Neutral Citation No. [2005] NICA 45 | *Ref:* **NICC5342**

Judgment: approved by the Court for handing down | *Delivered:* **30/06/2005**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

MARGARET HEWITT AND ROBERT GEORGE ANDERSON

Before: Nicholson LJ, Sheil LJ and Deeny J

NICHOLSON LJ

[1] The applicants applied for leave to appeal against a series of convictions for grave offences alleged to have been committed by them as members of staff of a Dr Barnardo's home, known as "Macedon", against children residing in that home. At the close of the hearing of their applications we granted leave to appeal and quashed their convictions. We gave an ex tempore judgment, outlining the causes for concern which led us to quash these convictions. At that time we undertook to give a written judgment setting out our reasons for doing so. We have concluded that it is unnecessary to expand unduly on the reasons which we gave at the time. But it is important that all concerned fully understand why the convictions were quashed.

Should there be a re-trial?

[2] It remains our responsibility to determine whether there should be a re-trial of both appellants or one of them and on which charges, if any, they should face a re-trial. In case there should be a re-trial we consider that at this stage it would be prudent to say as little as possible, so as not to prejudice any re-trial. We have not heard the arguments to be advanced for and against a re-trial.

Causes for concern

[3] A. WA

In the course of opening the case for the Crown it was stated that the principal witnesses were people who had been "in care" at Macedon, a large private house in an area of Newtownabbey, Co. Antrim, owned by a charitable organisation founded by Dr Barnardo, a nineteenth century philanthropist who set up homes for destitute and disadvantaged children. Barnardos' homes have cared for disadvantaged children since that time.

It was the prosecution case that these witnesses who were children in Macedon in the period between December 1977 and June 1981 were subjected to physical cruelty and sexual perversion by the two appellants. They were referred to as complainants and the first of them was WA whose allegations related to the first twelve counts (or charges) on the indictment against the appellant, Margaret Hewitt.

He was born on 11 April 1967. He and his elder sister, S, and young brother, D, were taken into care in 1973. Their family background had been very disturbed. There were grave allegations of sexual abuse in their family home. In 1976 he went to Macedon with this sister and brother and an account of the evidence that he would give to the jury (which, if true, was very damaging to Margaret Hewitt) was stated in some detail in the opening speech for the Crown. The twelve counts were "sample" counts designed to cover what were alleged to be numerous sexual offences. He was an important witness because he set the scene, so to speak, for those who made similar complaints against this appellant. Others alleged that both appellants conspired to sexually abuse them and other children.

The Crown relied on all as mutually supportive. The opening speech for the Crown commenced on 27 April 2004 and was completed on 28 April. A transcript of the speech can be found starting at p. 83 of the Transcript of Evidence and sending at p. 235 (Binder 1).

The Lord Chief Justice was originally to be the trial judge and heard applications to stay the proceedings for abuse of process brought by both appellants on 10 November 2003. He was told that the appellant, Miss Hewitt, had been interviewed about allegations of ill-treatment made by WA on 4 June 1997 and that no charges resulted from that questioning. He was not given any other information and for reasons which he gave ex tempore and subsequently set out in writing he dismissed both applications. We respectfully agree with his ruling, based on the information with which he was supplied.

At the close of the Crown case significant facts had become established. Mr Gallagher QC for Margaret Hewitt then made a submission to the trial judge that the further hearing of counts 1 to 12 of the indictment based on the allegations of WA should be stayed as an abuse of process. In his ruling at pp. 2627 – 2630 the learned judge stated:

> "WA first made the allegations that give rise to these counts in 1997. A statement was taken from him by police on 6 May 1997 and it is that statement which continues to ground the impugned counts. Miss Hewitt was interviewed by police about the allegations contained in that statement on 4 June 1997 when she roundly denied the allegations, describing them in summary as 'nonsense' and 'complete lies'. She stated:
>
> > 'I'm completely innocent of all that. It is dreadful anybody would dare make those allegations.'
>
> And later:
>
> > 'He has a great imagination.'
>
> And:
>
> > 'I'm not guilty'.
>
> The papers were referred to the Department of the Director of Public Prosecutions which directed that there should be no prosecution and that decision was communicated to Miss Hewitt in October 1997. It was not until June 2000 when Miss Hewitt was re-arrested and re-interviewed in relation to exactly the same allegations in [respect of] which a direction not to prosecute had earlier been made and communicated to her. When interviewed again in relation to these same allegations, Miss Hewitt repeated her denials with words such as:
>
> > 'It's absolute scum', 'good gracious' and 'dreadful, there's not a shred of truth in that.'
>
> Against that factual background Mr Gallagher submits that nothing altered between 1997 when it

