Neutral Citation no. [2008] NICA 24 | *Ref:* **KER7172**

Judgment: approved by the Court for handing down | *Delivered:* **21/05/2008**
*(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

Introduction

[1] As this application for leave to appeal involves alleged sexual abuse of a female when she was a minor, nothing should be reported about the appeal or the proceedings in the Crown Court that would tend to identify the victim. This requires that the identity of the complainant and the applicant should not be revealed. It is also necessary that there should be no reference to the names of various persons who gave evidence at the trial who are connected with either of them, whether as relatives or otherwise. Throughout this judgment the complainant will be referred to as 'A', the applicant as 'CK' and other personalities by appropriate acronyms.

[2] The applicant applies for leave to appeal against his conviction of three offences of sexual abuse of the complainant. She is the daughter of his wife's sister. He had been charged on an indictment containing ten counts. These counts, the verdicts reached by the jury on each of them and the sentences imposed are set out in the following table: -

Count	Charge	Verdict & Sentence
1	Indecently assaulting 'A' on a date between 7/3/90 – 1/4/93	Unable to reach verdict
2	Indecently assaulting 'A' on a date between 7/3/91 – 12/2/00	Guilty (Majority 11-1) 3 months imprisonment (consecutive)
3	Gross indecency with or towards 'A' on a date between 7/3/91 – 12/2/00	Unable to reach verdict
4	Gross indecency with or towards 'A' on a date between 7/3/91 – 12/2/00	Unable to reach verdict
5	Gross indecency with or towards 'A' on a date between 7/3/91 – 12/2/00	Unable to reach verdict
6	Raping 'A' on a date between 1/1/97 – 1/4/00	Guilty (Majority 10-2) 8 years imprisonment (consecutive)
7	Indecently assaulting 'A' on a date between 1/1/99 – 31/12/01	Not Guilty
8	Raping 'A' on a date between 7/3/91 – 31/12/03	Unable to reach verdict
9	Indecently assaulting 'A' on a date between 1/1/01 – 22/1/04	Guilty 6 months imprisonment (consecutive)
10	Gross indecency with or towards 'A' on a date between 7/3/99 – 22/1/04	Unable to reach verdict

Background

[3] The first count concerned an incident that was alleged to have occurred when A was approximately four years old. She claimed that she had been at the back step of the utility room of the applicant's house when he placed his

hand inside her clothing. She stated that this had been witnessed by her two cousins, N and J. They gave evidence that either they did not see it happen or that they could not remember it happening.

[4] The offence in the second count was alleged to have taken place in the pigeon shed. The complainant said that, on a number of occasions in the shed, CK would pull her towards him in order to have her fellate him. The forced fellatio itself was the subject of counts 3, 4 and 5. The indecent assault charged in count 2 related to the drawing of the child towards the applicant, preparatory to the act of oral sex. As noted above, a majority verdict convicting the applicant on this count was returned although the jury was unable to agree a verdict on each of the counts involving the gross indecency that was alleged to have occurred in consequence of the indecent assault.

[5] The offence of rape alleged in the sixth count was claimed by A to have happened during a fishing trip with the applicant and his two sons. She was aged about 10 or 11 years old at the time. She gave evidence that the applicant took her off to a forested area (this was somewhat different from her account to police in her interview, where she said he took her to a field). She said that he put clothing on the ground, took off his trousers and shoes and told her to be quiet. He then, in her words, "had sex with her". When questioned about the exact nature of his having sex with her she described that he had inserted his penis in "the place she uses to pee". It was claimed that this statement was coaxed from the complainant and that earlier indications given by her that the applicant had placed his penis "around" her genital area fell short of establishing that there was penetration. We shall deal with this argument presently.

[6] Giving evidence about fishing trips that he went on with the applicant, A's cousin N (CK's son) said that he could not remember the injured party being on any of their fishing trips. N's brother, J, said that he could remember A being present on a fishing trip but could not recall anything unusual happening. It was suggested that CK was extremely careful not to leave his sons alone near the water on fishing trips; it was not credible therefore that he would have taken A away from the boys as she had alleged.

[7] The incident which was the subject of count 7, indecent assault, was alleged to have occurred on Christmas Day when A was 13 years old. She said that the applicant came up to her bedroom to see her presents and told her cousin N, his son, who was present at the time, to fetch a glass of water. The injured party claimed that the applicant then put his hand inside her trousers. N could not remember going for a glass of water, and J gave evidence that at no time were the applicant and the injured party alone in the bedroom.

