Neutral Citation No. [2013] NICA 36 | *Ref:* **COG8856**

Judgment: approved by the Court for handing down | *Delivered:* **24/06/2013**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

MICHAEL CHRISTOPHER BRADLEY

Before: Higgins LJ, Girvan LJ and Coghlin LJ

COGHLIN LJ(delivering the judgment of the court)

[1] Michael Christopher Bradley ("the applicant") was convicted of a number of offences at Londonderry Crown Court on 3 December 2008 at the conclusion of a trial by jury presided over by His Honour Judge Lynch. The convictions included three counts of indecent assault on a female, contrary to Section 52 of the Offences Against the Person Act 1861 ("the 1861 Act"), three counts of gross indecency with or towards a child, contrary to Section 22 of the Children and Young Persons Act (Northern Ireland) 1968, seventeen counts of buggery, contrary to Section 61 of the 1861 Act and one count of assault, contrary to common law and Section 47 of the 1861 Act. All of these offences are alleged to have been perpetrated by the applicant upon his daughter. The sexual offences are alleged to have commenced on 31 August 1999, when the victim was nine years of age, and continued until 30 June 2003. The Section 47 assault is alleged to have been committed on a date unknown between 30 May and 2 June 2005.

[2] The applicant seeks leave to appeal against both the convictions and his total sentence of 13 years imprisonment. The applicant was also made the subject of a Sexual Offences Prevention Order ("SOPO") requiring him to have no contact direct or indirect, with the victim as well as no contact with any child under the age of eighteen unless approved by Social Services. Leave to appeal was refused by the Single Judge by order dated 4 October 2010.

[3] During his trial before His Honour Judge Lynch the applicant was represented by both senior and junior counsel but, subsequently, a change of representation has taken place and this application has been conducted upon his behalf by Mr O'Rourke QC and Mr Ian Turkington while Mr McMahon QC and

Ms Roseanne McCormick appeared on behalf of the Public Prosecution Service. The court is grateful to both sets of counsel for their industry and the benefit that it has derived from the clarity of their written and oral submissions.

The factual background.

[4] For the purpose of this hearing the applicant's counsel have focussed upon a number of respects in which it is alleged that the applicant's former legal representatives were incompetent in the conduct of his defence. At the request of counsel this court delivered a separate judgment with regard to the alleged failure by counsel to put before the learned trial judge a submission that he should give the jury a good character direction on behalf of the applicant. The court refers to the history and factual background of the case set out in that judgment delivered on 4 March 2013.

The grounds for the current application.

[5] On behalf of the applicant Mr O'Rourke submits that, as a consequence of a number of examples of incompetence on the part of the applicant's previous counsel and/or failures on the part of the investigative process, the court should reach the conclusion that the conviction of the applicant is unsafe and/or in breach of his right to a fair trial contrary to Article 6 of the ECHR.

Incompetence on the part of counsel.

[6] In our earlier judgment we emphasised the inability of this court to stand in the shoes of counsel actively engaged in the conduct of a criminal trial. Prior to the commencement of a trial counsel will have prepared a general strategy for his or her conduct of the proceedings based upon the statements of evidence, disclosed documentation, instructions and his or her assessment of the strengths and weaknesses of the prosecution and defence cases. Some consideration may be given to the timing and content of tactical cross-examination. However, experience repeatedly confirms the impossibility of predicting the way in which an adversarial trial is likely to develop and many decisions will have to be taken as the evidence unfolds. Such decisions have to be taken in good faith and on the basis of professional skill and experience as the case develops without the benefit of hindsight based upon the performance of the defence witnesses and the eventual outcome of the case. While no specific affidavits were filed on behalf of either the prosecution or the defence, it is clear from a careful reading of the transcript that previous counsel acted on the basis of instructions during his cross-examination at first instance. For example, during his cross-examination of the complainant's mother counsel referred to a matter that he put on instruction and he took detailed instructions for the purpose of recalling the complainant for additional cross-examination. In addition a number of matters were put to the complainant and other witnesses, including her younger sister, "formally" or on the basis of what defence witnesses "will say". In R v Day [2003] EWCA Crim 1060 the Court of Appeal in England and Wales emphasised that incompetent representation cannot *in itself*

form a ground of appeal or a reason why a conviction should be found to be unsafe and that the single test is that of safety. The appellant must show that the incompetence has led to identifiable errors or irregularities in the trial which themselves rendered the process unfair or unsafe. In the course of delivering our previous judgment in this appeal we referred to the judgment of this court in R v Boyd [2011] NICA 22 in which the relevant legal principles relating to allegations of incompetence on the part of counsel were set out at paragraph [10]. The authorities clearly establish that it is not enough to simply be "wise after the event" or to establish that different counsel might have approached cross-examination in a different manner. In our view the relevant principles were also stated in a succinct and clear manner by Moses LJ in the course of delivering the judgment of the Court of Appeal in England and Wales in R v Wood [2008] EWCA Crim. 587 when he said at paragraphs 2 and 3:

> "2. This court has, on a number of occasions, deprecated the use of the mechanism of challenging the approach of counsel defending at trial as a means of persuading this court to go over again that which had failed to succeed during the trial. One of the reasons why this is deprecated is that trial counsel must be trusted to exercise his or her judgment faced with circumstances at trial which can never be fully or accurately recreated in an appeal. There is a wide range of judgment the trial counsel are compelled to make, which cannot properly be impugned merely by the suggestions that they might with hindsight have been pursued in an alternative way or with different focus.
>
> 3. However, there will be occasions – rare we hope – where the skill of counsel on an appeal can demonstrate that decisions were taken by trial counsel and an approach adopted which was one out with the range of a reasonable cause of action and which therefore should not have been pursued. But even then, such justified criticism will be of no avail to an appellant unless it can be demonstrated that those failings trenched upon the safety of the verdict to which the jurisdiction of this Court is solely confined."

