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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

P

Defendant/Respondent

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] The appellant was returned for trial at Belfast Crown Court on two counts of gross indecency with or towards a child and two counts of indecent assault on a female. At his arraignment on 26 September 2008 he pleaded not guilty to all counts. His trial took place between 2 June 2009 and 15 June 2009 before Her Honour Judge Philpott QC sitting with a jury. The jury returned a verdict of guilty on all four counts. The appellant was sentenced on 27 August 2009 to a total of 3 years 6 months imprisonment. The learned trial judge also made a Sexual Offences Prevention Order in respect of the appellant on 16 September 2009. The appellant lodged a notice of appeal against conviction dated 13 October 2009 and on 4 March 2010 Deeny J, acting as the single judge, granted leave to appeal against conviction. The principle issues in the appeal are delay giving rise to abuse of process, the application of the Galbraith guidance on whether to grant a direction and the need to avoid interruptions to counsel's closing speech.

Background

[2] The appellant was friendly with the complainants' father when he (the father) was married to the complainants' mother and had known the complainants since they were born. The appellant would have visited their house on occasions. The complainants' parents separated and some time after this the appellant began a relationship with the complainants' mother. This relationship lasted from 1990 to 1992. The appellant lived in the family home

for a period in 1991/1992 (although there seems to be a dispute as to the actual length of this period). The Crown case was that the present offences were committed against the complainants, L and D, when they were 9 and 7 years of age respectively.

[3] The complainants are now adults. Following the birth of his daughter, D disclosed to his mother that the appellant had sexually abused him when he was 6 or 7 years old. He described the two counts of gross indecency committed against him occurring between 31 October 1991 and 1 February 1992. His reports indicate that when he was in his mother's bedroom playing a games console with the appellant, the appellant stripped off his own clothes and told the complainant to touch his penis and masturbate him. The second incident as described also happened when the complainant was playing a games console in his mother's bedroom and the appellant told the complainant to masturbate him and perform oral sex on him.

[4] When D's mother spoke to her daughter L about the abuse, L also disclosed sexual abuse perpetrated by the appellant. She described the two counts of indecent assault which occurred between 31 October 1991 and 1 February 1992. She reported being in her mother's bedroom playing the games console and described how she got into the bed to keep warm. She recalled the appellant was also in the bed and he began touching her leg and proceeded to touch her vaginal area. She recalled a second incident again occurring in her mother's bed. She was lying on top of the duvet pretending to be asleep when the appellant licked her vaginal area. When she pretended to squirm and waken he told her not to tell anybody.

[5] The grounds of appeal are:

> (i) The trial Judge erred in law in refusing a defence application to stay the case as an abuse of process by reason inter alia of delay.
> (ii) The trial Judge erred in refusing a defence application for a direction of no case to answer in respect of the preferred charges at the close of the prosecution case.
> (iii) The trial Judge's remarks to the jury irrevocably prejudiced the fair trial of the applicant by indicating that complainants in sexual abuse cases rarely make false allegations.
> (iv) The trial Judge wrongly intervened irreparably wrong footing, disrupting and undermining the delivery, content and impression of the defence closing speech to the jury:
>
> > (a) in directing the jury defence counsel was wrong in referring to the criminal standard of proof as being "beyond all reasonable doubt";
> > (b) in the presence of the jury refusing to receive submissions in their absence thereby further

undermining the defence making the defence appear to have misled the jury on a basic consideration;
(c) permitting the jury to retire to consider their verdict under such unrepaired circumstances;
(d) only conceding the correctness of the defence position on this critically central issue belatedly after the provision of legal authorities.

(v) The verdict was against the evidence and against the weight of the evidence.

(vi) The convictions of the applicant are unsafe.

No case to answer

[6] The appellant argues that the sole evidence was that of the complainants; there was no forensic, medical or other expert evidence in respect of the allegations; the house where the alleged incidents took place has in the intervening years been demolished; the complainants originally reported the incidents had occurred in their respective bedrooms but both later said they had occurred in the master bedroom; D said that his memory was "vivid" but later said that he thought this word meant the same as "vague"; L told a Nexus counsellor that the abuse may only have occurred once; L attempted to place sinister connotations on hitherto innocent family photographs; and L alleged that the type of car driven by the appellant at the time was a white Mazda with pop up headlights but then accepted that he did not own such a car but suggested that he did own a white Mantra which did not have pop up headlights. The appellant denied owning such a vehicle at that time.

