual abuse.

At the close of all the evidence the full and complete picture had emerged. Apart from the evidence in chief of the complainant and a detailed, careful and skilful cross-examination of the complainant and the evidence of his wife and an uncle, the jury had also heard the evidence of the applicant, his mother, a witness of the event which was the subject of the first count and expert evidence. This was a case in which the evidence of the complainant could be tested both in relation to inconsistencies within that evidence but also by other evidence. The requisite majority of the jurors were convinced by the evidence of the guilt of the applicant on all of the counts with the exception of count 18 where there was an understandable disagreement.

[6] In R v B [2003] 2 Cr.App.R. 197 it was held that there remained in the Court of Appeal a residual discretion to set aside a conviction if it was felt to be unsafe and unfair. That was so even where the trial process itself could not be faulted. It was a discretion which had to be exercised in limited circumstances and with caution. At the heart of the criminal justice system was the principle that while it was important that justice was done to the prosecution and justice done to the victim, in the final analysis it was even more important that an injustice was not done to a defendant. That was central to the administration of justice. Although it might mean that some guilty people went unpunished, it was more important that the innocent were not wrongly convicted.

Lord Woolf CJ delivering the judgment of the court said at p. 198:

> "This appeal raises a worrying point of general interest, difficulty and sensitivity in relation to complaints arising out of sexual offences alleged to have been committed many years prior to the trial. The problem arises because in criminal law unlike civil law there is no statutory limitation. Furthermore, in relation to sexual offences Parliament had removed the common law protection which had been provided by the requirement of corroboration in the case of allegations of sexual offences."

At p. 202 he stated:

> "… The passage of time in this jurisdiction has never been a ground in itself for the staying of a prosecution. Just as the courts do not close the door to allowing appeals out of time if new evidence is forthcoming to show that someone who is innocent has been convicted, so if the prosecution decides that there is a case to go before the jury, the courts do not in the ordinary way consider it right to interfere with the prosecution process as long as (and this is an important qualification) a fair trial is possible. The question of who is to be believed in a case of this nature is very much an issue for the jury and not for the judge. The judge has the responsibility for giving the jury appropriate warnings demanded by the circumstances.
>
> On the whole the best time to assess whether a case is fit to be left to the jury is not before the trial is started but at the end of the trial when the judge is in a position to take into account the actual evidence presented to the jury by the prosecution and by the defence. As far as we are aware no application was made to this judge to rule again at the end of the trial. We certainly do not criticise those who were involved in the case for that. If the judge had been minded to take a different view to that he had indicated on the application for a stay, we are confident that he would have made that clear to counsel, and counsel, no doubt appreciating that, were not going to make an unnecessary application. Accordingly, we are satisfied that no complaint can be made of the judge's

> decision to allow the case to go to the jury for a verdict".

[7] In R v Smolinski [2004] 2 Cr.App.R. 40 it was held that applications to stay proceedings based on abuse of process where there had been delay had become prevalent but should be discouraged. In cases of alleged sexual offences it was sometimes very difficult for young children to speak about such matters and therefore it was only many years later that the offences came to light. However, when a long time had elapsed, the court would expect careful consideration would be given by the prosecution as to whether it was right to bring the prosecution at all. If, having considered the evidence to be called, and the witnesses having been interviewed on behalf of the prosecution, a decision was reached that the case should proceed, then in the normal way it was better not to make an application based on abuse of process. Unless the case was exceptional, the application would be unsuccessful. If an application were to be made to a judge, the best time for doing so would be after the evidence had been called and for the judge then, having scrutinised the evidence with particular care, to come to a conclusion whether or not it was safe for the matter to be left to the jury. That was a particularly helpful course if there was a danger of inconsistencies between the witnesses of the sort that, it was common ground, had occurred in that case.