[7] We now propose to deal with the additional submissions advanced on behalf of the applicant.

The alleged assault on 31 May 2005.

[8] The complainant gave evidence that at the end of May 2005, when she was 15, she and her younger sister had gone to stay with the applicant and his mother at the farm over the weekend. She said that she had gone to a friend's party on the Saturday night and that when she came home the applicant was really drunk and subjected her to a serious assault. She said that he was screaming obscenities at her and grabbed her by the hair. The complainant agreed that she had been drinking at the party. She said that she had threatened to "blow the lid" on the alleged sexual offences if the applicant ever touched her younger sister. She alleged that the applicant threw her against the range, that he kicked her in the stomach and that she struck her head against the door handle as a result of which she sustained a cut to the back of her head. The complainant maintained that this prolonged assault was witnessed by the applicant's mother. The complainant maintained that, although they were supposed to stay with their father and grandmother until Sunday evening, she arranged for herself and her sister to be picked up the following morning by their aunt, Rosemary Scullion.

[9] It was common case that this was an incident of very considerable significance in the case since the agreed evidence was that after it occurred the complainant never subsequently returned to stay overnight with the applicant and his mother. It was also common case that the credibility conflict between the complainant and the applicant was fundamental. In such circumstances Mr O'Rourke criticised the applicant's former counsel for simply putting to the complainant that the applicant would deny that he was drunk upon this occasion and that, while there was a row, both he and his mother also completely denied the allegations of assault, other than the applicant giving the complainant 'a push' towards the door of the room and telling her to go to bed. Counsel had put to the complainant that the applicant's mother would confirm that the applicant had not struck her or kicked her at all and that her evidence was a tissue of lies. Mr O'Rourke criticised that course of action and submitted that the complainant should have been cross-examined in detail about the specific allegations of assault and the length of time that they had persisted. In particular, she, her aunt and her mother should have been asked about the alleged cut to the back of the complainant's head and the extent of, together with any relevant differences between, the accounts that the complainant had given to her aunt and/or her mother.

[10] It is important to bear in mind the nature and extent of the information available to counsel when he rose to cross-examine the complainant upon this topic. At that time he would have been aware of the following:

(*i*) The complainant had given a detailed account of the alleged assault and the circumstances in which it had come about in the course of her evidence. She had said that, on the following morning, she had told her aunt that the applicant had been drunk, that there had been a row and that she had been struck by the applicant but she had also clearly

stated that she had never told anybody the extent of the assault or why it had been "so bad". She had told the jury that her ribs were really sore, that she had some marks on her and there was a cut to the back of her head, her hair was a mess and "covered in blood". She said that she had told her mother there had been a fight and that she had been hurt by the applicant.

(*ii*) When the complainant's mother, Agnes Bradley, attended Home First Community Trust on 16 May 2006 she had referred to her daughter alleging that the applicant had "trailed her around the place by the hair" and given her "a hiding". She also stated that her daughter had not told her the full extent of the physical abuse until the day before that attendance, 15 May 2006. Mrs Bradley told the duty social worker that her daughter "covered up everything".

(*iii*) The first ABE interview conducted by the police with the complainant took place on 17 May 2006. During the course of that interview the complainant referred to this incident. She said that she had fought with the applicant, that he got violent and "basically beat me up that night". She said that she had come in from the party late, that the applicant had got her by the hair and "yanked her through the door". She told the police that she had threatened to "blow the lid on it" if he went near her younger sister, that he had banged her head off the range and thrown her to the floor where he had kicked her in the stomach repeatedly. She also said that he had hit her head off a door. She told the police that she had also fought with her granny who had witnessed the assault. She told the interviewing officer that there was blood coming from the back of her head from a cut caused by impact with the door handle.

(*iv*) In the course of giving evidence in June 2008 at the first trial, which was subsequently aborted, the complainant gave a similar account of this assault in the kitchen and living room of her grandmother's house. In cross-examination it was put to her that she had alleged that she had been kicked in the stomach for two hours. Her response was that it "felt like it went on for hours".

(*v*) In a statement to the police dated 10 August 2007, but more likely to have been made in 2006, the complainant's aunt, Rosemary Scullion, had explained that she had received a text message from the complainant about 9.00 o'clock on the Saturday morning that "dad was drunk and wrecking all night". She said that as soon as she had stopped the car at the applicant's house the complainant and her sister came out and they were "very scared". She noticed that the complainant was trembling and when she asked what was going on she was told by the complainant that she had come in late the night

before and that her father had been drunk. She said that he had pulled her hair, fired her against the wall and kicked her in the stomach and all over. Her aunt said that she had asked how long it had gone on for and the complainant told her "for hours". When pressed about the time Rosemary Scullion said "I think she said for about two hours". Rosemary Scullion stated that when they had arrived back at her house she had told the complainant she would need to go to a doctor but that she kept saying she was okay. She said that she had seen bruising on the complainant's legs but could not tell if she had bruising elsewhere because she had not seen the rest of her body.

[11] As we have already observed, this court cannot stand in the shoes of defending counsel at different points of the evidence as it unfolded during the course of a first instance trial. While the complainant was undoubtedly a vulnerable individual recounting harrowing events, the transcript confirms that she was capable of displaying a considerable degree of resilience and fortitude during the course of cross-examination. She had recorded detailed accounts of her allegations of assault by the applicant. Previous counsel had been instructed by the applicant and his witnesses, who included his 82 year old mother, that all of the complainant's allegations about this incident were to be completely denied, apart from a push and an instruction that she should go to bed. In such circumstances counsel may well have taken the tactical decision, with justification, not to cross-examine the complainant, her mother or aunt in relation to the details of her allegations in order to minimise any risk of generating further sympathy from the jury. It is perhaps not without significance that counsel who undertook a similar cross-examination of the complainant in the original aborted trial did not cross-examine with regard to the alleged cut to the back of the complainant's head. That counsel did ask if the complainant had ever stated that her father had kicked her around the room for two hours to which she had replied: "I said it felt like it went on for hours". Counsel did not pursue the point with any real degree of vigour no doubt because he was aware of the statement made by the complainant's aunt in which she had said that when she had pushed the complainant about the time she said "I think she said for about two hours".

