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Judgment: approved by the Court for handing down | *Delivered:* **16/9/05**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

SARAH JANE MARGARET HEWITT
AND
ROBERT GOERGE ANDERSON

Before: Nicholson LJ, Sheil LJ and Deeny J

NICHOLSON LJ

Re-Trial

[1] The outstanding issue which we have to determine is whether both or either of the appellants should be re-tried. We have had the benefit of having arguments from counsel on both sides.

[2] Mr Simpson QC, counsel for the Crown, has adopted a neutral stance, neither advocating that there should be a re-trial nor urging that a re-trial should not be ordered. But he has rightly drawn to our attention some of the difficulties which the Crown would face if a re-trial was ordered. Firstly, a decision would have to be made as to which of the remaining complainants could properly be presented by the Crown as credible witnesses. He gave as an example S who in the course of her evidence stated that the compensation which she had received as a result of civil proceedings brought against Barnardos had been given away to charity. When she gave that evidence it was not possible to say whether it was right or wrong. But if it was true, it was a strong indicator that she was telling the truth. Subsequent investigation showed that it was untrue and her evidence was inevitably tainted. Secondly, it would be difficult, if not impossible to keep out extraneous evidence. Complainants were liable to give evidence which was inadmissible but which might prejudice the appellants.

Thirdly there were difficulties that the Defence would face in presenting their case. They would have problems in conducting cross-examination of complainants and could be placed in an unfair position in that they might be forced to introduce evidence which had been ruled out in order to discredit the allegations of complainants. He gave as an example evidence relating to WA which the defence might wish to use in order to discredit other complainants.

Finally he adverted to the publicity given to the trial and verdicts of the jury and to the appeal and the difficulties which a new trial judge would face in deciding whether the appellants could have a fair trial. These arguments might have little weight in other circumstances. But in the circumstances of this particular appeal they presented to the court what must fairly be described as unique problems, scarcely likely to occur again. In the normal course of events the Crown would be seeking a re-trial. In this case, for the reasons which he gave, it was not. It was a matter for the court.

[3] Mr Creaney QC and Mr Gallagher QC made submissions on behalf of the appellants, Anderson and Miss Hewitt. The outstanding charges against Anderson involve DA, SK, EJ and C. The most serious are the allegations of rape made by EJ and SK.

[4] Mr Creaney QC submitted that the allegations made by DA were very vague (as was pointed out by a member of the court). He had a substantial criminal record. He alleged that he had been seriously ill-treated by his brother at Macedon. These allegations were much more serious than those made against Anderson. His credibility was considerably weakened in the course of cross-examination, not least when he was re-called to give evidence late in the trial and it was shown that he had lied to the court.

His evidence against Miss Hewitt was similar to the evidence of others. The case for the Crown had been that the witnesses had no opportunity to collude with one another. Having received fresh evidence in the Court of Appeal it had been shown that there was an opportunity for complainants to discuss the allegations which they would make. DA was amongst those who had an opportunity to concoct a story, he contended.

He submitted that in so far as the evidence of EJ was concerned as against Anderson, the jury acquitted him of a number of allegations of rape made by her. In respect of one of her allegations of rape, she admitted in cross-examination that she had not been raped but said that she had been sexually abused. "Sexual abuse to me is rape" she said. Her evidence in cross-examination about these allegations was, to say the least, unsatisfactory and it was not surprising that Anderson was acquitted of these charges. He contended that the difficulty which this court had involved the verdict of the

jury of rape at the holiday home at Ballylough, for which there was no supporting evidence. It was, therefore, on a par with the charges of rape in respect of which the jury found Anderson 'Not Guilty'. Moreover she claimed to be present at Ballylough when SK was allegedly raped by Anderson. But contemporary records produced by independent members of the staff indicate that she was not at Ballylough at that time. The allegations made by her related to incidents which had occurred more than 20 years previously. It happened by chance that at the trial contemporary records of these events made by the staff became available. These contradicted her version of events. She had made a series of allegations against another member of staff which were not proceeded with, as a result of a direction by the DPP not to prosecute. But this was only discovered after the trial. The allegations were on a par with her allegations against Anderson.

Mr Creaney further pointed out that the jury acquitted Anderson of allegations of rape made by SK in respect of incidents at the children's home at Macedon. She made an allegation that she was raped by him at Ballylough, the holiday home for children from Barnardos to which reference has already been made. She described in some detail how she was raped by Anderson on a night which could be identified. When he had stopped raping her, she said, she put on a duffle coat and went outside onto the public road screaming and shouting. He was trying to shut her up by hitting her. She went, she said, to a public phone box. Again she was recounting an incident which had occurred more than twenty years previously. The jury convicted him of this rape although they acquitted him in respect of her other allegations of rape.