Lord Woolf CJ said at p. 664 of the report:

> "We do not think it is right for this court to lay down the principle that because of the period which has elapsed (20 years) when the complainant has given a reason for the delay, it is inevitably the case that the convictions will be unsafe. However, where there has been a long period of delay such as exists in this case and where the complainants are young, as they were here (6 and 7 respectively at the time matters happened) this court should scrutinise convictions with particular care. Likewise, we consider the trial judge should scrutinise the evidence with particular care and come to a conclusion whether or not it is safe for the matter to be left to the jury."

At p. 665 he said:

> "We hope we have made clear two things in the course of hearing this appeal. One is that we discourage applications based on abuse in cases of this sort. Secondly, where evidence is given after so many years, the court should exercise very careful

> scrutiny at the end of the evidence to see whether or not the case is safe to be left to the jury. If there is an appeal, then this court will scrutinise the situation with care. We are certainly not indicating that it is not right to bring prosecutions in appropriate circumstances merely because of the period that has elapsed. As this court appreciates, it is sometimes very difficult for young children to speak about these matters and therefore it is only many years later they come to light. Justice must be done of course to a defendant, but the court must also be mindful of the position of the alleged victims."

[8] In R v Burke [2005] All ER (D) 118 Hooper LJ said at para. [32] of his judgment:

> "Prior to the start of the case it will often be difficult if not impossible to determine whether a defendant can have a fair trial because of delay coupled with the destruction of documents and the unavailability of witnesses. Issues which might seem very important before the trial may become unimportant or of less importance as a result of developments during the trial, including the evidence of the complainant and of other witnesses including the defendant should he choose to give evidence. Issues which seemed unimportant before the trial may become very important..."

At para. [33] he said:

> "We take the view that the judge should not have been asked to stay the case before it started. This is pre-eminently a case in which the fairness of the trial will only probably be determined when all the evidence has been called. Any particular difficulties caused by the passage of time and the destruction of documents and unavailability of witnesses could be identified and considered against the background of all the evidence in the case."

At para. [34] he said:

> "We shall therefore now ask ourselves whether, looking at all the evidence in the case the defendant was prevented from having a fair trial by reason of

> the delay, of the destruction of documents and of the unavailability of witnesses."

[9] We have given careful consideration to Mr Fee QC's submissions as, we are satisfied, the trial judge also did. He was in the best situation to assess as the trial proceeded whether or not it was safe to leave the case to the jury and we have no doubt that he kept open that question until all the evidence had been heard. We are satisfied that the application based on abuse of process is not made out. We do not consider that the trial judge ought to have stayed the proceedings at the conclusion of the Crown case in view of inconsistencies in the evidence of the complainant nor do we consider that anything occurred during the course of the evidence given on behalf of the Crown or on behalf of the applicant to warrant a stay of proceedings. In our consideration of this ground of appeal we have followed the reasoning of our Court of Appeal in <u>Re DPP's Application</u> concerning the test to be applied. See [1999] NI 106 at 116 b to f. But we remind ourselves that it is our duty to scrutinise the evidence with particular care on this appeal.

(2) <u>The judge should have directed the jury to acquit at the close of the Crown case</u>

[10] Mr Fee QC submitted at the close of the Crown case and renewed his submission to this court that the case should have been stopped at the end of the Crown case and the jury directed to acquit the applicant. We do not need to set out all the principles which are to be found in <u>R v Galbraith</u> (1981) 73 Cr.App.R.124. At p. 127 Lord Lane CJ said:

> "Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury … There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[11] The complainant first raised allegations with the applicant on Saturday 8 June 2002 when late in the evening and having consumed alcohol he telephoned him and raised with him an allegation of buggery. During the course of the telephone call the applicant's wife spoke to the complainant. On 18 June 2002 the complainant received a letter from the applicant's solicitor threatening legal proceedings against him. The complainant then went to his own solicitor and then to the police on 4 July 2002. He was interviewed by

members of the Care Unit and made a written statement that day. He made a second written statement on 14 November 2002 after jotting down a few notes at the end of October and made a third statement on 2 December 2003.