The evidence relating to the alleged cut to the complainant's anus.

[12] In her ABE interview the complainant had described how, as a consequence of the alleged acts of buggery, there was bleeding from her backside which stained her underwear and the sheet. She said that she had drawn this bleeding to the attention of her mother who had not examined her and had suggested that it was merely a "wee cut or something". The complainant was asked about this during the first aborted trial when she said that she had told her mother about the cut and asked her whether she thought that it was the start of her period. In cross-examination in that trial the complainant appeared to initially agree that she had shown the cut to her mother, then corrected that to explain that she had only told her mother about it and eventually told the judge that she 'didn't know' if she had

shown the cut to her mother. This matter was not raised in direct evidence in the second trial but previous counsel did ask about it in cross-examination. The complainant again stated that she thought that she had started a period but when she drew this possibility to her attention her mother she had said that she was too young. In answer to questioning as to whether her mother had examined her she said: "I don't remember. I don't know. I don't think. It was weird at that stage I didn't want anybody near me so I don't know if I would have allowed her".

[13] Mr O'Rourke submitted that, if this matter was to be raised, previous counsel should have cross-examined in detail. Mr O'Rourke criticised previous counsel for failing to cross-examine the complainant about the exact nature, appearance and location of the cut and to further probe the credibility of the suggestion that her mother would not have examined the complainant once the cut had been drawn to her attention. However, the complainant had never positively stated that her mother had carried out an examination of her anus and counsel may well have felt that, in the circumstances, little was to be gained by a cross-examination based upon an assertion that another mother might have done so. Further detailed cross-examination about this intimate form of injury might also have been inconsistent with the interests of the applicant before the jury.

[14] The complainant was physically examined by Dr Amanda Burns, a Forensic Medical Officer, on 24 May 2006. Dr Burns was given a history of anal penetration having occurred chronically from 1999 until approximately 2003 with regular anal bleeding. Dr Burns concluded her report in the following terms:

> "On examination of the anus findings were normal, there was normal tone, no prominent veins and no fresh or healed fissures. There were no scars present. Normal anal findings does not exclude the history given of chronic anal penetration. Normal findings can be consistent with anal penetration."

[15] Prior to the trial at first instance the applicant's solicitors obtained a report from Dr Cromie, Consultant Pathologist and Clinical Forensic Medical Officer. Dr Cromie had been provided with a copy of Dr Burns' report and he advised the solicitors that:

> "The most important factor here is one of time: this examination took place 3 years after the last alleged abuse and more than long enough for any diagnostic signs of repeated/chronic anal penetration to have resolved and disappeared. It would not be uncommon for a complaint of slight bleeding or blood stained discharge post acute penetration, due to stretching and superficial tearing of the perianal skin or from frictional erosion of the more

> delegate rectal mucus membrane. However, apart from occasional deeper fissure, such injuries would heal rapidly in a majority of cases within days or weeks without any trace. Deeper fissures could exhibit delayed healing with fan or linear shape scarring or the production of skin tags. It must be re-iterated that scarring is uncommon, seen in less than 10 per cent of cases."

[16] In direct evidence Dr Burns confirmed that there had been no abnormal findings or specific positive findings on examination of the complainant's anus. She confirmed that even with a history of chronic anal penetration it could be absolutely normal to find no abnormal signs. Dr Burns explained that, in order to be diagnostic, findings on examination would have to be such as to have been the product of no cause other than anal penetration but that such findings would be encountered only in a very low percentage of cases and she referred to research papers quoted in the relevant Royal College text book as indicating the presence of positive findings in 42 per cent of the cases examined but diagnostic findings being present in less than 10 per cent of such cases.

[17] Mr O'Rourke was critical of the prosecution for failing to disclose the research findings quoted by Dr Burns and of the learned trial judge in the course of his directions to the jury for describing the evidence of Dr Burns as "neutral". We do not consider there is any substance in the former criticism since, in view of the content of the letter from Dr Cromie, there was effectively no practical distinction between the views of the experts consulted by the prosecution and the defence. That may well explain the reference by the learned trial judge to the medical findings by Dr Burns as being "neutral". Mr O'Rourke was critical of the use of that term in so far as the judge could have described the findings as completely consistent with the blanket denial advanced on behalf of the applicant. We accept that there may be some substance in that submission but there are few cases in which judicial directions to a jury might not be improved in some respects with hindsight and it is not a criticism which persuades us that this conviction is unsafe.

The failure of the complainant's mother to draw her allegations to the attention of the authorities between February and May 2006.

[18] In her original statement the complainant's mother described how, on 20 February 2006 the complainant and her friend, Scarlett Brolly, had returned from a night out in the course of which both had been drinking and there had been an emotional confrontation between herself and her daughter. During the next few days she described how the complainant had alleged that her father had made her sleep with him, that he had touched her and rubbed his penis against her but that she denied that there had been any penetration. According to the statement, when she had asked the complainant did she want to take things further she had replied in

the negative saying that she did not want anyone to know. No further steps were taken by the mother until the incident on Saturday 13 May 2006 when the complainant made the allegation of anal rape. In her ABE interview the complainant had told the police that she had only given an edited version of what had happened to her mother in February 2006 and that, on that basis, her mother had thought that there was a chance that the applicant might "get off with it".

[19] Mr O'Rourke was critical of previous counsel for failing to cross-examine the complainant's mother in detail as to why, having received a complaint amounting to serious sexual misconduct, she had not contacted the relevant authorities or, at least, sought counselling for her daughter. He noted that, at the material time, the complainant's mother had been a trainee social worker and, therefore, she should have been perfectly aware of the appropriate steps to take. Mr O'Rourke further argued that rigorous pursuit of such a line of cross-examination might have significantly reduced the credibility of the suggestion that even partial disclosure was made by the complainant to her mother in February 2006, especially when one aspect of the defence was a possible conspiracy between the complainant and her mother to gain revenge for the breakup of the latter's marriage.

