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(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

JW

Before: Morgan LCJ, Higgins LJ and Girvan LJ

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal brought by the appellant with the leave of the single judge against his conviction on 30 March 2012 before Her Honour Judge Loughran ("the trial judge") and a jury on a single count of indecent assault on a female child on a date unknown between 1 January 2001 and 1 June 2003. In view of the complainant's right to anonymity she shall be referred to throughout this judgment as N. The appellant was originally arraigned before the Recorder of Belfast and pleaded not guilty. He was initially tried before Her Honour Judge McReynolds between 10 November 2011 and 21 November 2011. The jury could not reach a verdict and he was re-tried before the trial judge and a jury between 26 March 2012 and 30 March 2012. He was found guilty on a majority verdict of 10 to 2. On 10 May 2012 he was sentenced to a determinate sentence of one year six months and was made subject to a Sexual Offences Prevention Order until 10 May 2022 prohibiting him any contact with the complainant. He was disqualified from working with children under Article 23 of the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003. He is subject to the notification requirement under Part II of the Sexual Offences Act 2003 and he is included in the Children's Barred List as required under the Safeguarding of Vulnerable Groups (Northern Ireland) Order 2007.

[2] At trial Mr McCreanor represented the appellant. On the appeal Mr O'Donoghue QC appeared with Mr McCreanor for the appellant. Mr O'Kane appeared on behalf of the Crown. The Court is grateful to counsel for their detailed written and oral submissions.

The factual background

[3] The complainant N was born in February 1991. The offence was alleged to have occurred between 1 January 2001 and 1 June 2003 when the complainant was aged between 10 and 12. This represented an imprecise and lengthy period and the complainant did not identify the time of the offence by reference to any identifiable or significant life event or date. The appellant was the partner of N's mother F. According to his evidence he first was introduced to F in or about 1996 and he met her 2 or 3 months later. They began a relationship which resulted in the birth of a daughter R who was born in 1998, although he did not have contact with R until she was 3 months old. He started to stay with F over weekends and for periods of time whilst travelling to and from Glasgow. The relationship ended at the end of May 2005 although he kept in touch and maintained contact with his daughter R. When the appellant and F were living together the household comprised himself, F, the complainant, her two sisters and her half-sister R.

[4] According to the complainant's evidence in respect of the alleged indecent assault the incident was alleged to have occurred when her mother was out and when she was minding her sister R. She could not identify the day of the week, what year it was or what season it was. She thought it was a weekend because her sister M had been staying out overnight and that would not have happened during the week. According to her evidence R fell asleep and N put her to bed. She stayed downstairs and watched TV for a while. She claimed that the appellant came home drunk. She turned the television off because it was late and was about to go to bed. She was wearing her pyjamas and knickers under her pyjamas. She alleges that the appellant asked her to come over and lie beside him on a three seater sofa. He had his back to the back of the chair facing the window. N said that she got off the chair and lay beside the defendant with her back to his front. They were both facing the window. She said that he must have thought that she was sleeping. He put his hand into her trousers and down her pants and he started rubbing round and round her vagina with his right hand. He lifted his hand back up and she alleges that she heard him sniffing his hand. He put his hand down her pants and pyjamas. This time his fingers were wet because she could feel them as he put them inside her vagina. She flinched as it was sore when he was trying to push his fingers up and move them around. When she flinched he pulled away and put his hand over his head as if he was not doing anything. He then told her to go to bed and she went to her bedroom where R was in her single bed. She said that she got in beside R and was frightened. She remembers for a long time crying and holding R. She spent the night with R in R's bed.

[5] The complainant's sister M gave evidence that the complainant told her about the assault the following night when the two girls were lying in bed. The complainant allegedly told M that the applicant had touched her, that he put his hands down her trousers. According to M the complainant was crying when she told her this. M wanted N to tell her mother but the complainant made her promise not to as it would break up the family.

