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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

PAUL HUGHES

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Before: Campbell LJ, Higgins LJ and Girvan LJ

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CAMPBELL LJ

[1] The appellant was tried and convicted in the Crown Court in Newry on 25 May 2006 on twelve counts of gross indecency and twelve counts of indecent assault on a girl whom I shall call A and four counts of indecent assault on the sister of A, whom I shall call B. He was sentenced to a total of five years' imprisonment.

[2] The appellant appealed against these convictions with the leave of the single judge and the court quashed the convictions and ordered a re-trial. We now give our reasons.

[3] The offences against A are said to have occurred on various occasions between 1990 and 1995. The four offences against B are said to have been committed between 1990 and 1992. A was born on 2 June 1984 and was about six at the start of the period over which the offences are alleged to have taken place. B was born on 31 July 1981 and was about nine at the time of the alleged offences against her. The appellant who was 31 at the time of his trial was born on 23 February 1975 and the offences are alleged to have begun when he was 15 and continued until he was 20.

[4] The facts in outline are as follows. In June 1989 A and her sister B moved with their parents from Belfast to live in a small town in County Down. The family got to know and became friendly with the appellant's family. A was a frequent visitor to their house and B visited the house also but less often than her sister. The appellant's family had a large games room built and A as a child liked to go to this games room to play video games and

to use the other equipment there. She became very friendly with the appellant and his brother but especially the appellant. It was in this room when she was alone with the appellant that she alleges the offending began when she was six and where the majority of it occurred and continued, more than once a week until she reached the age of ten. On occasions it also occurred in a storage cupboard off the games room, a few times in a boiler room and also in a car in the garage. A said that it came to an end when she realised that it was wrong and she stopped going to the appellant's house unless his parents were there and when she would not be alone with him.

[5] A did not tell anyone what had happened to her until she told a friend at university around 2002. She told her parents in 2005 and she said that at the time that it happened her mother was very ill with cancer and she did not want to worry her and the appellant's parents were like an uncle and aunt to her. Furthermore she felt that it was her fault and she felt ashamed.

[6] B was between 9 and 10 years of age when she was in the games room with the appellant and claims she was indecently assaulted by him. This happened on ten or more occasions and always in the games room and after one of these incidents she decided she would never be alone with the appellant again. She said that she told two other ten year olds about it at that time.

[7] The mother of A and B, who also gave evidence at the trial, was asked if she noticed anything about A when she was about ten years of age. She said that A started to wet the bed when she was around six which she had not done when they had lived in Belfast and around the age of ten she stopped going to the appellant's house. She told her mother, when she queried why she was not going there, "I don't want to go back again". As A got older her mother said her personality and whole outlook became completely different. Having been a good child and always laughing she had a different expression on her face and a haunted look about her. Under cross-examination the witness accepted that children do change as they get older.

[8] The allegations made by A were reported to the PSNI on 9 February 2005 and the appellant was arrested on 18 April 2005 and interviewed in respect of the allegations made by A. He was interviewed later on 24 May 2005 in respect of the allegations made by B who had made a statement on 16 May 2005. The appellant denied all the allegations that had been made against him both when he was interviewed and at the trial. His evidence was that he had very little contact with A and that he would not play computer games with her and was never alone with her in a room or in a car. He denied all of her allegations. Under cross-examined he said that there was never any possibility that he could have been alone with A or B in any room.

[9] It was established in evidence that the appellant is now married and that he has no criminal convictions. In 1989 he was at secondary school and from 1988 he had part-time jobs. After leaving school in 1998 he did a two year course full-time at Newry Technical College before going to university in 1993. While at university he lived in Belfast and came home every other weekend. While at home at weekends he had no recollection of ever seeing A or B. He returned to live at home in 1996 when he finished at university.

Delay

[10] The first ground of appeal concerns the judge's direction on delay. The appellant complains that it was brief and "offered no assistance to the jury in deciding the degree of difficulty that delay may have caused the defence. The directions were inadequate for the purpose of ensuring the jury paid 'conscientious' regard to the burden and standard of proof." The direction that the trial judge gave was in these terms;

> "Another thing I wanted to say to you was, consider also the period of time that has elapsed since the 90s when these offences are dated – that is to say, the interval of time of something like 15 years, to either side. The difficulty that that creates in terms of not only the prosecution in relation to what were young girls giving evidence of what happened to them 15 years ago, but more particularly in relation to the defendant, who is having to deal with matters which are alleged to have occurred years ago. As Mr McCrory pointed out, it might be a different thing if an allegation had been made about a person, about something they did last Friday. It might be quite an easy matter for that person who is accused to turn round and produce alibi evidence and say, 'I was not even in that house last Friday, I can prove it, I was at work'. How much more difficult is it after a period of years to try and disprove evidence? Bear that in mind."