[20] Experience confirms the difficulties faced by children when deciding to make acutely embarrassing disclosures of this type particularly where it is alleged that a parent was involved. Disclosure may often be both partial and incremental. In her direct evidence the complainant's mother had described the impact upon her made by the complainant's initial allegations when she and Scarlett Brolly returned after the night out and how she had tried to calm the complainant and bring about circumstances in which a rational account might be obtained. Even in the next few days she said that the complainant had been reluctant and difficult to understand and she gave the example of her continual mention of the picture of the white horse on the wall. It is clear that defending counsel had put to the complainant her statement that her mother had said she did not want to put her through it if there was a chance that the applicant would "get off" and, in doing so, he had alerted the jury to the possibility of discussion between the complainant and her mother about the strength of any case against the applicant. He had specifically asked the question:

> "You had not told her enough that she thought he would get off with it, right? Is it in that context then that you decided to make up more?"

[21] It is not particularly easy to see how that point could have been improved by more rigorous cross-examination of the complainant's mother who had agreed that she had made the complainant aware of how traumatising the experience of going to the police and giving evidence was likely to be. With regard to the possibility of establishing that no disclosure at all had been made in the course of this incident it is also important to bear in mind that the complainant's friend, Scarlett Brolly, had made a statement of evidence in which she confirmed that in February 2006 there

had been a very emotional confrontation between the complainant and her mother and that the complainant had later told her about her father who had "done stuff" to her when she was younger when he would touch her and she would look at a picture of a horse on the wall. Scarlett Brolly was tendered for cross-examination by the applicant but that was declined, presumably upon instructions. As it was counsel was free to draw to the attention of the jury to the denial of penetration in February together with the suggestion that the applicant "might get off" and seek to draw the inference that the more detailed disclosures in May were an attempt to shore up the complainant's case.

Cross-examination in relation to alleged threats to the complainant's mother and her partner.

[22] Previous counsel put to the complainant that prior to her parents' separation there had been a lot of arguments some of which were very loud but that the applicant would deny that he had ever been violent in any way. He then put to the complainant that, in the circumstances, her mother would want to support her in any allegation she might make against the applicant. The complainant's answer was she would only do so because she would know the allegation was true. Counsel then asked her about her mother's allegation that the applicant had issued a threat to kill her and her partner and that her mother had been prepared to give evidence in court to that effect. The complainant agreed that she had supported her mother in that course of action. Counsel was then able to put to the complainant that the charge had been dismissed by the jury.

[23] Mr O'Rourke was critical of this line of cross-examination by previous counsel submitting that it was "totally unnecessary" and very damaging to the applicant in the eyes of the jury. He noted that the learned trial judge had dealt with this topic in the course of his directions to the jury in the context of the Scarlett Brolly incident in February 2006 when he said:

> "Again recounting the circumstances when she told someone, that is the night that Scarlett Brolly was staying over, she accepted that she and Scarlett were very drunk and both vomited in the course of the evening and her mother was very angry at all of this. She did not accept the proposition that she made up the allegation in order to deflect her mother's anger. She did, it appears, give evidence on behalf of her mother on a previous occasion when the defendant was prosecuted unsuccessfully for making threats to kill, presumably against the mother."

[24] Once again, while it is always possible to be wise after the event, this was a tactic that was reasonably open to counsel in cross-examination. Quite clearly, he was seeking to draw to the attention of the jury the fact that, on a previous occasion, the complainant's mother had made an allegation of criminal conduct against the

applicant, with the support of the complainant, but that allegation had been rejected as not credible by a jury. It would appear that counsel was seeking to leave the jury with a significant doubt about the credibility of the complainant and her mother, together with a possible motive for making further allegations by way of revenge.

The evidence relating to blue movies.

[25] As we have indicated earlier, when setting out the factual background, the case made on behalf of the prosecution included allegations that, after the younger sister had gone to bed, the applicant would compel the complainant to watch blue movies and ply her with coke laced with vodka. It was alleged that his behaviour was particularly brutal after viewing that type of film. In her ABE interview the complainant had referred to these as "blue movies". In her direct evidence in the aborted trial she had described them as "pornographic DVDs". In her direct evidence in the first instance trial she referred at different times to an "adult movie", a "blue movie" "a movie that was not out on the shop floor". She was asked by Mr McMahon on behalf of the prosecution "can you tell us the nature of these, what you saw on the screen, when you watched these adult movies?" The complainant's answer was as follows:

> "There is only one or two that I can properly remember. They did not make any sense to me at that age. There were like loads of people in them and it was like two sisters and a boy and then they were all naked and having sex. But then there would be children floating about in the background, like a homemade stupid thing or there was always loads of people but then in some of them there was kids in them, not doing anything but just there."

[26] In cross-examination previous counsel referred to the description that she had given of these videos putting to her that they were "… about children, brothers and sisters having sex and other children being in the video. You gave the detail to the jury, this jury about that video. Did you think that was relevant to this case or important?" He questioned her further about the need to provide detail asking:

> "Well do you think it was important that you explained what you saw in the video?"

To which she replied:

> "I gave the answer to the question."

It was put to her that she had never previously referred to this type of detail. There then ensued a debate between counsel and the judge in the absence of the jury and it

appears likely that the complainant had never previously been asked about any detail of the content of the blue movies.

[27] Mr O'Rourke submitted that the reference to the presence of children completely transformed the evidence of the blue movies and resulted in their prejudicial impact far outweighing their probative value. In such circumstances, he argued that previous counsel should have applied to discharge the jury once the relevant question had been asked by the prosecution. However previous counsel seems to have adopted the alternative of exploiting the additional detail as a further confirmation of the complainant's readiness to bolster her claims and, in the circumstances, we do not consider that such a tactic was unreasonable.