> was decided not to prosecute, and Miss Hewitt was so informed, and 2000 when it was decided to proceed. Mr Simpson QC [for the Crown] has not pointed to any changes of evidence or circumstances in the intervening period that explain or justify the reversal of the decision not to prosecute.
>
> The Code for Crown Prosecutors in England and Wales at para. 10.1 provides:
>
> > 'People should be able to rely on decisions taken by the Crown Prosecution Service. Normally if the CPS tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped , that is the end of the matter. And the case will not start again.'
>
> While Mr Simpson QC informed me that there is at present no equivalent code for Northern Ireland, he understands that such a code is currently being prepared and it is anticipated that a similar provision will be incorporated. In any event, he fairly conceded that there exists in Northern Ireland what he described as an "unwritten guideline" to th4e same effect…
>
> I have come to the conclusion that the decision to review this matter after a lapse of years following the decision that the prosecution would not proceed was unfair and that to permit the prosecution to proceed on counts 1 to 12 would be an abuse of process."

He rejected other submissions of counsel for the appellants. This ruling was given in the absence of the jury. We are of the opinion that this ruling was entirely justified.

In the course of further argument he said:

> "There's no question of sweeping away the evidence of WA. He has given his evidence and whether the jury conclude that it is helpful to the defence or helpful to the prosecution or a mixture of both, will be for them in due course. All I am doing is staying the further conduct of the matters so far as counts one to twelve are concerned."

The jury was re-called and told the counts 1 to 12 were to be stayed. The issue sheet shows that these counts were "stayed by direction of the Judge."

The learned judge dealt with the evidence of WA in his summing-up at pp. 3090 – 3093. We do not consider it necessary to refer to it in view of what follows.

He was inadvertently misled as was the Lord Chief Justice about the application before the Lord Chief Justice for a stay on the grounds of abuse of process. We make no criticism of counsel whatsoever but the Department of the Director for Public Prosecutions should have informed Crown counsel of the decision not to prosecute Miss Hewitt in 1997. He would have drawn that to the attention of the Lord Chief Justice. We have no reason to suppose that the Lord Chief Justice would have differed in his ruling from the learned trial judge. The first twelve counts on the indictment would have been stayed by him. WA would not have given evidence as a complainant. It seems to us idle to speculate whether he might have given evidence on the ground that it was "similar fact" evidence. The trial would not have taken the course that it did.

Although on the face of the transcript he appears to have been severely damaged in cross-examination, it is impossible for us to say that his evidence was not taken into account by the jury in their overall assessment of the guilt of Miss Hewitt and, although he did not give direct evidence against the other appellant, Robert Anderson, other witnesses linked Mr Anderson with Miss Hewitt so that the decision to find her guilty of serious sexual offences may well have had an adverse effect on Anderson. It is relevant to bear in mind that he was the first person to make allegations against either of the appellants and was at the time facing a charge of raping his sister's daughter. In the course of cross-examination it was suggested to him that his motive for making the allegations was to evoke sympathy for himself on the grounds that he had a very troubled upbringing.

D, the young brother of WA, who also went to Macedon in `976 followed his older brother into the witness-box. He was born on 6 October 1968. He made allegations against Miss Hewitt which were similar to those of his older brother.

D gave evidence against both appellants, indicating that Mr Anderson and Miss Hewitt conspired to commit indecent acts. In cross-examination he made allegations against his brother but he also gave evidence arguably supportive of his brother's allegations in evidence against a police officer. He said that he had been a friend of his brother

until his brother raped his sister's daughter. He and his brother both got compensation from Barnardo's before the trial of the appellants. He made his first allegations in June 1998. His brother made allegations in May 1997. We find it impossible to say that the jury did not seek support for his allegations from other sources in respect of counts 19 – 27 against Miss Hewitt and we certainly cannot rule out the evidence of WA as providing support for him, although we have taken into account the direction given to the jury about the evidence of WA by the learned trial judge. We made the same comment about the convictions of Margaret Hewitt based on the evidence of AD. If the proceedings based on the allegations of WA had been stayed before the trial began, we cannot tell what effect this would have had on the outcome of the trial.

But a much more serious blemish on the fairness of the trial arose as a result of events which occurred after the trial and we deal with this in the immediately following passage of this judgment.

