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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

R

v

DG

[Application for Leave to Appeal against Conviction]

Counsel for the Appellant – James Gallagher QC & Ian Turkington
Counsel for the Prosecution – Charles MacCreanor QC & Ciaran Harvey

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Before: Treacy LJ, McBride J & Sir Paul Girvan

TREACY LJ ***(delivering the judgment of the court)***

Introduction

[1] This is a sexual abuse case involving two complainants from one family. Stephens LJ refused leave to appeal the conviction on all grounds. The application for leave is renewed before the full court.

[2] Under section 1 of the Sexual Offences (Amendment) Act 1992 ("the 1992 Act") the complainants are entitled to automatic lifetime anonymity in respect of this matter. Accordingly, we have anonymised all parties to this case by allocating initials to them as follows:

- DG – the applicant/appellant ("the appellant"), cousin of the first complainant and nephew of the second complainant;
- AG – the first complainant, cousin of the appellant and son of the second complainant;
- KG – the second complainant, aunt of the appellant and mother of the first complainant;

- AAG – a witness, brother of the appellant and cousin of the first complainant;
- CG – a witness, brother of the appellant and cousin of the first complainant; and
- EG – not a witness at trial and sister of the appellant.

[3] We are grateful for the detailed oral and written submissions of counsel. Mr James Gallagher QC and Mr Ian Turkington appeared for the appellant and Mr Charles MacCreanor QC and Ciaran Harvey for the prosecution.

Factual Background

[4] The offences relate to historical assaults of indecency and gross indecency by the appellant, DG. Counts 1-21 relate to offences against the first complainant, AG, cousin of the appellant. The counts included touching AG's penis, making AG touch the appellant's penis, touching of penises with masturbation, mutual masturbation and oral sex. Count 22 relates to an indecent assault, touching over clothes, against the second complainant, KG, the appellant's aunt and the mother of the first complainant.

[5] On 12 March 2019 DG was convicted of 22 sexual offences comprising 21 offences against AG and 1 offence against KG. At the time of his conviction, DG was a 53 year old man with a clear record. All the offences were alleged to have occurred during the period 1981-1985 when the appellant was 16-20 years old. AG was approximately 6-10 years old at the time of the offences. Some of the offences took place in AG's home and the remainder outside on an adjacent family farm. The single offence relating to the second complainant, KG occurred when the appellant was 15 or 16 years old in KG's house.

The Grounds of Appeal

[6] The Grounds of Appeal are as follows:

(i) The trial judge erred in giving an emphatic written direction to the jury that the truth or otherwise of an alleged false complaint made by the first complainant against a third party, AAG, was not relevant to their deliberations and should "form no part of your consideration."

(ii) Counsel were not given any advance notice of the content of the written direction.

(iii) The trial judge erred in admitting recent complaint evidence from CG pursuant to Article 24 of the Criminal Justice (Evidence) (NI) Order 2004.

(iv) The trial judge suggested to the first complainant's father, during the course of the latter's evidence, that the complainant was working with

special needs children. An affirmative answer was provided. This was factually untrue and not based on any evidence. The trial judge erred in refusing the defence application to discharge the jury on account of this irregularity.

(v) The trial judge wrongly admitted in evidence hearsay evidence contained in the appellant's police interview to the effect that "EG told me she got a letter from KG saying AG has made allegations against DG I hope it doesn't affect our relationship." This was used to support the evidence of the second complainant. This evidence was also evidence of complaint made by the first complainant to EG (the appellant's sister, who was not a witness). This would have required an application pursuant to Article 24 of the Criminal Justice (Evidence) (NI) Order 2004.

(vi) The above mis-directions, erroneous evidence and inadmissible material contaminated the jury's consideration of the count relating to KG.

The Evidence-in-Chief

[7] AG's evidence was that he informed his parents about the events involving DG by letter in 1998 but he did not make a complaint to the police until early 2017, some 32 years after the offending occurred. AG also gave evidence that he had, at an earlier stage, informed his cousin CG about the events.

