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Judgment: approved by the Court for handing down | *Delivered:* **25/06/2013**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

CYRIL WARNOCK

Before: Morgan LCJ, Higgins LJ and Gillen J

MORGAN LCJ

[1] The appellant appeals his convictions on three counts of indecent assault of a female child contrary to Section 52 of the Offences against the Person Act 1861 between 1993 and 1996 and an attempted indecent assault on a female child between 1993 and 1995. He was sentenced by His Honour Judge Lynch QC to a Custody Probation Order of 3 years imprisonment followed by 18 months' probation. He is not appealing his sentence. Mr Barlow appeared for the appellant and Mr Steer for the prosecution. We are grateful to both counsel for their helpful oral and written submissions.

Background

[2] The families of the complainant and the appellant were friendly. The complainant was friendly with the appellant's son W. There was no dispute about the fact that, between the ages of 8 and 10, the complainant stayed over on some Saturday nights at the appellant's house. She would usually go over at around 6 p.m. and watch TV with W and they would be put to bed at around 9 or 9.30 p.m. When this happened she slept in the same room as the appellant's sons, W and N. The appellant's partner was the only other adult in the house. The appellant would usually be out at a football club until closing time.

[3] The complainant's evidence in relation to all four counts involved the appellant coming in to the boys' room late at night either naked or semi-naked, reaching for her and, in relation to the three counts of indecent assault, digitally penetrating her vagina. In evidence relating to the first two counts, she said that she shared a single bed with W. Later the boys had bunk beds. Her evidence in relation to the third count, the attempted assault, was that she was sharing the top bunk with N and was in the inside by the wall. As regards the fourth count, the complainant said she was at the outside of the lower bunk sharing with W. Her evidence included various other details about the incidents. Her evidence also included accounts of having told the other witnesses about the incidents, including W in 2005 and 2006. He did not want to believe it.

[4] There were a number of matters upon which the defence relied to seek to undermine her evidence. The complainant initially spoke to police of insertion of fingers plural. She explained this as her perception as a child. The complainant gave less detail to police in respect of the first incident than she mentioned in court. The complainant accepted there was no reference in her ABE interview to having spoken to W in 2005 although she had mentioned the 2006 conversation. The complainant accepted she said in the ABE interview that she did not know whether the appellant was naked during the second incident but said she did not know why she did not say that he was naked, as that was her memory at the time. The detail that she was sleeping top to tail with N at the time of the third incident was omitted from the ABE interview. Finally it was suggested to her that her motivation for the allegations was the discovery of an affair between her mother and the appellant whereas the complainant said that her decision to pursue this was as a result of seeing the appellant hold her son.

[5] LL was a friend of the complainant. At the time of the trial she was 25. She gave evidence of two occasions when the complainant talked about what had happened. The first was when this witness was probably 14 or 15 years old, around 2001/2002. She was in the complainant's bedroom and the complainant told her what happened. The second was on 27 September 2009 when they were in a club and the complainant told her that she had been thinking of doing something about the incidents since her son had been born and also spoke of her mother's reaction when she had told her of the incidents.

[6] The complainant's father had been a friend of the appellant for 25 years or so. He gave evidence of having been told on 28 September 2009 by the complainant of the incidents. Subsequently, on 11 October 2009 he went to the appellant's house. He stated that when he put the allegation to the appellant, the appellant put his hands on his head and said "I'm sorry". When the complainant's father said that he could beat him up for that the appellant responded "I couldn't blame you". He also said that he had noticed that when the appellant came around to the house the complainant would leave the room and that she had said once or twice, around the time of the incidents, that she did not want to go to stay at his house.

[7] The complainant's mother said that she first heard of the incidents on 28 September 2009 when she was standing at the bottom of the stairs, overhearing her daughter tell her husband about them. That was inconsistent with the evidence of LL that on the previous evening the complainant had told her of her mother's reaction when she told her.

[8] The appellant denied the allegations. He accepted that the complainant sometimes stayed over at his house as set out at paragraph 2 above. He also accepted that it was his practice when he came home on a Saturday to call into the boys' room to speak to them and he often did this even when they were asleep. He disputed the complainant's father's account of his reaction to the allegations on 11 October 2009 although he accepted that the father called and told him that he did not want him to have anything to do with his family. The appellant claimed he had had an affair with the complainant's mother but this was denied by her. It was inferred that this had motivated the complaint, but in cross-examination he was challenged about the lack of certainty over the date of this affair, placing it possibly after the period when the complainant had first spoken of the incidents. He had no previous convictions.