[28] Apart from the incompetence of counsel, Mr O'Rourke also submitted there had been significant failings on the part of the prosecution and the PSNI investigation. He argued that the presence of children in the blue movies imbued them with a criminal element that constituted them evidence of bad character. As such, Mr O'Rourke argued, the prosecution should have arranged a consultation with the defence about admitting that sort of content in evidence, a course of action to which the defence ought to have objected on the basis that the admission of such detail would be likely to have a prejudicial impact that would clearly outweigh any probative value. So far as the PSNI was concerned Mr O'Rourke noted from the notes of the prosecution consultation with the complainant on 28 March 2007 that she had given the video shop in Draperstown as the source of the adult entertainment. In response to an enquiry from the applicant's solicitors, the prosecution stated in a letter dated 1 August 2012 that the police had attempted to contact the owner of a video shop in Draperstown by phone and by letter but without success. It seems that he did not respond to police requests to get in touch with the investigating officer. Mr O'Rourke argued that such an exercise was inadequate and constituted a breach by the PSNI of the duty to properly investigate in accordance with the Code of Practice issued under Part II of the CPIA 1996.

[29] At all times the defence were on notice of the complainant's allegation that in the course of subjecting her to sexual abuse the applicant had compelled her to watch DVDs that were of an adult, blue or pornographic character. In answer to a question from the prosecution she had indicated that in some of the DVDs children were present or "in the background". The purpose of showing such DVDs to a child was clearly stimulation of the applicant's sexual desire and we do not consider that the inclusion of such detail enhanced the criminality of his actions to the extent contended for by Mr O'Rourke. The jury either believed the evidence of the complainant about the DVDs or rejected it and, in our view, in carrying out that exercise, such detail would not have made a significant difference. At its height, the evidence of the complainant was that children were present or "in the background" of some of the blue movies that she was shown by the applicant. The police had made an attempt to interview the owner of the video store in Draperstown and, while there may be some substance in the argument that they should have been

more persistent, we do not consider that the omission to do so amounted to bad faith or a sufficiently serious fault to constitute a breach of the relevant investigation Code.

The incident involving 'other people' in the jeep.

[30] The Homefirst contact record of 16 May 2006 recorded the complainant's mother as stating that she had been told by the complainant that the applicant had assaulted her in the home, in the toilets at McAllister's Bar, Draperstown and in his jeep. That record included the following:

> "Ciara informed her mother the abuse was anal sex. She recalls other people around. She is unclear if they took part in the abuse or if they watched. Ciara reported to her mother she often blacked out with the pain."

In cross-examination during the aborted trial she was asked about the reference in the Homefirst contact sheet to informing her mother about other people standing around but being unclear as to whether they had taken part in the abuse or if they watched. In response to questioning from His Honour Judge Marrinan as to what she had told her mother the complainant said:

> "I said that there was an incident that felt different, I didn't know if it was him for definite and that I couldn't talk about it … I never want to talk about it."

[31] Subsequent to a consultation with prosecution counsel the complainant was again made the subject of a video interview by the PSNI at the Care Unit on 6 April 2007 when she dealt with the reference contained in her mother's statement relating to "other people". In that interview the complainant had said:

> "When I was drunk I told her (her mother) about other people as well but I don't who they were and mostly nightmares and flashbacks is coming back in ehm in the jeep in same place and same act. I don't know who they were and I only know it wasn't him because it felt different it was."

When asked what happened she said:

> "Same thing he done except with other people … It felt it. It's hard to explain it just felt different it just wasn't him like different smells and different."

When questioned further she said this had only happened on one occasion. She was then asked whether she had a vivid memory of this incident and she replied:

> "Not good enough, it's just nightmares and flashbacks and it's never like a memory, it's just. I don't even see, I can't, I don't know. See I don't wanna like say it cause it's like not something, it's just like eh flashbacks all the time and I never even, always like really hazy or something there never normal and I told mummy when I was drunk and I now I have to talk about it."

Later in the interview the complainant was asked whether she thought that it was something that had actually happened or something "in her head". Her reply was:

> "You don't dream up stuff like that. … That's all I see I didn't want to say anything its cause I'd understand any of it. It doesn't make any sense. I didn't even talk about to anybody and then I said it whenever I was drunk I can't even remember telling her and then she asked me about it."

[32] Previous counsel arranged for the entire ABE interview conducted on 6 April 2007 to be played to the jury at first instance. The complainant was then cross-examined on the basis that this was "just another story" and not true at all. Her reply was:

> "It's not. It's not that it wasn't true, it's that I don't understand it and I never have and I have tried. Believe me I've tried."

Previous counsel suggested that it was something in her head and the following exchange then took place:

> "Complainant: Believe me, I wished that all of this was in my head because then I would have come to terms with it but I tried my best.
>
> Counsel: And when you realised that you can't explain that and the police officer doing his best, politely and very helpfully in a supportive way tries to help you, you break down and cry, isn't that right? When you don't have an explanation?
>
> Complainant: It's not that I don't have an explanation I try to explain it but it was difficult."

[33] Mr O'Rourke submitted that it was critically important to establish with the complainant whether or not in fact she had been abused by other people. Was she saying that it was true? If so, when did it happen? Where did it happen? When did she tell her mother? Was it a case of her father abusing her while others watched or others abusing her while her father watched? He emphasised that, in the relevant ABE interview, she had told police "you don't dream up stuff like that".