[8] The second allegation of rape forms the basis for count 8. The complainant alleged that when she was about 13 years old she stayed over in the applicant's house. In the early morning he came to her room. She said that he wakened her by tickling her face. He then took off his trousers and her pyjamas and, in her words, "put his dick in round her, making her feel all sick." She claimed that when she threatened to shout out, he told her that her aunt was away from the house at work, that it would be over soon and that her cousins would be upset if she shouted out.

[9] Count 9 related to another offence of indecent assault which was alleged to have happened in the applicant's home when the injured party was aged about 14. The applicant brought her up from the boat on her own to get lunch. He grabbed her and tried to get on top of her, but she drew back and kicked him in the groin.

[10] Count 10 was another offence of gross indecency. The injured party claimed that she was on the applicant's boat when it was being refurbished. The applicant and she were in the cabin. The injured party claimed that the applicant was standing upright, opened the zip of his trousers and made her perform oral sex on him. She claimed that this was witnessed by her cousin N, but he gave evidence that while he saw the two of them on the boat, nothing inappropriate happened.

[11] There was no corroboration of the injured party's evidence and the applicant denied all the allegations.

The trial

[12] The applicant was first tried on these counts in a trial before His Honour Judge Markey QC and a jury in a trial that began on 4 April 2006. The jury in that trial failed to agree on a verdict on any of the counts. A new trial before Her Honour Judge Loughran and a jury started on 21 March 2007. The verdicts outlined above were returned on 30 March. The applicant was sentenced on 4 May 2007.

[13] In the course of the trial in March 2007 the complainant was cross examined extensively on matters relating to her credit. This cross examination ranged over many subjects including familial disputes, disciplinary matters at school, damage to a witness's property and a false rumour that the complainant was accused of propagating to the effect that she had been beaten up by a boyfriend (whom we shall refer to as S).

[14] The learned trial judge was naturally concerned about the duration and nature of the cross examination. We consider that she was right to be concerned. The cross examination was protracted and took place over a number of court sessions. Many essentially peripheral matters were dealt

with at great length. It is, in our view, the duty of cross examining counsel to ensure that topics are dealt with in as economical and focused a manner as is possible, consistent with the full exploration of issues relevant to an accused's defence. This duty arises with particular importance in a case such as the present. Judges should be ready to intervene to curtail unnecessarily long or imprecise questioning of witnesses, especially vulnerable witnesses who give evidence, as did A, in special measures conditions.

[15] At a relatively early stage in the trial during the cross examination of A Mr Dermot Fee QC, (who appeared with Mr Ronan Lavery for the defendant on the trial and on this application), signalled his intention to cross examine the complainant about matters relating to her relationship with S. The judge ruled that Mr Fee be permitted to ask an 'open question' of A about her relationship with S but urged caution. A limited exchange between counsel for the defendant and the injured party then took place.

[16] The issue was raised for a second time, in the absence of the jury, just before the end of defence cross-examination of the injured party. The judge initially said that she would allow cross-examination on the issue so long as S would be giving evidence to support the suggestions that were to be made to A. There was discussion about whether S would appear as a witness on the trial. It had been anticipated that he would have given evidence on the first trial but had failed to do so. A decision on whether this cross examination should be permitted was therefore deferred until it became clear that S would in fact be prepared to testify. It was agreed that, if he did, the injured party could be re-called to be cross examined on the issue of her having made untrue allegations about beating her up.

[16] The issue was finally raised for a third time by Mr Fee after the defendant had completed his evidence. During his submissions to the judge there was some debate as to exactly who could say what about the rumour that S had beaten the injured party. The trial judge expressed the view that S could only say there was a rumour and that this would constitute hearsay evidence. This gave rise to an issue as to whether A had told S's mother directly that he had beaten her, along with various other lies regarding her life in general. The possibility that the mother of S also being called was then mooted whereupon the prosecution indicated that, in the event that this occurred, they would apply to call A's mother who claimed to have been present at the time when A was said to have made the allegation directly to S's mother.