Mr Creaney reminded the court of the evidence of independent members of staff. One of them, Mrs Elizabeth McNamara was tendered by the Crown for cross-examination. In fact her evidence was inconsistent with the evidence of SK. But for the fact that she was dealing with events which occurred more than 20 years earlier and could not remember the incident without referring to her own contemporary records she would have been giving evidence for the Crown, answering questions from Crown counsel. Her evidence was established by way of cross-examination and to that extent its force must have been diminished. She had made a report about the incident on the night that SK described as a "rape". In the course of the report she described how SK ate very little tea that evening; she went to take her to the pictures; SK got into a minibus to go to the pictures, shouted: "I hate him" referring to Anderson, subsequently got out of the minibus, then went to the pictures, walking on her own and sitting by herself. When the group arrived back from the pictures Mrs McNamara prepared supper, went to SKs' room to get her to come down for supper, stayed talking to her. SK said "You all talk rubbish, no-one ever sees my point of view". After sitting for about an hour with her, SK ran out. Mrs McNamara went after her walking down the road shouting for her, but she did not appear. Subsequently she was found in a public phone box, refused to come out of it and later returned to her

bedroom at 12.30 am. She started shouting that she was going to Belfast. She had a real outburst, yelling at the top of her voice. Mr Anderson then arrived. SK shut the door in his face. He shouted at her to be quiet as she had wakened the younger children who were sleeping nearby. She yelled and yelled at him, then pushed past him. Another member of staff, Mrs Craig, gave evidence, based on a report made by her at the time that she was terrified of SK that night, that she was "off her head", that she was volatile and that there had been other occasions when she was as bad as that. Mrs Mateer, another independent member of staff, recorded in a contemporaneous report that SK had claimed that Anderson had previously called her "a big cow" and that being jealous of him and another girl and desirous for revenge she had exploded on the night in question.

He submitted that it was apparent from this brief summary that Mrs McNamara's evidence contradicts SK's. The latter alleged that she was raped by Anderson, then ran out onto the public road. The former stated in a contemporary report that she was sitting talking to SK in her bedroom when she ran out of the bedroom and out of the front door of the building onto the public road. The discrepancies were plain. The motive for making the allegation, if the staff were right, was that SK believed Anderson had made a disparaging remark about her and was jealous. In these circumstances a conviction for rape on re-trial would be highly unlikely and would not be safe.

C also had made complaints about Anderson of indecent assault. R had given evidence before the Court of Appeal and volunteered that he reminded his sister about some incidents. It must, therefore, be a matter for concern, he contended, as to the extent to which any of her evidence was unprompted. Anderson had spent nine and half months in custody between the end of the trial and the completion of this appeal, the equivalent of a sentence of nineteen months.

[3] Mr Gallagher QC on behalf of Miss Hewitt referred to the highly adverse publicity following the conviction of Miss Hewitt. He outlined a number of the difficulties confronting defence counsel if there was a re-trial on the outstanding incidents involving Miss Hewitt. For example, C denied any contact with R but in this court he had volunteered that he had had to remind her about incidents in a bath allegedly involving Miss Hewitt. The Crown now conceded that they would not be calling him as a witness because on other matters he was not credible. The defence would obviously be at a significant disadvantage in establishing that C had asked him to remind her of incidents involving Miss Hewitt. Margaret Hewitt had been acquitted of many counts relating to specific incidents. In conducting her defence on a re-trial it would be difficult to avoid leading evidence about these incidents of which she was acquitted. Although on one view this might be advantageous, it could also be prejudicial. A truncated trial omitting a number of

complainants who had been shown not to be credible could cause prejudice. A trial within a reasonable period was essential in order to ensure fairness. Allegations had been made against Miss Hewitt as far back as 1997 and additional allegations had been made up to 2000. A re-trial would not be likely before 2006. Miss Hewitt was now 70 years of age. Many of the allegations against her carried a maximum sentence of 2 years' imprisonment and now that so many of the charges were no longer being pursued, sentences might be concurrent. She had spent nine and half months in custody from the date on which she was sentenced until the close of the appeal, the equivalent of a sentence of nineteen months. Many of the complainants had been exposed as lying in the witness box. She had had the charges hanging over her for many years. She had suffered greatly, he submitted.

The principles to be applied

[6] The decision whether to order a re-trial requires an exercise of judgment involving the public interest and the legitimate interests of the appellants. One could set out a list of the various factors which have to be taken into account. But each decision turns on the facts of the individual case and there is little to be gained by comparing one case with another or in using a decision made in one case when deciding another case. The general principles can be gleaned from Archbold on Criminal Pleading Evidence and Practice 2005 at para. 7-112, Blackstone's Criminal Practice 2005 at D23.35 and Valentine's Criminal Law of Northern Ireland – (note to section 6(1) of the Criminal Appeals (Northern Ireland Act) 1968.)

Conclusions

[7] We have taken all the relevant factors into account. We have had regard not merely to the stress and strain on the appellants and the publicity which will, inevitably, affect them for the remainder of their lives but also the stress and strain on those of the complainants who might be advanced as credible witnesses by the Crown. It is apparent that they went through a harrowing time in the witness box. Their early lives were robbed of the happiness which most young people enjoy and they have had to re-live those vicissitudes and the misfortunes and mishaps which have occurred to them since then. They would have to go through such an ordeal again when the case against the appellants was significantly weakened. We consider that the conduct of a re-trial would render it difficult, if not impossible to ensure a fair trial. Accordingly we consider that the interests of justice will not be served by ordering a re-trial.

[8] We wish to record that this trial was extremely difficult for the trial judge to conduct. His conduct of it was outstandingly fair.