[6] The appellant denied the allegations when first put to him in police interviews. In his evidence at trial he gave evidence amounting to a complete rejection of the allegations. He averred that there had initially been a honeymoon period when he moved in with the family but that this had gradually deteriorated as M would not do what she was told by her mother. He referred to a number of incidents which the complainant and M denied had happened. It was the appellant's case that nothing had happened prior to the making by the complainant of her complaints to indicate that she was in any way upset with the appellant. He referred to the fact that according to his evidence in February 2008 when he had been on the phone with the complainant's mother the complainant had asked him to speak to him and had said that it was her birthday the next day and that she expected a present. He averred that he had sent a card and money by recorded delivery. The complainant and the mother denied that any such conversation had taken place.

[7] The complainant said that over the years M would have shouted at their mother saying "You don't know what he had done" though M denied this. The allegation was revealed to the girl's mother in December 2008 in what appears to have been a drunken and emotional episode. M said in front of the mother "she needs to know". The complainant gave evidence that M was scared because the complainant had tried to take her own life and M knew she needed help. M said that she told the complainant to tell their mother because it was time to tell and the complainant then told her mother. In police interview the mother said, however, that it was M who told her of the allegation and she confirmed this in her evidence.

Grounds of Appeal

[8] The appellant sought to rely on a number of grounds of appeal some of which were not pursued in the course of the substantive appeal. The central thrust of the appeal was that the trial judge had failed to provide a balanced and fair overview of the defence case either in the summary of the evidence or in the summary of the defence arguments. The real substance of the appeal was that the trial judge had failed to adequately direct the jury on the issue of delay and that the trial judge had summed up the case without properly identifying to the jury the prejudicial impact of the delay and the effect which delay had on the presentation of the defence case. The appellant further sought to rely on an alleged irregularity in the course of the trial in respect of one juror who was seen by the jury keeper to be distressed after the jury had retired to consider their verdict. The juror was seen by the judge in chambers in the absence of counsel and of other members of the jury but with a stenographer present. The judge subsequently in open court in the absence of the jury read into the record a transcript of what had been said in chambers. The juror was asked and agreed that she could continue to take part in the deliberations. Counsel accepted that the course taken by the judge was by agreement with counsel and neither side sought a discharge of the juror or the jury. We have not been provided with the transcript of what the judge had read into the record. In view of

the conclusions which we reached on the central ground of appeal and since we have concluded that the verdict must be quashed we do not consider that it is necessary to reach a conclusion on this ground of appeal particularly since it would require production of a transcript of the relevant part of the proceedings.

[9] Defence counsel's full skeleton argument and their helpful speaking note set out the alleged shortcomings of the judge in her summing up of the defence case. The appellant's complaints in respect of the summing up in this regard are set out in paragraph 6(i) to (xxviii) and paragraph 7 of the skeleton argument. Paragraph 11 of the speaking note summarised the appellant's case thus:

(a) It was the appellant's case that he had not committed the offence.

(b) He did not know and could not explain why the complaint had been made against him at this time and why N and M were both claiming that N was now telling the court that N had complained to M on the evening after the alleged incident because it was not true.

(c) The untruth of the allegation was evidenced by the inability of the complainant or her sister to reference the incident to any date, season, month or event.

(d) Given that the complaint was completely untrue it was reasonable to conclude that both N and M had acted together in making not only the allegation but alleging that N made a complaint to M on the evening following the alleged incident. According to the appellant the fact that they were siblings made it more likely that they would lie.

(e) There were aspects of the girls' conduct prior to the appellant's departure from the family home which were relevant for the jury to consider, in particular M's poor relationship with him, evidence of teenage alcohol and drug abuse and their capacity to lie, for example in relation to the use of a NTL phone.

(f) The fact that neither the complainant nor his sister had informed any members of the wider family circle notwithstanding the appellant's absence from the family unit since May 2005 was a relevant matter for the jury to consider.