Mr Barlow (who appeared for the appellant before this court but not at the trial) relied on the decision of the Court of Appeal in *The Queen v Brian Percival* 97/6746/X4 (19 June 1998) where the court held that the judge's directions fell short of what would have served to counter the prejudice occasioned to the defence by reason of the delay. Holland J. who delivered the judgment of the court said;

> "True, a developing concern with and, understanding of sexual abuse is reflected in a growing experience of cases featuring delays that at one time would have

> been regarded as intolerable. That experience and the underlying problem of unreported abuse has served to encourage experienced judges to be more liberal in their concept of what is possible by way of a fair trial in the face of delay, but as we think there is a price, namely safeguarding the defendant from unacceptable resultant prejudice by a 'pro active' approach in terms of directions. Before a conviction following such a trial can appear to be safe, it is necessary to be satisfied that the judge has confronted the jury with the fact of delay and its potential impact on the formulation and conduct of the defence and on the prosecutions' fulfilment of the burden of proof."

In the later case of *R v Brian M* (2000) 1 Cr. App. R. 49 at page 57 Rose LJ said:

> "It is apparent that the judgment in *Percival* was directed to the summing up in that particular case. We find in the judgment no attempt by the court to lay down principles of general application in relation to how judges should sum up in cases of delay and we accordingly would wish to discourage the attempts being made, with apparently increasing frequency, in applications and appeals to this court to rely on *Percival* as affording some sort of blue print for summings-up in cases of delay. It affords no such blue print. Indeed in this area, as in so many others, prescription by this court as to the precise terms of a summing-up is best avoided. Trial judges should tailor their directions to the circumstances of the particular case. In the case where there have been many years of delay between the alleged offence and trial, a clear warning will usually be desirable as to the impact which this may have had on the memories of witnesses and as to the difficulties which may have resulted for the defence. The precise terms of that warning and its relationship to the burden and standard of proof can be left to the good sense of trial judges with appropriate help and guidance from the Judicial Studies Board. In some cases, however such a warning may be unnecessary and its absence, where the evidence is cogent, will not necessarily render a conviction unsafe, particularly when counsel's submissions at trial have not highlighted any specific risk of prejudice."

In his closing speech to the jury leading counsel for the appellant said this about delay:

> "These offences, members of the jury, took place, as I say, a number of years ago. His Honour no doubt will direct you on the significance of delay. Does delay make you wonder whether or not there is truth or veracity in the story at all? Delay can also prejudice the defence, because, for example, if these complaints had been made at the time or near the time, the defence might well have been in a better position to defend itself than just saying 'well, it did not happen'. You have heard, for example, the defendant says that he was working in a … factory, or that he was at the tech, or wherever, and the various things he was doing at the time. If an allegation had been made, for example, at the time, in relation to a specific date or a time or a place, he might have been in a position to produce alibi evidence or something of that nature. But he is not in that position, because he is disadvantaged now by these allegations coming all these years later, there are some specific allegations, and there is a veritable avalanche of specimen charges. He is not in a position to address them in that way. So, members of the jury, when you are deliberating, consider the effect and the impact that delay might have had in this case."

While the judge made sure that the jury appreciated the difficulty that a defendant faces so far as remembering where he was at a time in the distant past and therefore in producing alibi evidence he did not ask the jury to reflect on whether delay served to cast any room for doubt as to the complainants' reliability. We consider that the jury should have had it drawn to their attention that because of the delay the evidence had to be examined with particular care before they could be satisfied of the guilt of the appellant on any of the counts on the indictment. However, we would not have regarded this omission, in itself, as providing a reason for setting aside the convictions.

Good character

[11] The second ground of appeal was that the judge's direction on good character was "inadequate given the historic context of this case. In particular he incorrectly directed the jury in law by directing them that previous good character varied with the type offence charged. This created real prejudice to the [appellant] and may have left the jury speculating that his good character

had no effect in this case." The judge in his summing up said about good character:

> "The defendant in this case has asked about whether or not he had a clear record. That would open the door for the Crown to adduce a bad record if he had a bad record. The Crown has not done that, so from that you can take it he has a clear record. That is of twofold relevance. First of all, it is less likely, other things being equal, that the accused would commit the criminal offence. Secondly, where his credibility has to be weighed, he is more likely to be telling the truth than if he were shown to be a man of bad character. The weight of previous good character varies with the type of offence. Under general circumstances, it is always a relevant matter when weighing the question of guilt or innocence."

This direction deals with the first and second limb of a good character direction, as they are sometimes described. In a case such as this where a considerable length of time has passed since the date of the alleged offences and there was no suggestion that any similar allegations had been made against the appellant the jury should have been told that he was entitled to ask them to give more than usual weight to his good character when deciding whether the prosecution had satisfied them of his guilt. In the passage of the summing up which preceded the reference to good character the judge gave the normal direction on the burden and standard of proof. In a case of delay such as this we consider that more was required along the lines that we have indicated.

[12] The prosecution case depended upon the word of A and B against the word of the appellant and it was of particular importance that an appropriate direction on good character be given. In our view the addition by the judge of the words "the weight of previous good character varies with the type of offence" seriously detracted from the evidence of good character which was of particular significance. For these reasons we consider that the direction on good character was inadequate.