[17] For perfectly understandable reasons, the trial judge was perturbed at the effect that this proliferation of evidence would have on the conduct of the trial. She observed, entirely correctly, that the issue was in any event one of 'bad character' and therefore an application would have to be made to the court to allow it to be adduced. Counsel for the defendant, therefore, made an oral – and admittedly late – application to be permitted to cross examine A

on these issues. The judge gave an *ex tempore* ruling on this application in the following terms: -

> "… I have allowed Mr. Fee to make a bad character application out of time, so I emphasise what I am considering is the substance of the bad character application. The test that I have to apply is the test that the evidence that is to be admitted, is to have substantial probative value in relation to a matter which is of substantial importance in the context of the case as a whole.
>
> Now, I accept unreservedly that the credibility of the complainant is of substantial importance in the context of the case as a whole. The question I have got to focus on, therefore, is, does this evidence which it is proposed to lead, have substantive probative value in the context of her credibility. I have also said, I think on a previous occasion, that I have allowed a significant degree of latitude to the defence, to test the credibility of the complainant, and I have done that without requiring a bad character application, as I might well have done, for example, in respect of her alleged lies to the police when she reported her father, and possibly her mother … her failure, as she's accepted, to admit that she'd been involved in telephoning the teacher at school … As I have just read out, she has in fact accepted that there was a rumour circulating, and it has been put to her about an allegation made by her that S had attacked her …
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> Now, the additional matter[s] that [are] sought to [be] put to her, are that she said that she had trashed the house, that she then said that she had broken windows at the house on New Years Eve, and that she had slashed her wrists, that she had left home at 14 and didn't return home until 16, and that she did drugs in Antrim.
>
> I have concluded that those matters are not of substantial probative value in respect of the credibility of the complainant, and I am not going to allow them to be put, therefore."

[18] A subsidiary issue arose as to the admissibility of a message said to have been posted by the complainant on what is known as BEBO, an interactive social networking site on the internet. The message contained an account allegedly given by A of her having deceived a friend that she had been involved in a road traffic accident. The message referred to its author having done this as a prank. The learned trial judge ruled that since this was plainly a practical joke it did not have substantial probative value and she did not permit cross examination on it.

The application for leave to appeal

[19] Mr Fee advanced three principal submissions. He contended firstly that there was not sufficient material on which the jury could convict on any of the three counts on which the applicant was found guilty. His second submission was that this court should entertain a sense of unease about the safety of the verdicts, in light principally of the unsatisfactory nature of the complainant's evidence but also because of the logical inconsistency of the guilty verdicts with the jury's failure to agree on other counts. Finally, Mr Fee submitted that the judge was wrong to refuse to permit cross examination of the matters outlined in her ruling and in relation to the BEBO message or to allow evidence to be given on these matters on behalf of the applicant.

[20] In relation to the first of these submissions, Mr Fee pointed out that A had not alleged that being drawn towards the applicant involved him touching her indecently. There was nothing to support a charge of indecent assault, therefore. In relation to the conviction for rape, counsel argued that there was no evidence that the applicant had penetrated the complainant. As to the conviction of count 9, the only evidence was that the applicant had attempted to get on top of A – again, said Mr Fee, there was nothing to suggest that this involved indecent touching.

[21] On the second argument, counsel referred to what he described as a number of glaring inconsistencies in A's evidence such as whether she was taken to a forested area or a field when the alleged rape took place. He also produced photographs which, he said, demonstrated that it would be impossible for the applicant to stand upright in the cabin of the boat, as alleged by A, when the gross indecency that was the subject of the tenth count took place. Although the applicant had not been convicted of this charge, Mr Fee submitted that A's mendacity was established by an analysis of her evidence on this topic and that this should raise a doubt as to the safety of the convictions generally. Counsel also referred in this context to what he claimed was the injured party's refusal to undergo a medical examination. This might have revealed damage to her genital area if her allegations were true. Her rejection of the offer of an examination raised doubts, he claimed, as to the truthfulness of those allegations.

[22] Mr Fee identified the final submission as being the principal argument on the application. The matters on which he had sought to cross examine the complainant sounded directly, he claimed, on the case that the applicant wished to advance that A was a fantasist. By being unable to introduce this material a significant element of the applicant's defence was obliterated.

The sufficiency of the evidence

[23] The ingredients of the offence of indecent assault were extensively and authoritatively discussed in *R v Court* [1989] AC 28. At pages 46/7 Lord Ackner summarised these as follows: -

> "On a charge of indecent assault the prosecution must prove: (1) that the accused intentionally assaulted the victim; (2) that the assault, or the assault and the circumstances accompanying it, are capable of being considered by right-minded persons as indecent; (3) that the accused intended to commit such an assault as is referred to in (2) above."