The trial judge's direction on delay

[10] In relation to the issue of the delay in the case flowing from the late complaint by the complainant the trial judge directed the jury in the following terms:

> "I want to tell you about delay. You are considering an incident which is said to have taken place between 5 and 7 years before the complainant approached police and you must appreciate that because of this delay there is a danger of real prejudice to the defendant and you are entitled to consider – why did not these matters not come to light sooner? Is that a reflection on the reliability of the complainant or is it attributable to the age of the complainant at the time of alleged incident? You have heard that she was born on … and she has told you that the incident happened between 2001 and 2003 when she would have been between 10 and 12 years of age. This is where you can use your common sense to draw inferences. You I'm sure have children or grandchildren of 10-12 years and think of a position that they would be in. N told you that her mother, even after 2005 was always saying that she loved the defendant and wanted to get back together with him. She didn't want her mother to be with him because of what he had done to her. Between 2005 and 2008 she said that she thought her mother and the defendant would get together again. He was R's father and would always be around and she said she was scared to say what he had done.
>
> Let me give you just one example of possible prejudice to the defendant. If N had told about the assault on the night that she said it happened she could have been medically examined and there would have been possibly a question as to whether there was any DNA evidence from the defendant in her vaginal area. The possibility of prejudice to the defendant caused by the delay in this matter must be in your mind when you are deciding whether the prosecution has satisfied you beyond reasonable doubt of the defendant's guilt. Now that's all I'm going to say to you about the law."

The appellant's argument

[11] Mr O'Donoghue submitted that the passage dealing with delay in the summing-up was wholly inadequate in the context of the factual matrix of the case. Although the trial judge told the jury of the risk of a real prejudice and the fact of delay had precluded the possibility of securing some form of DNA evidence the

remainder of the section dealing with the issue of delay did little more than invite the jury to conclude that the reason for the delay was the complainant's age and effectively recited the complainant's explanation as to why she delayed. On the issue of delay in the context of the case counsel there argued that there was much more which required to be said. He referred to what he described as two obvious examples of highly relevant points made by the defence in the evidence in the trial. Firstly both N and M had the opportunity to make a relevant disclosure long before 2008. Evidence was adduced from N in cross-examination by defence counsel as to the number of relatives to whom she could have been spoken. Secondly, the fact that there was such a delay meant that there was no reference point against which to date the evidence of alleged assault. The long delay meant that neither the complainant nor M was able to give the court or the appellant even the slightest clue as to when during the course of 2001 to 2003 this event is supposed to have taken place. The appellant was being asked to deal with an allegation in what was in effect a temporal vacuum. The appellant in the course of his evidence stated that he did not even start to reside in N's household until after September 2001.

Discussion

[12] The problems created by the complainant bringing forward a delayed complaint of sexual abuse are well recognised. This court has on a number of decisions made very clear that the jury must be made fully aware of the problems created by delay and it has stressed that in order to secure a fair trial for an accused faced with historic allegations careful directions must be given by the trial judge to the jury which expose the difficulties created for the accused and which bring home to the jury the frailty of human memory in the context of particular allegations. Higgins LJ in R v McCalmont and Wade [2010] NICA 27 put the position thus:

> "It has long been recognised that allegations of historic sexual abuse present a trial judge with difficulties not encountered in a trial in which there is a recorded and verifiable crime and a prompt complaint and inquiry. In the absence of independent corroborative evidence the historic sexual abuse case usually comes down to one person's word against another, in which the complainant is remembering events that are alleged to have occurred many years ago. The frailty of human memory over time afflicts everyone though the ability to recall accurately unpleasant or distressing experiences is equally well-known. These cases present considerable difficulties for an accused who denies the offence, particularly where the event is alleged to have occurred many years previously on a date unknown during a period spanning many months or longer. An accused who denies an offence alleged to have been committed on

> a particular day might be able to produce an alibi for that date. Not so an accused in a historic sexual abuse case where no specific date is alleged. These are only some of the difficulties which such cases can produce. A trial judge faced with such a case has an unenviable task but ultimately he has a responsibility to ensure that the accused has a fair trial. The means to secure a fair trial for an accused faced with historic allegations lie in careful directions to the jury which expose the difficulties created for accused persons and at the same time to remind the jury of the frailty of human memory in the context of the particular allegations made and the time frame concerned. Both prosecuting and defending counsel have a role to play in ensuring that proper directions are given to the jury. Counsel on behalf of the appellants, who did not appear at the trial, submitted that the direction quoted above provided the jury with no assistance on the difficulties created for a defendant in this type of case nor how the jury might approach the issues raised particularly with regard to the onus and standard of proof."