[12] He gave evidence that the first occasion on which he remembered clearly something happening was when he was 6 years of age in 1978 before the house where B lived with his family was renovated. He stayed overnight and slept in a back bedroom downstairs which was the boys' room. There were two beds in which the applicant and his brother J, the best friend of the complainant, normally slept. The applicant and the complainant were in the same bed. J was in a bed to the side. The complainant was wearing red pyjamas and orange coloured underpants. The applicant was wearing blue underpants or pyjamas without a top. He could not recall what J was wearing at that time. The applicant had the complainant's pyjama trousers and underpants down at his ankles and his own underwear was down. The applicant had started to stroke the complainant's penis and told him that was the way he wanted his penis stroked. So the complainant did it for him. He was asked whether he wanted to do that. He said that he "didn't know any different at the time." It started off with teasing and playfulness. It progressed so that the applicant got an erection. The applicant's future brother-in-law, D came into the room and pulled the blankets back.

In cross-examination the complainant said that as far as he could remember J was in another bed. He thought there were two beds. He could not remember exactly. The reason why he could remember the colour of his underpants was that the other two boys kept him "going" about it. J was wearing a pair of red y-fronts. He had always said that in his statement [to the police] he said. This was not challenged. It was put to him that in the statement he said that the applicant, J and he were in one bed. The rooms were small and the beds were together, he replied. At one stage he was probably lying between J and the applicant in one bed. At the time the masturbation took place J was in another bed; the beds were beside each other. It started off as joking and carrying on. They commented on the colour of the underpants. His was the colour of a Nuffield tractor, the applicant's was a Ford and J's was a Massey Ferguson. It started off like that and progressed. He was asked about saying in his statement that D came into the room and switched the light on, came over to the bed and pulled back the bedclothes; he had heard noises and asked the applicant why the complainant's pyjamas were down. The complainant agreed that he did not mention to the police then that anything untoward had happened to him on that occasion. He told the police that he knew something had happened but he could not remember clearly what had happened. At the time they were children. They were in and out of beds. At one stage they were all in one bed; at other times they were out of bed. "We were young children in the room." He was not masturbating the applicant when D came into the room. The applicant said something to D. D would not have known what they were

doing. He agreed that he did not tell the police on 4 July that he was masturbating the applicant.

[13] He had started counselling and this helped him to come to terms with what happened to him. He said of his memory of events, "You put it away again" and "You remember it and you try to put it to the back of your head again." He agreed that he did not mention the details of that night in his second statement in November 2002. The first time that he made the detailed allegations was on 2 December 2003. He had always known that something had happened but he could not remember exactly what happened. He had not a specific memory of what did happen, when he was speaking to the police in 2002.

[14] The complainant gave evidence of incidents between 1978 and 1981 when there was mutual masturbation in various places around the farm belonging to the applicant's parents. His next clear memory of a specific incident was in 1981, he said, when he was nine years old. He was made to turn over on a mattress in a room which he described: the applicant put his penis between the complainant's legs, started to thrust and ejaculated over his back. Things got worse after that and he went into some detail as to what happened, and where and when it happened. We consider it unnecessary to set out this detailed evidence.

[15] He gave evidence of leaving primary school at the age of 11. This formed the basis of count 17. One night in the summer time the applicant had him alone in J's bed. He was turned round and the applicant put his penis between the complainant's legs and into his back passage and thrusted and thrusted, saying something like "Pat, oh Pat". He had a girlfriend around that time called Pat. He ejaculated onto the complainant's behind. He laughed at the complainant. He described how there was pain in his back passage. He said that the applicant also fantasised. The complainant said that he did not know whether the applicant was referring to his girlfriend or to the complainant's mother.

He was then cross-examined about this incident to which he had referred in his original statement to the police. It was put to him that in his second statement in November 2002 he said that he could not remember if it was morning or evening but he was nearly sure it was a late summer evening as he thought the sun was in his face when he walked home. It was definitely daylight. He replied, "It was daylight when I walked home."