The issues

[9] It was submitted that the complainant's father's evidence that (a) the complainant said she did not want to stay at the appellant's house; and (b) that when the appellant visited, his daughter would leave the room, was evidence of demeanour and was not admissible in the circumstances of the case. Since it was included the appellant contended that the judge should have directed the jury as to the significance to attach to it. The complainant gave evidence that she made excuses not to go to the appellant's home in order to avoid being exposed to the appellant. That evidence was material to the issue of the frequency of the complainant's visits and would also have been admissible to rebut recent invention. She did not give evidence about leaving the room when the appellant visited.

[10] The admissibility of evidence of demeanour was considered by this court in R v Paul Hughes [2008] NICA 17. The court approved the observation of Potter LJ in R v Venn [2003] EWCA Crim 236 about the admissibility of such evidence:

> "it may properly be afforded weight if the complainant is unaware of being observed, and if the distress is exhibited at the time of, or shortly after, the offence itself, in circumstances which appear to implicate the accused."

The admissibility of evidence of demeanour displayed at some remove from the events alleged was considered in R v Keast [1998] Crim LR 748. That was a case in which a child of eleven who was alleged to have been sexually abused by her step father had become withdrawn and anxious and was avoiding eye contact and on

occasions was incontinent during the period covered by her complaints. After she had unburdened herself about what had occurred she was said to have become normal and much happier. The learned trial judge warned the jury that the evidence could not assist on who was telling the truth. In the Court of Appeal Beldam LJ said:

> "To allow such evidence to be given merely because it is said that it could show consistency or inconsistency with the complainant's account obscures the fact that, unless there is some concrete basis for regarding the demeanour and states of mind described by the witnesses as confirming or disproving that sexual abuse has occurred, it cannot assist a jury bringing their common-sense to bear on who is telling the truth."

[11] In our view the evidence about the occasions on which the complainant visited the appellant's home was clearly admissible on the substantive allegations. Her reasons for not attending more often helped to identify the period of the alleged offending and the gaps between the incidents. We accept however that this was also evidence of demeanour. We also accept that the evidence given by the father that the complainant left the room when the appellant visited was evidence of demeanour. Although both pieces of evidence were mentioned by the learned trial judge in his charge he did not give any specific direction as to how the jury should deal with the evidence.

[12] In R v Paul Hughes [2008] NICA 17 Campbell LJ indicated at paragraph 18 that before evidence of demeanour was admitted it was necessary to establish a link between the behaviour exhibited and the abuse alleged. It was accepted that no such link was established in this case and that accordingly a clear direction should have been given that the evidence about the complainant's demeanour did not confirm what the complainant said happened to her. Indeed in this case the evidence of demeanour was equally consistent with the appellant's allegation that these complaints had been made because of his alleged affair with the complainant's mother.

[13] Although he accepted that a direction should have been given advising the jury that the demeanour evidence did not assist the prosecution case Mr Steer submitted that the absence of the direction in this case did not render the conviction unsafe. First he pointed out that the learned trial judge advised the jury that because the complainant was young at the time of the alleged offences and there had been a delay of approximately 18 years by the time of trial the jury should look for supporting evidence. He identified the evidence of complaint and the alleged confession as the two pieces of supporting evidence available to the prosecution and then advised the jury that the complaint evidence could not be supportive because it came from the complainant and was not independent.

[14] That direction had two consequences in this case. First by implication it excluded the evidence of demeanour as being supporting evidence that the jury could take into account. Secondly since the evidence of demeanour, like the evidence of complaint, came from the complainant it could not be independent. The risk in this case was the possibility that the jury would use the material as supporting evidence. The direction on supporting evidence steered the jury away from that possibility for those two reasons.

[15] The second point made by Mr Steer was that this case was clearly distinguishable from Venn and Keast. In those cases there had been detailed evidence about the long term behavioural change of each of the complainants which was in part advanced as a basis for concluding that the complainant's account should be believed. In this case the evidence was no more than a passing remark by the father and was mentioned without comment in passing in the judge's charge.

[16] In our view Mr Steer's submissions on this issue are correct. This case is quite different from Venn and Keast in the nature of the demeanour evidence introduced. We also accept that the direction in relation to supporting evidence supports the safety of the conviction on this point. The absence of a direction on the demeanour of the complainant did not render the conviction unsafe.