[34] We reject this criticism of previous counsel. It is quite clear that the complainant herself had serious emotional difficulties in understanding the nature of this material which she consistently described as "flashbacks and nightmares". The material had not been made the subject of any count on the indictment and, in our view, to subject the complainant to the type of detailed analytical questioning contended for by Mr O'Rourke would almost certainly have rebounded against the interests of the applicant by significantly engaging the sympathies of the jury for the witness. Previous counsel seems to have used this material to suggest to the jury that this was "just another story" and we note that this was one of two pieces of evidence in respect of which the learned trial judge directed the jury that they should take particular care when considering the credibility of the complainant. Such a direction can only have been in the interests of the applicant.

The alleged rape in McAllister's bar.

[35] The Homefirst contact sheet recorded that the complainant had told her mother that the assaults took place in her father's home, in his jeep and in the toilet at McAllister's pub, Draperstown. In her original ABE interview the complainant referred to often being in McAllister's bar prior to the alleged assaults in the jeep. The complainant's mother in her police statement of 24 October 2006 stated that, after the alleged assault in May 2006, she had been told by the complainant that she had been raped by the applicant at age 9 in the toilets in McAllister's pub when she was wearing green welly boots. According to her mother she had said that her father had followed her into the toilets. In her direct evidence in the aborted trial the complainant again referred to being in McAllister's pub prior to the assaults in the jeep. In cross-examination she was asked whether she had ever told her mother that she had been raped by her father in McAllister's bar and she replied in the negative. She said that she told her mother that her father had "done something" in McAllister's bar and that her mother had assumed that was a reference to rape. In a more detailed reply the complainant told counsel:

> "I said he had me in the bar in green wellington boots and that he had done something in McAllister's bar. He had in fact called me into the toilets and watched while I went to the toilet and I didn't put that in my statement as I didn't think that that would matter, compared to everything else. And I told my mother about McAllister's bar, I said he had done something

> in McAllisters bar, I never said I was raped in McAllister's bar."

[36] When being questioned about what she had told her mother had taken place in McAllister's bar during cross-examination in the aborted trial the complainant had added that she had told junior counsel what had happened. That seems to have been a reference to a consultation with junior counsel for the prosecution, a representative from the PPS, the complainant and her mother on 20 March 2007. A note made by the representative of the PPS at that consultation read:

> "Bed, bath, jeep, pub – McAllister's pub – dungarees –
> few seconds.
> Into toilets with her stood with back to cubicle door."

Junior counsel's note made at the same consultation included the following "(1) bed, (2) bath, (3) jeep, (4) McAllister's toilet watching going to toilet!" The word 'ladies' is encircled and the word 'urination' contained in a box. Beneath that appear the word 'dungarees' and the words 'touched between legs/few seconds.' At a slightly later point junior counsel has recorded the words 'toilet, dungarees, straps, shouted need help!' The notes of this consultation were not disclosed to the applicant's legal representatives until 1 August 2012.

[37] In the trial at first instance the complainant was again asked in cross-examination by previous counsel whether she had told her mother that her father had raped her in the McAllister's bar in the toilets. The complainant denied that she had done so and explained: "She misunderstood me, I can't comment on my mother. I can only comment for myself". Previous counsel then put the matter more specifically asking her whether she had told her mother that, when she was nine, she was raped by her father in McAllister's bar in the toilets when she was wearing green wellington boots. The complainant replied: "The words he raped me never came out of my mouth. What I said was that he had done it in McAllister's bar. I never once said my father raped me in McAllister's bar. I said to mother, when we were talking about stuff, she misunderstood me. You can ask her I can't comment." She further explained that she had been wearing dungarees and that her father had followed her into the toilets and watched her go to the toilet.

[38] Previous counsel also took up this point with the complainant's mother in cross-examination at first instance. He asked her directly whether she had told the police that the complainant had told her that she had been raped by her father in McAllister's bar. The complainant's mother replied that she told the police that she thought the complainant had said that.

[39] As was also the case in relation to the allegation that others had been involved in an incident in the jeep there was no specific charge relating to anything that took place in McAllister's bar. However, Mr O'Rourke submitted that previous counsel failed to appreciate that the issue was not whether a rape had taken place in

McAllister's bar but whether, at some stage, the complainant had falsely alleged to her mother that such an offence had taken place. Mr O'Rourke argued that the complainant and her mother should have been asked whether they had discussed the various allegations prior to attending Homefirst, why the social worker had been told that the complainant had been "assaulted" in the toilets of McAllister's pub if her father had simply followed her into the toilet, whether there was any further discussion between the complainant and her mother before the latter made a statement to the police on 24 October 2006 and, if so, why her mother apparently continued to harbour a misunderstanding etc. Mr O'Rourke further submitted that failure to provide the applicant's legal advisors with counsel's notes of 20 March 2007 consultation or at least a gist of the relevant information contained therein prior to the trial constituted a serious breach of the prosecution's obligation of disclosure.

[40] We note that, upon the directions of previous counsel, the solicitors representing the applicant spoke to the owner of McAllister's bar and the barmaid. Both potential witnesses refused to make statements and neither witnessed anything untoward. However, it appears that both indicated that it would have been possible for offences to have occurred without their knowledge. Previous counsel did raise the matter with the complainant during cross-examination asking specifically what she had meant by saying that he had "done it" in McAllister's bar to which he received a reply: "It could have meant anything". In the circumstances, in the course of his closing, previous counsel was able to draw the attention of the jury to the apparent inconsistency between the complainant and her mother and suggest that it was difficult to resolve. In our view that was not an unreasonable approach for counsel to take in the circumstances.