He said that it was the next day because the incident happened at night. It was put to him that he would have run to his mother or father. He replied, "Who was I going to run to?" He said that he could hardly walk and that he cried after it. He could remember the pain. What was he going to say to his mother at the age of eleven? "You don't go home and tell your mother something like this is happening to you." He felt numb. There was some

blood. He could not remember whether there was blood on his underpants. He could not remember who was at home when he reached there. He hid the pain as best he could. He said that he now knew as an adult what a fantasy was and it was suggested to him that he was fantasising, making accounts up. He replied: "Well, why would I have to do something like that?"

[16] Mr Fee relied on a number of alleged inconsistencies in the accounts given by the complainant. The most striking of these is in relation to the 18th count in respect of which the jury disagreed. In evidence the complainant said that he could recall one other time for sure when he was buggered. It was in the summer of 1987. He said that the abuse had very much decreased by that time and he avoided the applicant as best he could. That Saturday evening Mr and Mrs B. were away visiting another family in Dublin. There was alcohol in the house and he had just returned home from a school trip. He thought that he was drinking coke with ice but he very quickly became drunk and was very violently sick. He was covered in vomit. He passed out. He remembered wakening up in the bedroom. The applicant was lying on top of him as he lay face down and he was forcing himself into the complainant's back passage. He did not know whether he was coming or going.

In cross-examination he was referred to rough notes which he made before his second statement in November 2002 in which he said that the only occasion on which he was buggered was the incident in 1983. He replied: "The second incident was when I began to get flashbacks in the last two or three years" (before giving evidence in January 2004); especially in January 2003. In October 2002 he had written that he was not buggered again after 1983. In his statement to the police in November he said that he knew something had happened in 1987 but could not remember exactly what it was.

He explained that his reason for going to the B. home in 1987, was to see Mrs B the mother of the applicant but she was in Dublin. When he found she was away it was early on Saturday evening and there was no reason to go home at that time and those present just sat there talking.

It was put to him that he said in his police statement of 14 November 2002 that the last time he stayed at the applicant's home was in June 1987. The applicant gave him some vodka to drink; he was very sick and woke up; he did not know if anything happened that night; he never stayed again and his visits got less; at that time he did not know if anything happened because he was drunk.

He started to get flashbacks. When he wrote the notes in October 2002 he was still going through a lot of trauma and counselling. At the start he thought that he was drinking coke but it started to taste funny and he had never been drunk before. It was the first time he had alcohol. He said that he

never forgot that he was buggered but he did not remember the full details at that time. He did not want to remember being buggered. He said: "You know a lot of the things that happened maybe I tried to put to the back of my head, I tried to forget them, but they won't go away. They won't go away" and again "I don't want to remember". It was suggested that he went to the police to put them to the front of his mind. He replied: "I went to the police under legal advice" and "I was told to go to the police" and "I made it very clear at the start of my counselling that I wanted to sort it out. I didn't think I would ever take this path that it has taken" and "I honestly did not think that I would be sitting here today giving evidence or I didn't think anything would happen." He was asked what he thought when he was giving a statement to the police. He replied: "Because he was taking legal proceedings against me. I had to do something about it. I mean it's quite clear in the solicitor's letter … what other choice had I got but see a solicitor." There was a further interchange about the telephone call to the applicant in which the wife of the applicant spoke to him and "the ignorance from her was unbelievable." Then he said that at the time of the interview with the police he did not think that when drink was involved in some way, "that anything could be done about it" and "that it would be dismissed out of hand."

The judge intervened and the complainant stated that the reason why he didn't tell the police was because there was drink involved. He said he told the police about the drink because he just had to get it off his chest but he was not ready "to go the rest at that time." He had to get some of it off his chest. He now had additional memory – flashbacks, things that happened to him came in on top of him. Later he said that his memory was blurred about the incident at the stage when he was making the statement. Since he made the statements, he said, he had gone through hell with memories. He was getting back on his feet now. The memory of the incident in 1987 was clearer now.