In R v McCalmont and Wade the court provided a helpful review of the authorities both in England and in Northern Ireland on this important issue and trial judges should carefully bear in mind what was stated in that decision and in the authorities discussed.

[13] The problems for a defendant inherently created by delay in relation to both civil claims and criminal prosecutions are well recognised. In the civil law context statutes of limitation seek to cater for the need to protect defendants against stale claims. In many criminal law systems statutes of limitations prevent the pursuit of criminal charges after defined periods. Our legal system of criminal law does not preclude the bringing of criminal charges after lengthy periods of delay and it has been clearly established that the passage of time does not of itself lead to an obligation on the part of the court to stay as an abuse of process criminal proceedings brought after lengthy delay in the making of a complaint laying the foundation for the charge. To counter-balance the inherent problems created by delay what our legal system does require is scrupulous care by the court in ensuring that the jury fully appreciates the dangers to a defendant created by the passage of time and the potential for unfairness to a defendant when faced after many years with an allegation of criminal actions when the complaint cannot be subjected to the same kind of rigorous investigation as one to which a recent complaint of sexual abuse would be subjected.

[14] What has been said in the context of the prejudice created by delay in the context of civil litigation applies with even greater force in the context of criminal proceedings for the outcome of criminal proceedings may subject the defendant to potentially severe penal consequences and to extensive damage to his private life and reputation. In Birkett v James [1978] AC 297 in the context of a civil case of alleged want of prosecution Lord Salmon said:

> "When cases (as they often do) depend predominantly on the recollection of witnesses, delay can be most prejudicial to defendants and to the plaintiff also. Witnesses recollections grow dim with the passage of time and the evidence of honest men differs sharply on the relevant facts. In some cases it is impossible for justice to be done because of the extreme difficulty in deciding which version of the facts is to be preferred."

As was pointed out by the Law Commission in its Consultation Paper 151 on Limitations of Actions the justification for limitation periods lies in the key concern that a defendant may have lost relevant evidence and be unable to defend the case adequately. Due to the loss of vouchers or other written evidence and the death or disappearance of witnesses it might be very difficult if not impossible for a defendant to meet a claim made after several years had gone by. Even where witnesses are still available they might have no memory or an inaccurate memory of the events in question. As long ago as 1829 in their first report the Real Property Commissioners (Parliamentary Paper 1829 Volume X 1, 39) stated that:

> "Experience leads us to the view that owing to the perishable nature of all evidence the truth cannot be ascertained on any contested question of fact after a considerable lapse of time."

If this proposition were invariably the case all old criminal cases would be bound to be stayed because justice could not be done and a fair trial could not be conducted. Our criminal law does not go that far. A more accurate way of expressing the matter is that as time elapses the ascertainment of the truth of an allegation becomes increasingly difficult. As the Law Commission paper demonstrates it is clear that "it is desirable that claims which are brought should be brought at a time when documentary evidence is still available and the recollection of witnesses are still reasonably fresh". This is the best way to ensure a fair trial and thus to maximise the chance of doing justice. Delay of its very nature increases the risk of injustice occurring. This is a point which any summing up should bring home to the jury so that they sufficiently appreciate the point.

[15] Where a recent complaint of sexual abuse is made a detailed investigation can be made of the allegation in its full factual matrix. The time of the alleged incident

can be identified. The location can be identified, examined and photographed. Forensic examination can be carried out of the scene of the alleged crime, of the complainant and of the defendant. Body samples can be taken and analysed. Potential witnesses can be clearly identified and questioned. The precise familial or social context in which the alleged events happened can be closely scrutinised so that as clear picture as possible can be formed of the full context of the alleged abuse. Any alleged recent complaints to third parties can be carefully scrutinised. The defendant will have an opportunity against the picture flowing from a recent investigation to put forward explanations of the alleged events, can respond to the specific allegations in their precise context and can present a full defence (such an alibi) if one is available. Where an allegation is made long after the event and is made in an unidentified and wide time frame the police can carry out few of the investigative steps open to them at the stage of a recent complaint. The defendant thus suffers the real and clear prejudice presented by the fact that the complaint cannot be fully scrutinised and investigated in the light of recent events by an impartial police investigation. A consequence flowing from this is that the case will often come down to what is in reality a dispute between two persons with one person's word against another. A jury must fully appreciate the risks presented by having to decide a case on that basis since it necessitates the jury deciding whose evidence is preferable in the absence of any of the police investigative steps which are normally available to subject to scrutiny the honesty and reliability of a recent complaint. The absence of such timely investigation often removes the possibility of a more objective analysis. A jury should be made aware in the course of the summing up of these difficulties presented to a defendant arising out of a late complaint and a delayed investigation.