[24] We are satisfied that the circumstances accompanying the alleged assault (*i.e.* the touching of the child while pulling her to a position to perform oral sex) would constitute an indecent assault. The drawing of the complainant towards him by the applicant would have been directly connected to the fellatio that was to occur. The purpose of bringing her to the position where this was to take place would obviously have been indecent.

[25] We can find no merit whatever in the suggestion that there was not sufficient evidence of penetration to support the charge of rape. There are lengthy passages of cross examination of A by Mr Fee in which her understanding of what is meant by sexual intercourse was explored. There can be no doubt that, at the time that she was giving evidence on the trial, she knew exactly what was involved – she was then in a sexual relationship. Although she was understandably reticent about giving details of the actual mechanics of what she said had been done to her when she made the videotape that was used as her direct evidence, this did not apply when she was cross examined. At that point she was unambiguous in her assertion that the applicant had penetrated her. It is unsurprising that no application for a direction was made to the trial judge on this, or indeed any of the arguments concerning the adequacy of the evidence to support the charges. The only matter for surprise is that this issue was canvassed on the application for leave to appeal.

[26] Largely for the reasons that we have given in relation to count 2, we reject the argument that there was not sufficient evidence to support the indecent

assault offence charged in count 9. Touching the injured party in an attempt to get on top of her for plainly sexual purposes would unquestionably qualify as an indecent assault, in our opinion.

The lurking doubt argument

[27] Mr Fee took us through several items of the complainant's evidence on which, he claimed, her inconsistency and even her untruthfulness had been established. These included the time at which the alleged abuse had begun, the number of times that she had gone fishing with the applicant and his sons, differences in her evidence about various dates, conflicting accounts of family disputes etc. We have considered all of these carefully but do not find it necessary to examine each of them in any degree of detail. We are satisfied that such differences as Mr Fee was able to demonstrate in the accounts that the injured party gave are inconsequential. It is to be remembered that she admitted lying about various matters that were extraneous to the present proceedings. She did not display the characteristics of someone who clings remorselessly to a patently implausible story. Moreover, one must keep in mind that the offences that she purported to describe, if they occurred, took place over quite a long period, in many instances they had happened a long time ago and she was very young during many of these events. In these circumstances, inconsistency is to be expected. A fine parsing of evidence, such as was conducted by Mr Fee, does not necessarily hold the key to a confident conclusion as to the essential truth of the complainant's story.

[28] In *R v Pollock* [2004] NICA 34, this court discussed how the test of whether a conviction is unsafe under section 2(1) of the Criminal Appeal (Northern Ireland) Act 1980 should be applied. At paragraph 32 the following principles were outlined: -

> "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.
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> 3.The court should eschew speculation as to what may have influenced the jury to its verdict.
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> 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."

[29] On the basis of the analysis of the injured party's evidence that Mr Fee conducted, and following the approach outlined in *Pollock*, we would not be prepared to say that the verdicts are unsafe. We have considered the safety of the conviction of the offence of indecent assault charged in count 2 in a somewhat wider context, however. As we have said, this charge was based on A's evidence that the applicant had pulled her towards him in order to require her to fellate him. But the jury failed to agree on a verdict on each of the gross indecency charges that were directly connected with the allegations of forced oral sex. The question arises, therefore, whether there is a logical inconsistency between the finding of guilt on the indecent assault charge when the jury has been unable to agree on the associated charges of gross indecency.

[30] In *R v X* [2006] NICA 1 the question of inconsistent verdicts was considered. This court referred to the judgment of Buxton LJ in *R v G* [1998] Crim LR 483 in which he had cited with approval the following passage from the case of *Clarke and Fletcher*, where Hutchison LJ said: -

> "We approach the present case on the basis that it is for the appellant to show (1) that the verdicts are logically inconsistent and (2) that they cannot be sensibly explained in a way which means that the conviction is not unsafe. Thus an appellate court will not conclude that the verdict of guilty is unsafe if, notwithstanding that it is logically inconsistent with another verdict, it is possible to postulate a legitimate train of reasoning which could sensibly account for the inconsistency."