[17] It was put to him that he made an allegation to the police that he had seen the applicant put his penis inside a hen and inside a cow. He said shortly afterwards that the applicant put his penis up to a cow.

[18] Having examined all the alleged inconsistencies in the complainant's evidence and taking into account the criticisms of his wife's evidence, we consider that the judge was right to allow the case to go to the jury at the close of the Crown case and at the close of all the evidence in accordance with the principles stated in Galbraith.

(3) J B, the brother of the applicant

[19] An amendment to the grounds of appeal was allowed as follows:

> "The judge erred in his direction to the jury not to speculate by failing to give a clear and precise

> direction to the jury to take no account of the absence of J B as a witness."

In the course of interviews with the applicant detectives put the statements or allegations of the complainant to him. These were edited but inadvertently a portion was not deleted from the transcript which one of the detectives read out to the jury. In the course of the second series of interviews there was read to the jury the following passage:

"Detective	That's everything that M has said in his statement, B, all right. So really
Applicant	Uh huh
Detective	Just to recap on all of that there he's talking from about 1978 up to about 1985, '86 time, all right
Applicant	Un huh
Detective	When he says that there would have been masturbation between yourself and [the complainant] that he's witnessed masturbation between yourself and J
Applicant	Right
Detective	That, em, he would have had to masturbate you
Applicant	Un huh
Detective	And that you would have performed oral sex on him
Applicant	Un huh

The complaint which counsel for the applicant makes is that there was an improper reference to the fact that the complainant witnessed masturbation between the applicant and J [his brother.] Counsel informed the court that he consulted with his client about this slip and that it was decided not to ask for the jury to be discharged at that stage.

In our view the numerous allegations of sexual abuse made by the complainant to the police, put by the detective to the applicant and read to the jury by the detective, all of which were vehemently denied by the applicant would have made this slip inconsequential.

[20] The jury then heard the evidence of the applicant, of the veterinary surgeon, the mother and the wife of the applicant and three other witnesses called on behalf of the applicant.

After the applicant, the veterinary surgeon, the mother and the wife of the applicant had given evidence on Thursday, 8 January 2004, a question was sent from the jury room to the judge. It came from one juror but read:

> "Your Honour,
>
> The Jury wishes to enquire if, and or, why Mr J B…., the brother of the accused, will give evidence or has made a statement to any authority on this case.
>
> Our query is based on the frequency of reference to this individual.
>
> If such statement has been made by Mr J B…. will we have reference to it in our deliberations?
>
> (Signed) The Jury
>
> Presented by Juror 92"

There had been frequent references to J B. by the complainant who described him as his best friend and referred to him as present at the home of the applicant's family on many occasions though not as an eye-witness to any sexual abuse on him. The Crown case had closed and the case for the Defence was not finished because there were three further witnesses to be called. We have read a transcript of the way in which the judge dealt with the question.

He asked the clerk of the court to show the piece of paper on which the question was written to counsel. He said:

> "I would propose to deal with this matter, but I won't be over-emphasising it, by saying that they have now heard the totality of the evidence and they shouldn't speculate about any evidence as to why a witness hasn't been called or has been called, or as to what evidence that persons would or would not have given. I think that's all I can say.
>
> Mr Fee QC: My concern is that [inaudible]."

Mr Fee QC informed the court that at this stage he raised the matter of what was read out by the detective from the transcript.

> "The Judge: Yes, well it's just one juror.

Mr Fee QC: [Inaudible]. Whether he pointed out that the question came from the jury, rather than one juror, we do not know. But clearly it was a question written out by one juror by on behalf of the jury.

Mr Fee QC: [Inaudible].

The Judge: That was….?

Mr Fee QC: [Inaudible].

The judge: That was not said.

Mr Fee QC: [Inaudible]. That wasn't said [inaudible] Mr Hunter QC, general exchange of views [inaudible].