[7] The appellant argued that the learned trial judge should have acceded to his application for a direction of no case to answer on the grounds that the self contradictions and inconsistencies within the prosecution evidence were such that no properly directed jury could properly convict in reliance on it in respect of the said charges or any of them. The prosecution accept that there were contradictions and inconsistencies between the prosecution witnesses but argue that these must be viewed in light of the age of the complainants at the time of the offences, the lack of motive for the complainants to lie about the incidents and the fact that there was no dispute the appellant lived in the house at the time. The prosecution submits that inconsistencies and contradictions are not in themselves cause to withdraw the case from the jury. The learned trial judge properly directed her mind to whether the flaws in the evidence were of such a substantial kind as to make the evidence of the complainants wholly incredible and determined it was not.

[8] The seminal authority on determining whether there is a case to answer is R v Galbraith [1981] 1 WLR 1039. In the course of his judgment in that case, Lord Lane CJ said (at p. 1042B–D):

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury…."

[9] At trial the appellant referred the learned trial judge to the case of R v Shippey [1998] Crim LR 767. In that case the trial judge directed no case to answer on the grounds that the injured party's evidence was incredible. The case of Shippey was considered by the English Court of Appeal in R v Alobaydi [2007] EWCA Crim 145 (cited by the prosecution in the present trial) where the Court emphasised:

> "16 The third ground of appeal is that there was no case to answer, which is based on the second limb in R v Galbraith (1981) 73 Cr App R 124. The submission was made in reliance on the often cited "plums and duff" from R v Shippey [1988] Crim LR 767. That was a first instance decision in which the judge said that if the evidence of the complainant was self-contradictory and out of all reason and common sense, then it was tenuous and inherently weak within the Galbraith principles and the case should be withdrawn at the halftime stage. In this court in R v Pryor [2004] EWCA Crim 1163 it was pointed out that Shippey is a decision on its own facts; it does not establish any legal principle. On the evidence before him, the trial judge said that the

> case was not simply a matter of the credibility of the two protagonists in the trial (the complainant and the applicant). The inconsistencies in Shippey had been of such a substantial kind as to make the complainant's whole evidence incredible."

[10] The appellant also relied upon the decision of the English Court of Appeal in R v R [2006] EWCA Crim 2754. The defendants in that case were charged on an indictment containing 27 counts of cruelty to a child, contrary to s.1(1) of the Children and Young Persons Act 1933. The prosecution case was that between 1976 and 1988, the defendants had worked at a boarding school for children with special needs and that they had been involved in deliberate acts of cruelty involving vulnerable children in their care. It was alleged, inter alia, that they had forced children to settle their differences with acts of violence and that, in relation to counts seven to nine, three victims had been set upon by the rest of the school at the instigation of the second and third defendants. As to those counts, only one of the alleged victims gave evidence about the incident, one had not been called, and the other said nothing of the incident in his evidence. The sole witness's evidence as to who had instigated the attack and as to which members of staff had actually been present at the incident was unclear. Moreover, the judge wrongly summed up the evidence in support of counts seven to nine. The second and third defendants were convicted, inter alia, on counts including counts seven to nine. Each defendant appealed against their conviction.

[11] The appeal was allowed. The court said that cases concerning events so long ago naturally gave rise to great concern. They would require special consideration, not only as to whether they should be stayed on the ground that a fair trial would be impossible but also, if they were not stayed, whether any verdicts based upon so distant a recollection were unsafe. The dangers inherent in such cases required the judge carefully to scrutinise the evidence himself in order to see whether it was safe to leave the case to the jury. Such scrutiny required the judge to consider not only the nature and quality of the evidence but also inconsistencies, either within the evidence of one witness or between a number of witnesses. It was not sufficient for a judge merely to remark that inconsistencies were a matter for the jury. Whilst inconsistencies might well be a matter for the jury in many cases, where the complaints were of events many years ago, it was the responsibility of the judge to consider whether the inconsistencies were such that no jury, even when properly directed as to the significance of such inconsistencies, could safely convict the defendant. Judges should scrutinise the evidence at the close of the case. However, beyond emphasising the need for careful scrutiny, it was not possible to lay down clear principles according to which a judge should decide whether it was safe to leave a case to the jury or whether it was not. Indeed, it would be undesirable for any principle to be established. Any principle would be liable to provide far too rigid a process of determination.