B. R

R gave evidence immediately after WA and D and AD between 4 May and 6 May. He was born on 31 December 1967 and went to Macedon with his sister C in 1975. He left Macedon to be fostered at the age of 13 but returned from his foster placement to Sharonmore, a Barnardo's home to which children were sent from Macedon when it ceased to be available as a children's' home. He made allegations against both appellants. He was subject to severe cross-examination but the jury convicted Miss Hewitt on counts 31 to 43, based on his evidence. They acquitted Anderson on two charges based on R's evidence, for which there was no supporting evidence from others.

At the time of the trial R was awaiting sentence of a number of serious offences and was subsequently sent to prison. Whilst in prison investigations were carried out by the police about offences alleged to have been committed by him against the children of his sister, C, another complainant. From there he wrote a serious of letters to a social worker. In one of them he made a lengthy retraction of his evidence at the trial. He gave evidence before this court. In the course of cross-examination he was asked about these letters. He agreed that some of the letters would have been honest and some of them would have been dishonest. He was asked whether he had any difficulty in moving from honesty to dishonesty and replied "No, none whatsoever." He could switch to complete dishonestly without any difficulty, he agreed. He said: "When I am telling the truth I know I am telling the truth. When I am telling lies I know I am telling lies."

He was asked questions about the letter retracting his evidence. He said that it was true and that he and others who had given evidence at the

trial had lied. The others included EJ, SK, DA, TM, AD and WA. He and the other six were seven out of the nine complainants who gave evidence at the trial. He was not asked about an eight who was not a resident at Barnardo's but a daughter of a member of staff. His sister C was the ninth. He agreed with counsel that when he gave evidence against Margaret Hewitt he was trying to get his own back because she had scared him very badly when he was a child. A number of the others whom he named were not frightened of her at all. He agreed with counsel that it would not surprise him if Mr Anderson was innocent as well. He had written to him apologising for the allegations he had made against him. In answer to counsel he agreed that he had told his sister what to say in court against Miss Hewitt and Mr Anderson. He later amended this concession.

He was then referred to a statement which he had made to a police officer called Detective Sergeant Brown. In that statement he said that the evidence he had given in court was true. In answer to the court he said that he did not know whether he had told lies about Miss Hewitt for revenge upon her. He also said that he did not know whether Miss Hewitt was innocent. Then he said that the letter of retraction written to the social worker was written for attention in order to get someone to come to the prison and see him and that the truth was what he had said during the trial. There is a transcript available of the entirety of his evidence.

After consultation with the Director of Public Prosecutions Mr Simpson QC indicated that the Crown did not seek to stand over any conviction based on the evidence of R at the trial. This was a proper and responsible attitude for the Crown to adopt. It led on to concessions about the reliability of convictions based partly on C's evidence and partly on his own.

So far as counts against Margaret Hewitt are concerned where they involve other complainants than R we cannot be sure that the jury did not rely on R's evidence as supporting their evidence. We are satisfied that the jury looked for mutual support from witnesses such as R when they were considering the other charges. They were invited to do so by the Crown at the trial, quite properly. Now R's evidence is accepted as not credible.

There were seventeen counts on which George Anderson was convicted by the jury. WA, as we have said, did not give evidence directly implicating him in sexual impropriety. But the case made by the Crown involved the contention that Miss Hewitt and Mr Anderson worked together and anything supporting her guilt may have helped to contaminate him by association. Moreover R made positive allegations against him which the jury may have thought were probably true but lacked support ad thus found him Not Guilty. None of the counts against him can safely stand in the circumstances.

C. Verdicts of Not Guilty

A number of verdicts of Not Guilty were found by the jury in respect of counts of rape and other sexual offences alleged by EJ and SK. Yet they convicted him of the rape of both girls at a placed called Ballylaigh which was a holiday place for children from Barnardos. We have found it difficult to understand why the jury did so. But we wish to hear further submissions as to whether convictions on these charges would be safe, if there was a re-trial on both or either of them and Mr Anderson was convicted.

D. Compensation and the conduct of the investigation

Although we did not mention these as factors in our ex tempore judgment which we have reduced to writing and annexed to this judgment, we are obliged to say that we have been concerned about them. This is not intended to reflect in any way on the probity and dedicated work shown by Detective Sergeant Boyce and by the social workers and staff of Barnardos' homes who gave evidence at the trial or before this court.