The Judge: Was that full reply, sorry, question given? On the other hand it just would be a general query, in that J was there, J was [the complainant's] best friend. He was in the bedroom, why aren't we hearing from him.

Mr Fee QC: It could be [inaudible] concern that [inaudible].

The Judge: Well, I will consider that."

On the following day three witnesses were called on behalf of the applicant. The case for the Defence then closed.

The week-end intervened. Monday was a Bank Holiday.

On Tuesday morning there were legal submissions about the contents of the summing-up. Mr Fee QC appears to have expressed concern about dealing with the jury's question without highlighting it. The judge indicated what he proposed to say.

The jury was brought back and the judge addressed them as follows:

> "Good morning, ladies and gentlemen, I was handed a note on Thursday before the end of the evidence. It was a query about certain evidence. Now you have now heard all the witnesses, there aren't going to be any more witnesses, there isn't going to be any more evidence. The answer, the specific question that was raised by the jury concerning a particular witness, the

> answer of course is no, but it is very important that you do not speculate as to why a witness has been called or has not been called, in particular by either the Prosecution or the Defence. Of course do not speculate about evidence which he or she may or may not have given. It is very important that you deal with the case on the evidence that you have heard in this courtroom and don't speculate about any other evidence.
>
> We are now going to have counsel's speeches."

During the course of his summing-up he said as follows:

> "but decide the case only on the evidence that you've heard. There isn't going to be any more evidence and you remember I said this before counsels' speeches, but it is important that you don't speculate on evidence that might have been or about witnesses that might have been called; in fact, don't be drawn into any form of speculation, just deal with the evidence that you've heard. Now, of course, you are entitled to draw inferences, and what I mean by that is just coming to commonsense conclusions based on the evidence you accept as reliable."

Mr Fee QC submitted that the judge should have singled out J B. for special mention. Mr Hunter QC contended that the judge's directions were proper and sufficient. He dealt with the jury's question twice, before counsels' speeches began and during his summing-up. There was no evidence about anyone having made a statement to a person in authority other than witnesses who were called. The jury did not ask any question after the judge's direction. There was no application by the Defence after the reading of the passage by the detective. There was no objection to what the judge proposed to say. There was no requisition. Be that as it may, the judge has to make his decision and make the correct decision. See <u>R v Smith</u> [2005] UKHL 12. We consider that he did. The question from the jury was in general terms, namely:

> "….Our query is based on the frequency of references to this individual."

The judge was wise not to over-emphasise the absence of J B , the applicant's own brother from the witness-box. To single him out would have been unhelpful to the applicant, not to the Crown.

(4) <u>The absence of warning that evidence of counselling and the like was not supportive of the complainant's allegations</u>

[21] An amendment to the grounds of appeal was allowed. This read:

> "The judge failed to give a full and appropriate direction to the jury in relation to lack of corroboration and in particular not to regard the complainant's allegation made against the applicant in the phone call of June 2002 or other complaints to counsellors or psychiatrists as corroborative or supportive of the case against the applicant."

Mr Fee QC submitted that the judge should have cautioned or warned the jury that evidence of counselling, of hospital treatment, of discussions with others by the complainant was not supportive evidence.

Mr Hunter QC referred us to R v Makanjuola [1995] 2 Cr.App.R. 469 at pp. 472, 473 and to R v P G [2005] NICA at paras. 15, 22, 23. In his evidence-in-chief the complainant referred to counselling briefly as part of the narrative of events. He referred to "confronting" the applicant on the telephone and how he came to go to the police as part of the narrative of events. In the course of cross-examination counselling was mentioned on a number of occasions. No reasonable juror could have imagined that counselling was supportive of the complainant's allegations. The cross-examination was set in the context of testing the credibility of the complainant and impugning the character of the complainant. The note made by the complainant dated 27 October 2002 on the advice of a counsellor was used by the Defence to attack his credibility. There was no need on the judge's part to advert to counselling. Mr Hunter QC took the court through the various references to counselling in order to show that the cross-examination on that topic was used in an attempt to undermine the complainant. He submitted that the direction by the judge was in the clearest possible terms.