[8] AG's evidence in chief, in relation to the abuse by DG, was provided by a pre-recorded "Achieving Best Evidence" ("ABE") interview made on 31 January 2017. In the course of his interview (p23) AG was asked "Can you recall any specific incident maybe which stands out in your mind?" His reply included the following statement:

> "… there was 8 in that house so the 4 boys are all older than me, the girls older than me, the next boy is 3 years older than me so you had 6 and then you had my 2 older sisters which was 7, 8 and then you quite often had cousins so it was always around my grandparent's farm there always could have been any number of 2 kids running around, 5 kids running around playing hide and go seek, messing about that bunch of 4 boys would have been running around doing different stuff and you know none of them, none of them were involved in anything at all, kind of there was no incidents of where any of them even eluded (sic) to anything but I like he would have worked up with my grandparents, my granda drawing plans so there would have been times when he would

> have done that there and I might have been up around so there was a wee shed where he was doing drawing, so basically there would have been a times whenever there was just me and him on our own and like I can't remember the significance of the first time that kind of eh …"

[9] On 8 May 2017, some three months after his ABE was recorded, AG made a further report to the police in relation to an incident he claimed had occurred between himself and AAG, a brother of the appellant and a cousin of AG. This alleged incident occurred at around the same time and in a similar location to the conduct involving DG which he had described in his ABE statement. AG reported that when he was around 11 years old, he had engaged in masturbation alongside his cousin AAG, who was then aged 18. AAG was interviewed under caution and denied the allegations.

[10] The incident involving AAG was recorded as follows in the police officer's notebook (anonymised by the Court):

> "(i) Notebook entry dated 8 May 2017
>
> '11.25 Received telephone call from AG. AG advised me that he recalled when he was aged 11 being in a field with DG's younger brother AAG and he and AAG mutually masturbating ie masturbating side by side. He stated that this act was instigated by him and he believed AAG was about 3 or 4 years older than him …'
>
> (ii) Notebook entry dated the 11th May 2017
>
> 'AG attended Police Station regarding further information he had disclosed to me on Monday the 8th May via telephone. Stated that he did not wish to make any complaint against his cousin AAG as with respect to what had occurred he did not feel like a victim and was not coerced in any way.'"

The Defence

[11] The appellant's case was that all AG's allegations against him were untrue and that none of the behaviour alleged had ever happened. He claimed that the incident complained of by KG was also untrue and had been manufactured by her to support AG who is her son.

[12] In order to advance this defence, defence counsel wanted to call AAG to say that the incident involving him which AG reported to police on 8 May 2017 had never happened. This would enable the defence to claim that AG had made a previous false complaint of sexual misconduct against someone other than the defendant in this trial.

[13] Before the trial began, defence counsel made an application under Article 28 of the Criminal Evidence (NI) Order 1999 ("the 1999 Order") for leave to adduce this evidence from AAG and to cross-examine AG about it. Article 28 provides, so far as is relevant:

> "Restriction on evidence or questions about complainant's sexual history
>
> 28.—(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—
>
> (a) no evidence may be adduced, and
>
> (b) no question may be asked in cross-examination, by or on behalf of any accused at the trial about any sexual behaviour of the complainant.
>
> (2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—
>
> (a) that paragraph (3) or (5) applies, and
>
> (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.
>
> (3) This paragraph applies if the evidence or question relates to a relevant issue in the case and either—
>
> (a) that issue is not an issue of consent; or
>
> (b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or

(c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complaint which (according to such evidence) took place at or about the same time as that event,

that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of paragraph (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This paragraph applies if the evidence or question—

(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused."

[14] In its written Article 28 application on this, the defence refers to AG's report to police about the sexual incident with AAG and asserts that it "represents a false complaint of a serious sexual nature against AAG."

[15] The prosecution resisted the application on the ground that it raised an issue about the bad character of the complainant on the basis that he had made a previous false complaint of sexual misbehaviour by others when there was insufficient evidence to establish that the allegation in question was in fact false. The prosecution suggested that the correct procedure for the defence to follow in such

circumstances was to seek leave to question the complainant under the Criminal Justice (Evidence) (NI) Order 2004 Article 5(4)[1] and secondly, to seek a ruling from the Court that Article 28 of the 1999 Order does not exclude the questions. The prosecution argument was that cross-examination about inconsistencies between the complainant's ABE statement and his subsequent report to police which appeared to contradict the contents of his ABE statement was permissible but that the defence questioning must stop there. The defence had failed to provide a sufficient evidential basis that the complainant's allegation against AAG was untrue and therefore it must not be allowed to pursue any line of questioning that proceeded on that basis.