But we consider that the submissions made by Mr Creaney QC, supported by Mr Gallagher QC and set out in the written argument put in on behalf of Mr Anderson under the heading: "The Conduct of the Investigation" have considerable weight and will be borne in mind when we consider the issue of a re-trial.

[4] As we indicated at the end of the appeal the test which we had to apply was: did we have a significant sense of unease about the safety of the convictions? We did and as a result we quashed the convictions for the reasons which we have given above.

[5] It remains for us to pay tribute to the exemplary manner in which this appeal was argued before us. An enormous amount of work was put into it by all counsel. It would be inappropriate to single out anyone. It was a very difficult case. It was very complex. There was an enormous amount of detail. There was not a moment wasted. Justice was achieved.

Annex

1. These are applications for leave to appeal against convictions by Margaret Hewitt and George Anderson. We grant them leave to appeal.

2. The test which this court is required to apply in considering whether all or any of the convictions are unsafe is this: do we have a significant sense of unease about the safety of the convictions?

3. Four matters concern us in particular: firstly, the presentation of the Crown case in respect of WA and the effect of his evidence on the trial as a whole; secondly, the evidence of R, the convictions based on his evidence, his subsequent retraction of his evidence, the demonstration in this court of his unreliability and the extent to which his unreliable evidence may have affected the verdicts of the jury in respect of other complainants; thirdly, the verdicts of Not Guilty brought in by the jury in respect of serious allegations by some of the complainants and the apparent inconsistency between those verdicts of Not Guilty and verdicts of Guilty in respect of allegations by the same complainants which are, arguably, inconsistent. Fourthly, it appears to us that the jury appeared unable to rely on the evidence of a complainant standing alone and relied on support from the evidence of other complainants, the staff and, it may be, parts of the evidence of the appellants. We have to consider whether, in particular, the evidence of R, now totally discredited, tainted all or any of the verdicts based primarily on the evidence of other complainants but in respect of which, we are satisfied, the jury looked for support from others. That is to say, we have to decide whether we can safely exclude the influence of his evidence in respect of the findings of the jury based on the complaints of others.

4. We deal, firstly, with WA. The charges which Margaret Hewitt faced in connection with his evidence were counts 1-12 and he was the first complainant to be called. We are satisfied that as the learned trial judge held, it was an abuse of process to rely on his evidence. The ruling of the learned trial judge is to be found at binder 7 of the transcript from pp. 2627 – 2630. The reason why it was an abuse of process was because the Directorate of Public Prosecutions had written to Miss Hewitt in October 1997, having considered the file containing his allegations based on a statement made by him on 6 May 1997. Miss Hewitt had been interviewed about these allegations and a decision taken by the DPP not to prosecute on foot of them was communicated to her in October 1997. The prosecution was then revived in 2000. No explanation was put forward to the court as to why the prosecution was revived. There was no additional evidence, no new basis for reviving the prosecution. To revive the prosecution ran contrary to proper practice and the trial judge rightly ruled that this was so. WAs' evidence had been relied on by the Crown in opening the case, he was the first complainant to give evidence and much was made of his evidence both in relation to the

specific allegations which he made and the support which his evidence gave to the allegations made by the other complainants.

No blame is to be allocated to the conduct of the case for the prosecution by Crown Counsel. No criticism is intended or deserved. We hope that this is clear.

But an application had been made to the Lord Chief Justice prior to the opening of the case for the prosecution based on abuse of process by the Defendants. Crown Counsel had not been instructed by the Office of the Director of Public Prosecutions that a decision had been taken not to prosecute Miss Hewitt on foot of the allegations made by WA and this vital piece of information was not drawn to the attention of the Lord Chief Justice because Crown Counsel were unaware of it and Miss Hewitt could not remember clearly enough the circumstances in which she had been informed that she would not be prosecuted, so as to enable her counsel to advance this as a basis for exclusion of his evidence.

We have no hesitation in finding that the Lord Chief Justice would have done what the trial judge did when he became aware of the full circumstances – namely, he would have held that it was an abuse of process to rely on the evidence of WA. In consequence WA would not have been called as a witness and the trial would not have been contaminated by his evidence. The trial judge did his best to undo the damage which had been caused. But we are not satisfied that this was achieved. Arguably, it could never have been achieved. If so, there may be exceptions to the general rule proposed by the Court of Appeal in England and Wales that applications in relation to abuse of process should invariably be made at the close of the case, before it goes to the jury.