We have given careful consideration to the observations of Higgins J in R v P G [2005] NICA 9. The direction of the judge to the jury in that case was not adequate. This case can be clearly distinguished on its facts.

The judge charged the jury as follows:

> "Now, there is no separate independent evidence corroborating or supporting [the complainant's] evidence concerning the acts of sexual misconduct. Of course, such evidence is not specifically required, but it is absent in this case, and you should bear that in mind – particularly when there are inconsistencies in this evidence – when you ask yourselves if the prosecution have satisfied you beyond a reasonable doubt."

We consider that this was a clear direction expressed in a straight-forward way. He made brief references to counselling and to treatment in Holywell Hospital as explanations given by the complainant for delay in going to the police and as assisting his memory but in our view they were appropriate. The judge invited the jury to consider whether the complainant's medical difficulties and the fact that he had been a patient in Holywell affected his credibility generally and the accuracy of his evidence.

(5) The verdicts were unsafe

[22] As to count 1 we have set out a number of inconsistencies in the complainant's statements to the police and in his evidence. The applicant denied that any incident such as was described by the complainant ever occurred and D also denied that any such incident occurred. Mr Fee QC reminded us of the inconsistencies, as, no doubt, he reminded the jury and as the judge reminded the jury. They convicted the applicant by a majority of 11-1. Plainly, the complainant told the police in July 2002 that he remembered that something wrong had happened when he was six though he said he could not remember the details. If he was inventing a story of indecency, why not tell it then? Why introduce D as coming into the room when he must have known that D, the applicant's brother-in-law, was likely to contradict him. According to the complainant D said that he heard noises and the jury may well have taken the view that he pulled down the blanket to see if there was anything concealed in the bed and that the last thing he would think of was that anything indecent was going on. D was given some explanation by the applicant which, the complainant said he could not remember. D was 22 years of age. The jury must have concluded that the incident did not register in his memory or that D lied to protect his brother-in-law. It seems to us much more likely that the former was the case. But we must not speculate. In evidence the complainant said that D "wouldn't have known what they were doing." The full details of the indecent behaviour were not recalled by him, he said, until late in 2003. The explanation given by the complainant that "you remember it and you try to put it to the back of your head again" seems to us to be convincing. As a result of the third statement the indictment had to be amended. The complainant was bound to realise that he would be challenged for making the allegation at so late a stage. Mr Fee QC rightly pointed out the difficulty faced by the applicant in dealing with such an allegation. But the applicant was unable to provide any plausible explanation for the making of it. We have scrutinised the discrepancies with particular care, as is our duty.

[23] In respect of count 17 we have set out in some detail the complainant's account of what happened and the cross-examination by Mr Fee QC. No doubt the jury in convicting the applicant by a majority took into account that it was the complainant who had created the inconsistencies by his two statements, concluded that on each of the two occasions when he made the statements he was trying to remember exactly what happened and that the

inconsistencies made no difference to the facts of the offence. We have again examined with care the evidence which he gave and the two statements, as they were put to him. They were not put in evidence on behalf of the defence as they could have been. We fully understand why it was not going to assist the defence to do so. We do not hold that against the applicant. But the details such as: "Pat, oh Pat", his apparent effort to sort out in his mind that it happened in the evening and that he went home that next morning with the sun in his face, that he could scarcely walk with the pain he felt, that "at eleven years old you don't go home and tell your mother something like this is happening to you" must have struck the jury as having the ring of truth. The applicant denied that this incident occurred and we accept Mr Fee's contention that the applicant must have been in great difficulty in casting his mind back to a day almost 20 years previously. But a majority of the jurors who saw and heard the complainant give evidence were persuaded that he was telling the truth.

[24] We have dealt with the complainant's evidence on count 18 and the applicant denied that this incident happened. His mother said that she was not in Dublin in 1987.