[41] On the face of it the note recorded by junior counsel for the prosecution during the consultation on 20 March 2007 would appear to introduce a fresh allegation of assault on the part of the complainant insofar as she appears to have stated that the applicant touched her between the legs for a few seconds in the toilets in McAllister's bar. If that were so, it is not an allegation that appears to have been repeated to the police during the course of the ABE interview at the Care Unit on 6 April 2007. During the course of the hearing before this court Ms McCormick, who was junior counsel at the consultation and the author of the relevant note, explained that the reference to "touched between legs" referred to a gesture made by the complainant during the course of the consultation rather than an allegation that she had made about the conduct of the applicant. In the absence of any explanatory words or phrase such as "... at this point the witness …" we have some difficulty in accepting the accuracy of junior counsel's recollection. In some ways, the note appears to "speak for itself". However, on the other hand, if this was a fresh allegation of indecent assault on the part of the applicant it is very difficult to understand why it was not made the subject of a formal count on the indictment. As we have already noted, no charge was formulated against the applicant in respect of any event alleged to have taken place within McAllister's bar. That would tend to support the accuracy of junior counsel's account and the omission to disclose the

note. Ultimately, we are not persuaded that any failure to disclose the note or the gist thereof has rendered the conviction unsafe.

The alleged wrongful admission of hearsay evidence.

[42] During the course of the trial at first instance the prosecution filed an application for leave to admit hearsay evidence in accordance with the provisions of article 18 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (the "2004 Order"). The evidence sought to be admitted by the prosecution was a text message from the complainant to her aunt Rosemary Scullion together with the account that she had given to her aunt of the alleged assault by the applicant in May 2005. The application was submitted upon three of the grounds contained in the 2004 Order, namely, res gestae, the interests of justice and that the material constituted recent complaint. The evidence in question was that contained in the police statement of the complainant's aunt, Rosemary Scullion, dated 10 August 2007, (in all probability a mistake for 2006), as to what she had been told by the complainant when she collected the complainant and her sister from their grandmother's house in May 2005. Ms Scullion said that she had been told that the appellant had pulled the complainant's hair, fired her against the wall and kicked her in the stomach and all over. She had said that the assault had gone on "for hours" but, when pressed, had provided an estimate of "about two hours." Previous counsel did not object to the admission of that passage as hearsay or to the complainant's estimation that the alleged assault persisted for about two hours.

[43] The hearing of the hearsay application took place after the complainant had given her evidence in the course of which she had said that she told her aunt that the appellant had been drunk, that there had been a row and that the appellant had "hit me." There were discussions between counsel which produced an agreement that the text message should be excluded but that the account given by the complainant to her aunt should be admitted. Mr O'Rourke argued that previous counsel should not have agreed to the admission as hearsay of the passage from Ms Scullion's police statement referred to at [42] above. He submitted that the evidence that the complainant had given that the appellant "hit me" was arguably consistent with the "push" that the appellant conceded he had administered but quite inconsistent with the aunt's recollection as to what she had been told.

[44] Mr O'Rourke referred to the relevant provisions of articles 18 and 24 of the 2004 Order as being:

"18- (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if –

(c) all parties to the proceedings agree to it being admissible."

24 – This Article applies where a person ('the witness') is called to give evidence in criminal proceedings.

> (4) A previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if –
>
> (a) any of the following three conditions is satisfied, and
> (b) while giving evidence the witness indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth.
>
> (7) The third condition is that-
>
> (a) the witness claims to be a person against whom an offence has been committed,
> (b) the offence is one to which the proceedings relate,
> (c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence,
> (d) the complaint was made as soon as could reasonably be expected after the alleged conduct,
> (e) the complaint was not made as a result of a threat or a promise, and
> (f) before this statement is adduced the witness gives oral evidence in connection with the subject matter."

Mr O'Rourke submitted that it was incompetent of previous counsel to agree the admission of the extent and content of the complaint as recorded in Ms Scullion's police statement as admissible hearsay in the context of the oral evidence of the complainant being limited to "he hit me."

[45] It seems to us that there are a number of points to be made in relation to this submission:

> (i) At all times the complainant maintained that she had not recounted the full details of the assault when she initially spoke to Ms Scullion in May 2005 and further details of her allegations emerged upon an incremental basis. We do not consider that it is essential for the complainant to have used precisely the same content and extent of words as those alleged to have been reported in order to make the complaint admissible as hearsay. Nor is it necessary for the complainant to repeat the precise wording of article 24(4)(b).
>
> (ii) Ms Scullion did not make her police statement until October 2006 subsequent to further complaints made by the complainant to her mother. Debate about the exact time and circumstance under which she received the material had the

potential to underline the severity of the alleged assault. The complainant had given details of her injuries in her direct evidence.

(iii) In practical terms it would have been very difficult to inhibit Ms Scullion from giving this evidence as it was inevitable that the jury would want to know what the complainant said when she arrived to collect them, after being contacted to come earlier than previously arranged, and found them in a distressed state.

(iv) In such circumstances previous counsel may well have considered the better tactical course of action was to agree the admission of the evidence and exploit the differences as part of the appellant's case that the complainant was quite prepared to embellish her allegations when it suited her to do so.

(v) That does appear to have been the case in respect of previous counsel's approach to cross examination of the complainant's mother. In his oral submissions to this court Mr O'Rourke asserted that there had been no cross-examination of Agnes Bradley about what the complainant had told her of the assault but, while that may have been strictly speaking correct, it was not the end of the matter. Defence counsel confirmed in cross-examination of Agnes Bradley that, when she saw the complainant after the bank holiday incident, the only injury she noticed was bruising to one wrist. He then asked:

"As a result of anything that Ciara said to you, that weekend, you didn't feel the need to look for bruises anywhere else for bruises, did you?"

No

And you didn't see any others?

No."

That exchange, in the context of the complainant's account to her aunt admitted by agreement as hearsay, enabled counsel to close to the jury in the following terms:

"Also, she (Agnes Bradley) said as a result of what Ciara Bradley told her, she didn't look for other bruises, this is Agnes in her statement to the police. Now you'll remember that Ciara has described to her aunt Rosemary an event that went on for

> nearly two hours in the house where she was kicked about the floor, kicked in the stomach, kicked in the back. Now if she had told her mother that when her mother came home, would her mother not have looked for other bruises?"

> (vi) The suggestion that the appellant could have relied upon an argument that the complainant's evidence of what she told Ms Scullion was consistent with his concession of "a push" is, in the circumstances, quite unrealistic.