Contamination and Collusion

[13] The third ground upon which leave to appeal was given was that the judge "failed to direct the jury as to the issue of contamination or collusion between the two sisters". In the course of cross-examination of B counsel for the appellant suggested to the witness that she had made the allegations against the appellant for the purpose of providing support and to back up her sister's claim. Her response was that she would not do that. Counsel

continued that "for whatever reason or whatever motive, what would appear to be out of loyalty to her sister she was endorsing her claim by making allegations of her own". To this she replied "Definitely not." Mr Barlow submitted that it was important for the jury to be alive to the danger of contamination or collusion and in the circumstances the judge should have dealt with this possibility in his summing up. We do not agree. Counsel had explored the possibility of collusion between the sisters before the jury and this was sufficient to bring it to their attention without it being necessary for the judge to do so again. It is a possibility to which any jury is bound to have been alert.

Demeanour

[14] The final ground of appeal on which the single judge gave leave was that the trial judge allowed inadmissible evidence of demeanour to go before the jury from the mother of A and B. "It was highly prejudicial and there was no basis upon which it could be placed before the jury. Further, having been placed before the jury the trial judge failed to direct the jury to ignore such evidence."

[15] The evidence from the mother of A about her daughter's bedwetting and the change in her countenance was admitted without objection from the defence. At the trial counsel suggested to the mother in cross-examination that children change as they grow older and she agreed with this. In his summing up the trial judge repeated the evidence without comment.

[16] In *R v Keast [1998] Crim L.R. 748,* evidence was given that a child of eleven who was alleged to have been sexually abused by her step father had become withdrawn and anxious and was avoiding eye contact and on occasions was incontinent during the period covered by her complaints. After she had unburdened herself about what had occurred she was said to have become normal and much happier. The trial judge told the jury that the evidence of the child's demeanour and incontinence could not be regarded as confirming her story as there might be a variety of explanations for it. In the Court of Appeal Beldam LJ said;

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

The court held that the evidence did not render the conviction unsafe as the judge had told the jury emphatically that the evidence about demeanour and incontinence in no way confirmed what she had said.

[17] In *R v Venn [2003] EWCA Crim 236,* evidence was admitted of the complainant's distress when she gave the police an account of indecent assaults by the appellant. The basis upon on which it was admitted was that it was linked with and integral to the evidence of the mother as to the complainant's untypically depressed demeanour over a long period which was dramatically reversed following her revelation and complaint as to the conduct of the accused. Potter LJ said of such evidence;

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

However, the court considered that in view of the uncertainties involved in establishing a link between the complainant's demeanour and the alleged abuse, the judge should have excluded it from the jury's consideration. Having admitted it, the judge had given a careful direction with a clear indication that little weight should be attached to the evidence and the court was satisfied that the conviction was safe.

[18] Before this evidence could be admitted it was necessary for the prosecution to establish a link between the symptoms that the mother said A exhibited and the abuse that was alleged. In the absence of such a link the evidence ought not to have been admitted. Once it was before the jury a clear direction was required from the judge that the evidence did not confirm what A alleged had happened to her. As stated earlier the judge did not make any reference to this evidence in his summing-up.

Separate consideration

[19] A further ground of appeal in the notice of appeal is that "the trial judge's direction on the (sic) separate consideration was wholly inadequate given the nature of the case and the allegations being made by two sisters." In his summing–up with reference to the closing speech of leading counsel for the defence, the judge said "He reminds you that in relation to each count, you should consider the evidence of each of the complainants individually and separately, and also in relation to each count consider the evidence individually and separately."

[20] In *R v Clifford Robin D* (2004) 1 Cr. App. R. 19 the appellant was convicted of offences involving sexual abuse of his two step-daughters. As in the present case the prosecution did not treat it as a similar fact case. In his

summing-up in *R v D* the judge directed the jury that the counts did not all stand or fall together because the evidence in relation to each count was not the same as in relation to the other counts. You have to consider the evidence in relation to each count and ask yourselves, 'Are we sure that this offence has been proved?'. Delivering the judgment of the Court of Appeal Nelson J said:

> "Where however the Crown do not rely on similar fact and the charges are not severed, it is essential that the jury is directed in clear terms that the evidence on each set of allegations is to be treated separately and that the evidence in relation to an allegation in respect of one victim cannot be treated as proof of an allegation against the other victim. If such a warning in clear terms is not given there is the risk that the jury may wrongly regard the evidence as cross admissible in respect of each separate set of allegations, and may, as a consequence, rely upon what amounts to no more than the evidence of propensity as evidence of guilt."

Nelson J. also said in *R v D* "A sensible overview of the judge's directions must be taken, rather than a minute analysis capable of depriving the direction of its ordinary meaning."

[21] There was no independent evidence to support the version of events given by A or B and we consider that it was important that the judge directed the jury not only on the need to treat each of the allegations separately, as he did, but also that the allegations in respect of one sister could not be treated as proof of an allegation in respect of the other sister.

[22] In view of the shortcomings to which we have referred we could not regard the convictions as being safe. On the question of ordering a retrial we heard the submissions of counsel with regard to the legitimate interests of the appellant and to the public interest. Although we were conscious of the fact that the allegations concerned incidents that occurred a considerable time ago and that the appellant has served a major part of the term of imprisonment that was imposed we decided that the public interest required that there should be a retrial and so ordered.