The next complainant, his elder sister, unexpectedly declined to give evidence, yet it is apparent that she sought to keep in touch with other complainants prior to and during the trial. We will comment on this when we give our written judgment.

As a consequence the jury were directed to find the appellant, Miss Hewitt, Not Guilty on the first 18 charges which she had to face. WA's younger brother, D, was the third complainant and gave evidence which led to the conviction of Margaret Hewitt on counts 19-27 on the indictment. We cannot rule out the possibility that the jury were influenced by the evidence of his elder brother, notwithstanding the direction by the trial judge in his summing-up, so as to find support for D's evidence from this tainted source. We, therefore, have a significant sense of unease about the safety of the jury's verdicts on these counts and are duty bound to quash these convictions. We will deal with the effect of quashing convictions at a later stage. The remarks that we have made and the reasons which we have given for quashing these

convictions apply also to the convictions based on the evidence of AD which we also quash. These are counts 29 and 30.

There were convictions on counts 31 to 43 against Margaret Hewitt, based on the evidence of R as he was then known. His evidence is the second matter of concern to this court. At one stage after the trial in a lengthy letter he retracted all his allegations which had led to convictions against Margaret Hewitt not merely in relation to complaints made by him but also to allegations made by his sister C, supported by his evidence.

In the course of evidence before this court he stated that he had no difficulty in switching from saying something honest to saying something dishonest. In our view there was no way in which one could tell whether he was lying, telling the truth or something in between. Yet the jury acted on his evidence. Of course, they did not know what he was going to write or say. After the trial on Tuesday 21 June Mr Simpson QC on behalf of the Crown having hear his evidence before us, indicated that the Crown did not seek to stand over any convictions reliant on the evidence of R. This very proper concession indicates, as we have always known the responsible attitude which Mr Simpson QC has adopted throughout this appeal. It has led us to quash the convictions on counts 31-43, and Counts 45 and 46 which relate to charges of incitement by Margaret Hewitt to commit acts of gross indecency with his sister C and counts 64, 65 and 68 where C is the complainant but the convictions are rendered unsafe by reason of the fact that they were supported by R.

In so far as allegations of indecent assault or gross indecency made against Margaret Hewitt by EJ, SK, TM and SC are concerned and the allegation by TM of assault, the convictions based on their evidence has been contaminated by the evidence of R on which no reliance can be placed.

One of the matters which we raised at the outset was that the jury appeared to feel unable to rely with certainty on the evidence of a complainant standing alone. We have been unable to disentangle the evidence of R from them and are driven to hold that the jury may well have taken support from R's evidence in convicting Margaret Hewitt on counts 70 and 71, 78 to 83, 87 to 94 and 96 to 105. We therefore must quash these convictions on the grounds that we have significant unease as to their safety.

The quashing of these convictions is not, however, the end of the affair, so far as Margaret Hewitt is concerned. We shall give serious consideration to the question of ordering a re-trial on a significant number of counts, after we have delivered our written judgment and, of course, we will give careful consideration to submissions on the issue of a re-trial. We hope to do this at the beginning of next term.

So far as George Anderson is concerned there are seventeen counts on which he was convicted by the jury and the verdicts against him were unaffected by the evidence of WA. In so far as he is concerned the fourth matter of concern which we mentioned at the outset were the verdicts of Not Guilty in respect of serious charges of rape alleged by EJ and SK against him when contrasted with the verdict of Guilty in respect of the rapes at Ballylough which are, arguably inconsistent. We shall deal with these at greater length in our written judgment. Suffice it to say that we are not prepared to hold that they are unsafe, standing alone at this stage.

But we consider that the verdicts against Mr Anderson are also tainted by the evidence of R, or, put another way, we cannot be sure that the jury's verdicts in respect of him were unaffected by the evidence of R even though they acquitted Anderson on the counts solely involving R. We therefore quash the convictions on counts 134 to 136, 139, 140 and 145, 150 – 156, 160 and 163, 164 and 166 on the grounds that we have a significant sense of unease based on the verdicts of Not Guilty brought in against him by the jury and the tainted evidence of R in respect of the verdicts of Guilty.

The quashing of these convictions is not, however, the end of the affair, so far as George Anderson is concerned. We shall give serious consideration to the question of ordering a re-trial on a significant number of counts, after we have delivered our written judgment. We will, of course, gave careful consideration to submissions on the issue of a re-trial. We hope to do this at the beginning of next term at the same time as we deal with the same issue in respect of Margaret Hewitt.