[31] In *X* we held that a logical inconsistency had not been demonstrated simply because a case could be made that the jury had apparently not believed the complainant in respect of some charges but had accepted it in support of other counts. Here, however, the situation is different. The indecent assault alleged is inextricably related to the gross indecency charges and we find it impossible to understand why the jury could find the applicant guilty of indecent assault consisting of his drawing the complainant to him for her to perform oral sex on him when they failed to be convinced that she had been required to do so. On that basis we consider that the verdict on the second count must be regarded as unsafe.

The refusal to allow cross examination and the calling of witnesses

[32] We can deal with the argument about the BEBO website briefly. Having considered the content of the message that the injured party is alleged to have posted, we are entirely satisfied that this recounted a trick that she had sought to play on a friend. There is nothing in the text to suggest that she wished to perpetrate a false story for an indefinite time. In fact, she boasted of her own prank in the message. At best, the only propensity that the message illustrated was of a penchant for rather silly practical jokes. We agree entirely with the learned trial judge's conclusion that this did not display an inclination to manufacture malicious falsehoods. Like her, we do not consider that this had any probative value on the issue of whether the complainant had concocted her allegations against the applicant.

[33] Article 5 of the Criminal Justice (Northern Ireland) Order 2004 deals with the circumstances in which evidence of the bad character of a witness other than the defendant may be given. In so far as is material, it provides: -

> "*Non-defendant's bad character*
>
> 5. - (1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if-
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> …
>
> (b) it has substantial probative value in relation to a matter which-
>
> (i) is a matter in issue in the proceedings, and
> (ii) is of substantial importance in the context of the case as a whole …
>
> …
>
> (3) In assessing the probative value of evidence for the purposes of paragraph (1)(b) the court must have regard to the following factors (and to any others it considers relevant)-
>
> (a) the nature and number of the events, or other things, to which the evidence relates;

(b) when those events or things are alleged to have happened or existed;

(c) where-

(i) the evidence is evidence of a person's misconduct, and
(ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,

the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct …"

[34] In paragraph 13-16 of *Archbold Criminal Pleading and Practice*, the following commentary on the equivalent provision in England and Wales appears: -

"… the credit-worthiness of a witness is to be regarded as a matter in issue in the proceedings for the purposes of section 100(1) (b) . If the judge concludes that it is of substantial importance in the context of the case as whole and that the bad character evidence has substantial probative value in relation to this issue, then such evidence is admissible. In *R. v. Sweet-Escott,* 55 Cr.App.R. 316 , Assizes, Lawton J. stated that the test to be applied was whether or not the matter which it was sought to put to the witness would affect his likely standing with the tribunal of fact. This test was approved by the Court of Appeal in *R. v. Funderburk*, 90 Cr.App.R. 466, and it seems probable that the Court of Appeal will equate it to the requirement that the bad character evidence should have substantial probative value."

[35] The net issue in the present case is whether the evidence that the applicant sought to introduce would, if credible, have had substantial probative value. In this context, it appears to us that the provisions of article 5 (3) (c) are most relevant. In effect the applicant alleges that the complainant has manufactured a wholly lying case against him. If a believable case could be made that she had fabricated a wholly fictitious account on other occasions, it seems to us that evidence to support such a case must be regarded as having at least the potential to be substantially probative of the

defence that the applicant wished to promote. It would also, in the words of Lawton J in *Sweet-Escott*, be likely to affect the complainant's standing with the tribunal of fact, in this case the jury.

[36] It must be borne in mind that there was at least an element of discretion in the judgment that the learned trial judge had to make in evaluating the probative value of the evidence that the applicant wished to adduce on this issue. We acknowledge that a trial judge is usually best placed to make this type of decision by dint of her familiarity with not only the content of the evidence but also the manner in which it has been given. But we must also keep in mind that our duty is to ask ourselves whether we think that the verdicts are unsafe, having reviewed all the issues that surround the question whether this evidence should be admitted.

[37] We can understand and sympathise with the reluctance of the judge to permit the evidence to be called at the juncture at which the application to introduce it was made. The trial was nearing its end and a whole raft of issues would potentially have to be investigated, not to speak of the number of witnesses who might be required to deal comprehensively with them. Having considered the matter anxiously, however, we have come to the conclusion that it is impossible to say that this evidence was not of substantial probative value.

Conclusions

[38] We grant leave to appeal, treat the application for leave as the appeal against the convictions, allow the appeal and quash the convictions. We will hear counsel on the question whether there should be a re-trial.