Failure on the part of the PSNI to identify and interview all of the young men in the car in which the complainant returned home on Saturday 13 May 2006.

[46] As noted earlier, the prosecution case was that a partial disclosure was made by the complainant to her mother in February 2006 after she had returned to her mother's house with her friend Scarlett Brolly and in the days immediately thereafter. In her original ABE interview the complainant described how she had returned to her mother's house after a social night out on Saturday 13 May 2006 and further more detailed disclosure took place. The interview took place at the care centre during the following week and the complainant described how she had "flipped" on the previous Saturday night. She described how this had occurred when she was being driven home stating that she:

> "Told everything in a car full of boys that I am friendly with they're all raging they want to kill him. I was sick, I made myself physically sick thinking about it and I was drunk as well probably added to it, and then I knew by their reaction because I never actually came out and told anybody so I didn't know how bad it was until I actually said it and saw their reaction. I couldn't believe it they wanted to kill him and since I lived about a mile down the road and I was drunk and they were driving it wasn't, like they kind of had to, I had to calm them down and tell them not to do nothing."

She later explained that:

> "The reason it came out on Saturday night was because I managed to convince myself on Saturday night that the boy in the back of the car was trying to rape me and I started squealing and screaming and poor fella I probably freaked him out. I sounded like a crazy person and then that's where it went from

> there I was babbling, I was like you don't understand its happened to me before and bladdy, bladdy blah and it went on from there."

The complainant made the case that after she had been brought home by the boys in the car she had made a much more detailed disclosure to her mother.

[47] In the trial at first instance previous counsel cross-examined the complainant about this incident drawing her attention to the relevant part of the ABE interview in which she had said that she had told the boys in the car "everything". The complainant had earlier identified one of the boys in the car as an individual who had referred to her by the same pet name used by her father which had caused her significant emotional distress.

[48] Mr O'Rourke submitted that, in the context of the complainant's evidence that she had "told everything" to the boys in the vehicle, together with their alleged outraged reaction to this information, it would clearly have been important for the investigating police officers to have identified and interviewed each of the boys concerned. In the course of correspondence during 2012 the applicant's solicitors requested, inter alia, all notes and records relating to the police investigation and contact with the occupants of the vehicle. In the event of statements not having been taken from such individuals the applicant's solicitors requested their names and addresses in order that they could be interviewed on behalf of the applicant. In a reply dated 1 August 2012 the PPS referred to the fact that two of the individuals had apparently been identified by the defendant but that the PPS did not hold their addresses. The letter continued in the following terms:

> "The PSNI have indicated that any males in the vehicle that the complainant travelled in the night in May 2006, were not spoken to by police as it was not considered by the police that such disclosure amounted to evidence of first complaint. Further it was not considered that they would add significantly to the evidence in the case."

[49] Mr O'Rourke argued that neither of the reasons for not interviewing the boys put forward by the PPS in the letter of 1 August 2012 was of any real substance. It was common case that the disclosures alleged to have been made by the complainant were incremental and that those made on second occasion were much more detailed than those revealed on the first. In addition, the PSNI was clearly under a duty to investigate whether potential witnesses could "add significantly to the evidence" either by supporting or undermining the prosecution case.

[50] On behalf of the prosecution Mr McMahon accepted that the relevant codes of practice required the PSNI to pursue all reasonable lines of enquiry in relation to evidence that might point towards or away from a particular suspect. He accepted

that it would have been consistent with that duty for the PSNI to identify and speak to the unidentified boys travelling in the car. However, he submitted that while there might have been a "technical" breach of the code such a breach did not contain any element of bad faith nor did it amount to a serious fault on the part of the police or prosecution authorities. In such circumstances, Mr McMahon argued that the applicant's right to a fair trial had been preserved and the convictions could not be regarded as unsafe.

[51] We have given very careful consideration to the failure on the part of the PSNI to identify the boys in the vehicle and carry out reasonably contemporaneous interviews. It seems that officers did speak to one individual some years later but, perhaps not surprisingly, he had no clear recollection. No element of bad faith has been established on the part of the PSNI. They conducted the first ABE interview on the 17 May 2006 within a week of her return home with the boys and making detailed disclosure to her mother. Had they been carried out, the results of such interviews are essentially speculative bearing in mind the consumption of alcohol and the nature of the alleged disclosures. We bear in mind that in his oral submissions to this court Mr O'Rourke confirmed that he accepted that the learned trial judge had generally dealt adequately with delay. In the circumstances, we have not been persuaded that this failure prevented the applicant from having a fair trial or rendered the convictions unsafe.

Closing by previous counsel.

[52] Mr O'Rourke also relied upon previous counsel's mistake in his closing speech when he confused the last occasion upon which the applicant was alleged to have sought to penetrate the complainant but was deflected from doing so by the presence of a sanitary towel with the alleged serious assault on the 13 May 2005. That error was picked up by the learned trial judge who, after previous counsel conceded that it had been an oversight on his part, indicated that he would correct the matter. Mr O'Rourke pointed out that the learned trial judge had omitted to do so in his directions to the jury and that the error had not been made the subject of any requisition. While it is true that he did not specifically refer the jury to counsel's mistake, it is quite clear that the learned trial judge gave the jury accurate and correctly sequenced directions in relation to those separate incidents.

[53] Accordingly, we have stepped back and subjected to careful scrutiny all of the matters drawn to our attention as a consequence of Mr O'Rourke's impressive industry and thorough analysis in the context of the case as a whole. However, having done so, we do not consider that any of the matters that he has raised had the consequence of diverting the jury from the central issue or rendering the trial unsafe or unfair. The jury could have been in no doubt that the case depended upon being sure that the complainant and her witnesses were telling the truth and that the applicant and his witnesses were lying. In such circumstances we have not been persuaded that the convictions are unsafe and, accordingly the application must be dismissed.