[17] Although Mr Barlow relied principally on the demeanour point in his attack on the conviction he put forward a number of additional points in support. The appellant criticised the delay direction. It was accepted that the learned trial judge drew to the jury's attention the difficulty faced by the appellant in answering an allegation at such a remove with no identifiable date of alleged commission. He reminded the jury that if the matter had been reported at the time there would have been forensic investigation. He noted the young age of the complainant at the time of the alleged offences and advised the jury to treat her evidence with care. He noted the effect of the passage of time on memory. The criticism is that he told the jury that they may take these matters into account in favour of the defendant rather than telling them that they should do so if they considered that he was disadvantaged. In the context of the delay charge as a whole we consider that the criticism is not made out. As Mr Barlow submitted the object of the delay direction in historic sex cases is to provide effective protection for the accused facing events alleged to have occurred many years beforehand and to ensure that the jury are instructed that the burden and standard of proof remains at the same high level despite the passage of time. The learned trial judge expressly reminded the jury of the latter point. A failure to follow the detailed guidance of the Bench Book will not render a charge on that account alone defective. This charge was adequate for the required purpose.

[18] The appellant criticised the good character direction which was given in the following terms.

> "The accused has a clear record, no criminal convictions. What is the relevance of that, how do you factor that into the equation of guilt or innocence? Well the fact that Mr Warnock appears before you with a good character has two possible effects, the first is that by virtue of the fact that he has a clear record makes him a more credible witness, more likely to be telling you the truth you may think. It is not determinative, it doesn't mean he is telling the truth, but it is a factor you should take into account in his favour when you come to consider his evidence in the case. The second matter is that having reached the age of 63 years without any criminal convictions you may feel it makes it less likely that he would commit a criminal offence, particularly the type of sexual assault which is alleged against him because there is no conviction of sexual assault prior to this or subsequent to this. That's a factor you may take into account in thinking it is less likely that a man of this type would commit the offences with which he is charged. Again, it is not determinative, but it is a factor you should take into account in his favour when considering the evidence in this case are considering verdict."

[19] The criticism in this case is that the judge did not give the enhanced good character direction set out by this court in R v Paul Hughes [2008] NICA 17. We have previously considered this point in R v JSK [2011] NICA 44 at paragraph 17.

> "In our view the enhanced direction referred to in Hughes requires no more than that the jury should be aware that the accused was of good character both before and after the offending, that the jury are advised in the standard terms about the effect of good character and that the jury are invited to give weight to the accused's good character both before and after the alleged offending in considering the circumstances of the particular case. For the reasons that we have set out we consider that those elements were properly put before the jury in this case although that was no express direction by the learned trial judge in those terms. We repeat, however, that such an express direction should be given in cases of this sort."

We consider that the direction set out at paragraph 18 above satisfied the need to ensure that the jury were aware of the importance of the appellant's good character both before and after the time of the alleged offences. We agree, however, that the direction should be given in the terms approved in Hughes.

[20] The next issue concerned the direction in relation to the alleged confession. The learned trial judge told the jury that if they accepted that the appellant's reaction when the allegation was put to him by the father was to put his hands on his head and say sorry and if they accepted and were satisfied that this constituted an admission that could constitute supporting evidence. The appellant's criticism was that the learned trial judge did not instruct the jury that they can only rely upon the confession if they were satisfied beyond reasonable doubt that it had been made. We accept that such a direction should have been given and that it is clearly appropriate that it should be given at the time that the confession is being considered in the charge. In this case the learned trial judge dealt with the burden and standard of proof at the beginning of his charge. He instructed the jury that the prosecution's obligation to prove its case beyond reasonable doubt did not require them to prove every peripheral fact to that standard but did require them to prove the basic facts which make up the charge against the accused. We accept that the confession was not a peripheral fact but the effect of the direction by the learned trial judge was that the jury were alerted to the fact that the confession had to be proved beyond reasonable doubt.

[21] The final matters raised by the appellant related to the extent to which the learned trial judge exposed inconsistencies in the evidence and his alleged failure to direct in relation to them. In fact it is clear that on a number of occasions the learned trial judge properly considered inconsistencies in the evidence and directed the jury as to the materiality of those inconsistencies. We do not consider that any issue of safety arises in relation to these complaints.

Conclusion

[22] The appellant contended that the ground of appeal on demeanour was sufficient on its own to render these convictions unsafe and that the other matters contributed to the lack of safety. For the reasons given we consider that these convictions are safe. The appeal is dismissed.