The issue should be left to the good judgment of the judge. His judgment would depend upon the type of case and the type of evidence.

[12] In that case the issues included not just whether the criminal offence had occurred but which members of staff were present when it happened. In this case the learned trial judge recognised the contradictions and inconsistencies in the evidence of the prosecution witnesses but noted that there was evidence that L had reported the abuse to her boyfriend a year before the disclosure by D and there was also evidence of her response when told of the allegations by D. The sole issue was whether the events occurred. We consider that the evidence was carefully scrutinised and that no criticism can be made of the decision to leave the case to the jury despite the inconsistencies identified.

Interruption of defence counsel's opening speech

[13] At the beginning of his speech to the jury Mr McCrudden addressed the jury on the standard of proof in a criminal case. He contrasted the civil standard of the balance of probabilities with the criminal standard "beyond all reasonable doubt". At that stage the learned trial judge intervened.

> "JUDGE PHILPOTT: Mr McCrudden, I'm going to stop you there, because you said it twice (and I'm sure it's a slip) but it's not *all reasonable doubt*, it's *beyond reasonable doubt*.
> MR McCRUDDEN: Yes, of course...
> JUDGE PHILPOTT: But you have said that the standard is beyond *all reasonable doubt*.
> MR McCRUDDEN: Yes.
> JUDGE PHILPOTT: It's *beyond reasonable doubt*.
> MR McCRUDDEN: Yes indeed, your Honour. Well perhaps we should have a discussion about that …? Because I maintain, if your Honour pleases, it has to be beyond all reasonable doubt; and if there is a reasonable doubt the jury will have to acquit.
> JUDGE PHILPOTT: Well there is no need for a discussion. I'll deal with this in the charge. "

Mr McCrudden then proceeded with his speech. In her charge, which immediately followed Mr McCrudden's speech, the learned trial judge began by saying that these types of allegations were hard to contradict but that Mr McCrudden had accepted that although they were sometimes made up that happened only rarely. In fact Mr McCrudden made the point that it rarely happened that a complainant confessed that an account had been made up. The learned trial judge pointed out the strengths and weaknesses of the

evidence. She later addressed the standard of proof and advised the jury that it was beyond reasonable doubt. The jury retired at 12:57.

[14] In his requisitions Mr McCrudden submitted that his characterisation of the standard of proof was perfectly proper, that the learned trial judge should not have refused his application to deal with the issue in submissions in the absence of the jury and that the interruption of his closing speech inevitably had a damaging effect on his ability to put the defence case. The learned trial judge rejected this submission but accepted a submission that she had misrepresented Mr McCrudden in saying that complainants made allegations up rarely and agreed to draw some inconsistencies to the attention of the jury. The jury were brought back in to deal with those matters and retired again at 13:17. There is no complaint about the manner in which these matters were addressed by the learned trial judge and we consider that the further charge by her dealt with any question of prejudice to the appellant arising from her remarks. The jury were instructed to have lunch and commence their deliberations at 13:50.

[15] Over the lunch interval the appellant's counsel gathered a number of authorities on the standard of proof which supported the way in which he had put the matter before the jury. It was agreed that there was no criticism to be made of the standard as described by the learned trial judge but it was submitted that the formulation by Mr McCrudden was also perfectly proper. Having been referred to the authorities the learned trial judge recalled the jury at 14:41 and advised them that Mr McCrudden had been quite right to use the formulation that he had used and that they should not take anything adverse from the fact that the speech had been interrupted. The jury returned their verdict at 15:52.

[16] The appellant argued that the learned trial judge's interruption of counsel's speech so as to censure him for using the phrase "beyond all reasonable doubt", and then refusing to hear submissions on the issue in the absence of the jury, served to undermine the speech, place the defence at an immediate and continuing disadvantage in respect of credibility throughout the entirety of the speech, and caused a continuing and distracting concern in the counsel's mind during the remainder of the speech. Furthermore, the learned judge then repeated her rejection and censure of the phrase and only redressed the issue with the jury some 3 hours later. The appellant submits that in such a sensitive, vulnerable and delicately balanced trial the incorrect censure and belated retraction by the judge was an irreparable and unquantifiable impairment on his right to a fair trial.