[16] Because of the frequency of trials arising out of alleged historic sexual abuse which are now common place there is a real risk that sight can be lost of the fact that there is always inherent real prejudice to defendants facing a historic sexual abuse charge. A trial judge must be careful to avoid giving formulaic directions on the prejudice to a defendant arising from delay paying mere lip service to the possibility of a prejudice. The trial judge and practitioners have a responsibility to ensure that the question of potential prejudice is properly faced up to and understood by the jury. Unless a direction is carefully tailored to the context of the case, a formulaic direction on delay will not bring a proper focus to the jury's deliberations. One must bear in mind that in most instances the trial in question will be the first and only trial in which the jurors have to sit to reach a decision. They must be properly advised about the context of the case upon which they are called to adjudicate. The significance and importance of the need for the jury to grapple with the consequences of delay to the fairness of the trial must be made clear to the jury. For those reasons we conclude that *before closing speeches and before the judge's charge* the judge should have the benefit of submissions from counsel for the parties on how the question of delay and the potential or actual prejudice caused thereby should be dealt with before the jury. The jury should be directed on (a) how the defendant may be prejudiced generally by delay, and (b) how he may be prejudiced in relation to particular allegations in the specific context of the charge (per Latham LJ in R v

Mayberry EWCA 782 [2003] EWCA 782 referred to in R v McCalmont and Wade at para [15]). The trial judge would benefit in particular from counsel's submissions on (b). It is a matter for counsel and for the trial judge to decide how best those submissions are made and whether orally or in writing. A clear advantage arising from the preparation of a written note is that it calls for a clear focusing of minds on the issue and the note can be retained by the judge as part of the written record of the case.

[17] In the present case the trial judge's direction to the jury on the question of delay failed to give the jury a sufficiently clear direction on the general prejudice faced by the defendant because of the delay and how he might have been prejudiced in relation to the particular allegation as formulated by the complainant. In particular the direction did not bring clearly enough to the jury's attention the prejudice created to a defendant by the wide timeframe of the allegation which provided no meaningful temporal context within which the alleged event was alleged to have occurred.

[18] In view of the conclusions which we have reached on the issue of the judge's directions on delay it is unnecessary for us to reach a firm conclusion on the question of the overall fairness of the judge's summing up in respect of the defendant's case. It is clearly incumbent on a trial judge to set out the respective cases of Crown and defence fairly and in a balanced way. The summing up must identify with reasonable balance and clarity the relevant issues for consideration including what the defence case truly is. There is some substance in counsel's criticism of the summing up in that it did not spell out each and every aspect of the defence case though we incline to the view that read in its overall context and in the light of the judge's further directions after requisitions the jury must have appreciated the nature of the defence case. In view of our earlier conclusion it is not necessary to come to a concluded view on this ground of appeal.

[19] The summing up was succinct and short being delivered between 9.50 am and 10.20 am on the last day of the trial. The transcript suggests that the judge gave the impression of being under considerable pressure as a result of having to deal with a number of other matters that morning, apart from dealing with the jury in the on-going trial. The unfortunate, but perhaps unfair, impression created might suggest that the case had not been given the clear and undivided attention of the trial judge which it clearly merited. Since justice must not only be done but be seen to be done any impression that the case is not receiving the undivided attention of the court should be avoided. Trial judges should thus take care to ensure that in the case of an on-going criminal trial it both receives and appears to receive the careful and individual attention of the court throughout. Those involved in the listing of other cases falling to be considered by the trial judge in the course of on-going trials should bear that in mind.