Mr Fee QC doubtless made much of the inconsistencies in the complainant's version of events. The judge pointed them out strongly and the jury disagreed. They were not prepared by a majority to give the applicant the benefit of the doubt. In our view there was nothing inconsistent in their verdict by a majority of 10-2 that the applicant buggered the complainant in 1983 and their disagreement as to their verdict in relation to the incident in 1987 since in October 2002 he had written that he had been buggered once.

In our opinion there would have been no sense in recounting in November 2002 the incident in the summer of 1987 if nothing untoward had happened other than that he had got drunk for the first time. At one stage he was saying that he could not remember in November 2002 what had happened because he was drunk. At another stage he was saying that the incident came to him in flashbacks. Then he said that he did not tell the police because he was drunk. By December 2003 he was saying that he had a much clearer memory; that it had been hazy in November 2002.

Thus the jury were justified in disagreeing on their verdict. But we do not consider that it follows that the complainant was telling an untruth about the incident.

The hen and the cow

[25] We have recounted that the complainant's allegations against the applicant about a hen and a cow were raised in cross-examination. These were indignantly denied. The veterinary surgeon called on behalf of the

applicant said that it was impossible to insert an erect penis into a hen or at any rate that the shock to the hen would result very likely in a dead hen. To insert a penis into a cow's anus would require the cow to be restrained, he said. The prosecution called no evidence with regard to this allegation, nor was it the subject of any count on the indictment.

This evidence did not deter the jury from convicting the applicant on eighteen out of nineteen counts. We consider it highly unlikely that the complainant would have invented such a story or stories. But we also consider it highly unlikely that he would have been able to see more than that the applicant held his penis up to the hen's anus and to the cow's anus.

[26] Mr Fee QC made the valid point that it was virtually impossible to cross-examine meaningfully about the specimen counts relating to events when the complainant was aged 7 to 11 or thereafter. But the complainant gave fairly detailed evidence about these acts of indecency as can be seen from the transcript of his evidence. The jury saw and heard him give his evidence. He was most skilfully cross-examined. They heard the applicant give evidence. They did not believe his denials. They were made well aware by the trial judge of the difficulties which he faced in meeting the allegations. It does not follow that they disbelieved his mother. They may have taken the view that her memory was at fault. They may have taken the view that she was doing her best to protect her son. We must not speculate.

[27] We do, however, consider that the complainant was not frank about incidents concerning the applicant's wife. During the course of the telephone call between himself and the applicant, he described how she took part in the conversation. He said that: "The talk, it was more like the manners and ignorance from her was unbelievable." Later he denied that an incident occurred on 20 September 2003 when, as it was put to him, he banged her windscreen and shouted at her and her children and that on 29 September 2003 when his car was passing hers he gave her "the fingers." Mrs B said that she had contacted the police after the incidents. The complainant said that he had not been approached by the police yet there was evidence that he told an uncle by marriage that she had been to the police and accused him of harassing her. It would appear that she may have given exaggerated evidence about a number of incidents but we are of the opinion that there was probably some truth in what she alleged.

These matters were within the province of the jury and in any event we do not think that they have any bearing on his credibility in relation to the allegations which are the subject-matter of the convictions.

[28] We wish to pay tribute to the careful presentation of the applicant's case by Mr Fee QC and to the assistance which we received from Mr Hunter QC for the Crown.

[29] We have examined in detail each of the verdicts. We have read and re-read the transcript of the evidence. We have now to ask ourselves whether the verdicts are safe. We apply the test set by the Lord Chief Justice in The Queen v Pollock [2004] NICA 34. At paras. [24] to [31] he discussed the principles to be applied. At para. [32] he stated:

> "The following principles may be distilled from these materials:
>
> 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."

This court, having considered the evidence does not have a significant sense of unease about the correctness of the verdicts of the jury.

Accordingly the application for leave to appeal against conviction is dismissed.