[17] The prosecution accepted that the learned trial judge was wrong in law to censure counsel for using the phrase and was also wrong to intervene during counsel's speech. However, it submitted that there was no objective evidence that the attention of the jury was diverted or that counsel's train of

thought was disrupted. Furthermore, the jury were directed not to start deliberating until 13:50 (after lunch) and the learned trial judge corrected her error at 14:41 only a matter of 50 minutes into the deliberations. Moreover, there was no application by the defence at the time for the jury to be discharged.

[18] The leading authority on this topic is R v Teugel [2000] 2 All ER 872. In that case the English Court of Appeal said:

> "As to ground 2, interventions in Counsel's speech, exceptionally it may be necessary for a judge, in the presence of the jury, to interrupt a speech by counsel. But, generally speaking, just as it is preferable for counsel not to interrupt a summing-up, so it is preferable for a judge not to interrupt a speech—whether for prosecution or defence. The reasons are obvious. The speaker's train of thought may be disrupted and the jury's attention may be inappropriately diverted with consequences prejudicial to the case which is being made. Ideally, therefore, interventions for the purposes of correcting or clarifying something said, either by judge or counsel, should be made, in the first instance, in the absence of the jury and at a break in the proceedings, so that, thereafter, if necessary, the point can be dealt with before the jury in an orderly fashion."

[19] We accept that the same approach should be taken in this jurisdiction. In examining the extent to which the interruption raises a concern about the safety of the conviction we note first that there was only one interruption. It related to the standard of proof. Although there was some difference of expression between the learned trial judge and counsel for the appellant on the appropriate standard it is accepted that both were right and that the jury were instructed at all times on the correct standard. The learned trial judge corrected her error in interrupting the speech by telling the jury that counsel for the appellant had been correct. By that stage the jury were 50 minutes into their deliberations but those deliberations continued for more than an hour thereafter. We have available the transcript of Mr McCrudden's speech and it is clear that he put the appellant's case with clarity and vigour, that he carefully analysed and exposed the inconsistencies in the Crown case and that the speech as a whole was a model of the professionalism one might expect from such an experienced advocate. Although we entirely accept, therefore, that this interruption should not have occurred and that the issue should have been dealt with in the absence of the jury at the end of the speech, if at all, we do not consider that the interruption and the late correction could have

impinged on the deliberations of the jury on the issues in the case and do not consider that it can be contended that the verdicts were thereby rendered unsafe.

Abuse of process

[20] The law relating to staying proceedings for abuse of process was set out by Carswell LCJ in Director of Public Prosecutions for Northern Ireland's Application [1999] NI 106 when he stated:

> "Our conclusion from our examination of these authorities is that there are only two main strands or categories of cases of abuse of process:
>
> (a) those where the court concludes that because of delay or some factor such as manipulation of the prosecution process the fairness of the trial will or may be adversely affected (we regard these words, which were used in *Re Molloy's Application*, as the appropriate formulation of the criterion);
> (b) those, like *Ex parte Bennett*, where by reason of some antecedent matters the court concludes that although the defendant could receive a fair trial it would be an abuse of process to put him on trial at all.
>
> We do not consider that there is a third category of generalised unfairness …"

He went on to say:

> "The courts have constantly been enjoined to bear several factors in mind when considering an application for a stay:
> **1.** The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons: *Ex parte Bennett* [1994] 1 AC 42 at page 74, per Lord Lowry.
> **2.** The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct: *ibid***.**
> **3.** The element of possible prejudice may depend on the nature of the issues and the evidence against the defendant. If it is a strong case, and *a fortiori* if he has admitted the offences, there may be little or no

prejudice: see *Ex parte Brooks* (1984) 80 Cr App R 164 at page 169, per Sir Roger Ormrod."

[21] Although in this case the issue is being advanced on the basis of the common law test concerning delay there is some assistance to be gained from the jurisprudence under Article 6 ECHR where delay issues arise in the context of whether an accused can get a fair trial within a reasonable time. The general principles applicable were enunciated by the English Court of Appeal in R v Ali [2007] EWCA Crim 691. That was a delay case in which the appellants contended that documents were no longer available as a result of which the trial could not be fair. The general approach which a court should take was set out at paragraph 27.

