Neutral Citation no. [2008] NICA 31 | *Ref:* **KER7182**

Judgment: approved by the Court for handing down | *Delivered:* **30/5/08**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

THE QUEEN

v

CK

Before Kerr LCJ, Girvan LJ and Coghlin J

KERR LCJ

[1] Judgment in this matter was delivered on 21 May. Leave to appeal against his convictions was granted to the applicant; the application for leave was treated as the appeal and the convictions were quashed. We then heard argument on whether a retrial should take place and reserved our decision on that issue.

[2] We have concluded that a retrial should be ordered. Mr Dermot Fee QC argued on behalf of the appellant that it would be unfair that he should face trial on these charges for a third time, the jury having failed to agree on the first trial and the convictions on the second trial having been quashed by reason of the exclusion of evidence which this court concluded should have been admitted. We do not consider, however, that any particular unfairness to the appellant has been demonstrated.

[3] The case of *R v Henworth* [2001] 2 Cr.App.R. 4 is instructive in this area. In that case the appellant had been convicted in July 1996. In February 1998 that conviction was set aside by the Court of Appeal. In July 1998 a retrial took place which resulted in the jury being unable to agree. In July 1999 a second retrial began. The appellant dispensed with the services of counsel and conducted his own defence. Owing to difficulties in the conduct of his

defence the jury was discharged. A further retrial started in September 1999 and the appellant was convicted. He appealed against conviction on the grounds that the well-known convention, that if a jury had disagreed on two occasions the prosecution would not seek a further trial, should apply to the different circumstances of this case where the jury on the first occasion convicted. The Court of Appeal in England and Wales, dismissing the appeal, held that the rationale of the convention, which was not to be elevated into a proposition of law, was that the Crown should only proceed against any given defendant if they considered there were real prospects of obtaining a conviction from a jury, so that if two juries had disagreed when presented with substantially the same evidence inevitably the Crown had to think carefully about its position; but that, when a serious crime had been committed and it was shown that there was a case to answer as far as a defendant was concerned, there was a clear public interest in having a jury decide positively, one way or the other, whether that case was established. In any given case the time might come when it would be an abuse of process for the prosecution to try again but whether that situation arose had to depend on the facts of the particular case.

[4] We consider that the same considerations apply in this instance. The offences of which the appellant was convicted are extremely serious. The convictions were quashed on the ground that the appellant should have been permitted to adduce evidence which he sought to have introduced and, in the case of one count, that the verdict of the jury was logically inconsistent with its failure to agree on associated counts. An argument that the evidence called by the prosecution was insufficient to support the verdicts was rejected. Likewise, the argument that there was a reasonable doubt as to the safety of the verdicts was dismissed, save in respect of the logical inconsistency earlier referred to. This court did not accept that there was anything intrinsically unbelievable in the complainant's account.

[5] On the retrial the judge will have to consider whether the standard direction prescribed in the Judicial Studies Board Bench Book that the jury should be directed to consider each of the counts separately and come to a decision in respect of each will be sufficient to reflect the circumstances of this particular case. We recognise that an argument may be made that the circumstances of an individual case may make it appropriate for the trial judge to give further assistance to the jury in relation to the question of the evidential connection between the various counts charged. For example, if a jury were to conclude that a complainant had given false evidence in relation to some one or more of the counts, it *may be* considered that this is a matter to be taken into account in the jury's consideration of the credibility of the complainant's evidence in relation to other counts.

[6] Great care requires to be taken in the framing of such a direction, however, if it is deemed to be necessary by the trial judge. It must be recognised that

warning a jury of the need for care about the overall credibility of the complainant where they are not satisfied of the veracity of her evidence in support of a particular count, carries the risk of unwarrantably undermining a witness's credibility. Witnesses exaggerate or embroider for all manner of reasons. Because their truthfulness on one matter is to be doubted it does not automatically follow that they must be regarded as untrustworthy in relation to others. On the whole juries are well equipped to make the sort of deduction that is required in relation to such issues without over elaborate warnings and one must be careful to guard against the danger that the jury will be too ready to reject all the evidence because they have been warned by the judge to be careful before accepting the injured party's evidence on any of the charges where they are unconvinced by or entertain doubts about her evidence on one count.

[7] As was pointed out in *R v G* [1998] Crim LR 483, the fact that a complainant is not believed on one count does not automatically mean that she is to be disbelieved on another. In *R v Bell* [1997] EWCA Crim 1200 Rose LJ said: -

> "There have recently been a number of appeals to this court based on allegedly inconsistent verdicts, and it is perhaps therefore worth emphasising that it is axiomatic that, generally speaking, logical inconsistency is an essential prerequisite for success on this ground: see *Durante* 56 Cr App Rep 708.
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> … there are, of course, exceptional cases, of which *Cilgram* [1994] Crim LR 861 provides an example, where a verdict may be quashed because, although there is no logical inconsistency, the particular facts and circumstances of the case render the verdict unsafe. However, it is to be noted that in *Cilgram* this Court, differently constituted, expressly rejected the submission that, where a complainant's credibility is in issue and her evidence is uncorroborated, guilty verdicts must be regarded as unsafe because the jury also returned not guilty verdicts in relation to some of the complainant's allegations."

[8] In *R v G* Buxton LJ also took up this theme where he said: -

> "A person's credibility, any more than their reliability, is not necessarily a seamless robe. The jury has to consider, as the jury in this case was rightly told, each count separately. It may well take a different view of the evidence as to its reliability in one case rather than

> the other. Further, it is in our view too simplistic to make the stark distinction between credibility and reliability that was sought to be made in the argument before us. What the jury has to decide is whether on all the matters put before if it is satisfied so that it is sure of the particular matter that was alleged under each count.
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> …
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> In our judgment it does not follow as a matter of logic, any more than in the judgment of the court in *Bell* it followed as a matter of logic, that, even where credibility is in issue and evidence is uncorroborated, guilty verdicts must be regarded as unsafe because the jury also returned not guilty verdicts in relation to some of the complainant's allegations."

[9] In neither of these cases was it suggested that the jury required to be directed that, if they entertained a doubt about the truthfulness of the complainant on one count, they must bring that to bear in their consideration of her veracity in relation to other counts. But this must be a matter for particular consideration by the trial judge in each case who will be, as we said in *R v X* [2006] NICA 1 albeit in a different context, "best placed to assess whether the flow of the evidence, the firmness of the complainant's testimony, the quality of the defence proffered and a myriad of other aspects of the trial dictate the need for a warning".

[10] The observation in *R v X* was made in relation to whether a warning such as was discussed in *R v Makanjuola* [1995] 1 WLR 1348 concerning the need for caution in convicting on the uncorroborated evidence of a complainant was necessary. It was not argued in the present case either before the trial judge or on appeal that such a warning should have been given. We believe, however, that this is a matter that would require careful consideration on the retrial.