> "27. As we have already indicated, the question for this court is not whether the judge was correct to refuse to stay the proceedings, but rather whether the effect of the delay is such as to lead this court to the conclusion that the verdicts were unsafe. Often, there will be little, if any, difference between the question whether the judge ought to have stayed the case on the grounds of prejudice due to delay and whether this court takes the view, on those grounds, that the verdicts were unsafe. The coalescence of these two issues derives from the principle identified by a majority of the House of Lords in *Attorney General's Reference (No. 2 of 2001)* [2003] UKHL 68 [2004] 2 AC 72. A breach of the defendant's right to have a criminal charge determined within a reasonable time, contrary to article 6(1) of the Convention, will not necessarily require criminal proceedings to be stayed. It will only be appropriate to stay or dismiss proceedings if there can no longer be a fair hearing or it will otherwise be unfair to try the defendant (see Lord Bingham para 24 p 89). Once there has been a conviction, this court should only quash that conviction if the hearing has proved to be unfair, or it was unfair to try the defendant at all (see para 34 p 90)."

[22] The role of the court in dealing with any possible prejudice as a result of delay was addressed in paragraphs 29, 30 and 32.

> "29. *Attorney General's Reference (No. 2 of 2001)* was concerned with the remedy for a breach of article 6(1) rather than the means a court might adopt to avoid unfairness in the prosecution of a delayed

trial. The authorities are replete with examples of cases where evidence has been lost or destroyed but nevertheless this court has ruled that the trial judge was correct in refusing to stay the trial. This court has repeatedly emphasised that, during the course of a trial, there are processes, such as the power to exclude evidence under s.78 of the Police and Criminal Evidence Act, 1984, which may provide sufficient protection to a defendant against prejudice caused by delay. That is the second principle identified by Brooke LJ in *R (Ebrahim v Feltham Magistrates Court* [2001] 2 Cr App R 23 at para 74). In that case a video tape, which might have showed images inside a store, where an alleged assault was alleged to have taken place was no longer available. The loss of such a recording is not unusual in cases of delay. Loss or destruction of the video evidence did not lead to a stay in such cases as *Medway* [2000] Crim LR 415, *Dobson* [2001] EWCA Crim 1601 or in the other case decided by the Divisional Court at the same time as *Ebrahim (Mouat v DPP).* The mere fact that missing material might have assisted the defence will not necessarily lead to a stay.

30. But in considering such powers to alleviate prejudice, Brooke LJ (at para 27) emphasised the need for sufficiently credible evidence, apart from the missing evidence, leaving the defence to exploit the gaps left by the missing evidence. The rationale for refusing a stay is the existence of credible evidence, itself untainted by what has gone missing….

32. There is another important feature of the protection afforded to defendants in such cases. Prevention of prejudice to the defendants depends upon careful and accurate warnings by the judge as to the consequences of delay. Unless the available safeguards in the trial process are carefully deployed, then the prejudice flowing from delay and loss of evidence will not be alleviated. There will, however, be cases where a defence can establish, on the balance of probabilities, that the prejudice flowing from a failure by the authorities to prosecute a matter with the diligence required by

> article 6 cannot be cured and a fair trial is no longer possible. In such a case, if the judge has nonetheless refused to stay a prosecution then that unfairness is likely to affect the safety of a verdict."

[23] The offences in this case were alleged to have occurred in private and accordingly by their very nature there was no corroborating evidence. This was not a case where there was an issue about medical or forensic evidence. The contradictions and inconsistencies in the prosecution case were plainly developed in evidence and set before the jury by both the appellant's counsel and the judge. One example was the change in L's account about the type of car owned by the appellant. There was no criticism of the careful charge given to the jury on the issue of delay and how delay could affect the ability of the appellant to remember events and his ability to gather other evidence. In our view this was a case where there was evidence before the jury which was sufficiently credible and tested effectively. We do not consider that the verdicts were unsafe nor do we have any lurking doubt about their safety.

[24] We do not consider that the other grounds of appeal raise any new issue. For the reasons set out the appeal must be dismissed.