The First Ruling

[16] In his extempore ruling on 23 January 2019 the trial judge held that evidence relating to the complaint against AAG was properly admissible as it related to the consistency, credibility and reliability of the first complainant. He divided the application into two parts:

> "I think the first part of the application can be dealt with quite easily …"

He describes this first part as relating to the apparent conflict between the section of the ABE statement quoted at para [8] above and AG's subsequent behaviour in informing the police of another sexual incident involving himself and one of his cousins, AAG. The trial judge stated:

> "It is suggested that … that involves sexual conduct and that it should be part and parcel of a cross-examination of the complainant in this case, about how, when he's making … his ABE statement – this is something striking which was left out. It's an inconsistency. It affects his credibility and reliability."

He concluded:

> "I'm satisfied under Article 28 that **it is admissible for that purpose**". [Our emphasis]

[17] The second part of the application relates to the "question of bad character and **whether or not this is a false complaint**". On this point the trial judge considered that there is a conflict between some earlier authorities of the Court of

[1] (4) Except where paragraph 1(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court. [Art 5(1)(c) provides that evidence of a non-defendant's bad character is admissible if all parties to the proceedings agree to the evidence being admissible].

Appeal which suggest that evidence relating to an alleged previous false complaint can be allowed if there is "some evidential underpinning" that could satisfy a jury that the complaint is false. However, in R v D [2009] EWCA Crim 2137 such evidence was not permitted. The TJ notes:

> "It was held that the early authorities were not to be regarded as authorising the use of a trial to investigate the truth or falsity of a previous allegation, merely because there is some material that could be used to try and persuade a jury that it was, in fact, false. The court should employ a degree of understanding of those who make sexual allegations. The mere fact that a complaint was raised and not pursued, does not necessarily mean it is false."

[18] It is clear that the trial judge favoured the approach taken in R v D. He wished to allow the defence to cross-examine AG in relation, specifically, to the apparent contradiction between the ABE statement in which he said that none of his other cousins were involved in any sexual activity at the relevant time and his subsequent police report about mutual masturbation with one of those cousins, AAG. However, he was quite clear that he did not allow cross-examination about the truth or falsity of the AAG allegation:

> "And it will be heavily limited – I say heavily limited, it will be limited to the extent that **it is not to become a satellite issue in the trial**, but it will be there and there as an assertion that the witness has to deal with." (Our emphasis)

[19] It is clear that this trial judge thought long and hard about how to allow both sides in this case to put their case to the full. In this context he allowed the defence to cross examine about the AAG allegation up to the point where it would be stated in evidence that this allegation had been made and was denied, but there this line of cross examination was to stop. The trial judge was clear that an investigation of the truth or falsity of the AAG report was to form no part of this trial. That was a collateral issue which should remain 'off limits'.

The Trial

[20] At the trial AG was cross-examined extensively about his allegation re AAG and its apparent inconsistency with his ABE recording. His explanation to the jury included the statement:

> "… whenever I made the statement, that I was making a statement about sexual abuse on the – by the hands of DG and I was not thinking of AAG and AAG did not come

> into my thought, even whenever I was picturing – because I was picturing up around the shed …".

Asked if he was concerned about why the incident with AAG had not come into his head during the last 30 years and then suddenly did come into his head he replied:

> "No because AAG did not abuse me."

[21] On 6 March 2019, AAG was called as a witness on behalf of the appellant. Before his examination-in-chief there was a further discussion between the judge and prosecution counsel in which they tried to clarify "the extent to which the issue involving AAG was allowed to be dealt with so that it could not become a satellite issue in this case".

[22] Prosecution counsel reminded the judge that having said he had "admitted cross-examination for the purpose of inconsistency" he had later also stated that:

> "it is open to the defence to suggest that this is a false allegation that has been made against AAG".

He was concerned about how his cross-examination should be conducted in light of these two statements.

[23] The trial judge illustrated how he expected the cross-examination to go:

> "So a line of cross-examination that you were … interviewed about this, you denied it and you still deny it".

[24] Prosecution counsel summarised his understanding of how this witness would be dealt with:

> "I intend … to say you denied it, he said it happened, that's not an issue for the jury and move on …"

[25] Defence counsel then raised a concern about the assertion that the truth or falsity of the allegation against AAG would not be an issue for the jury. His view was:

> "Whether or not it's a false allegation will be, very much, an issue for the jury".

[26] The trial judge asked how a jury could determine an issue about which they had heard no evidence [Line 25]. Defence counsel stated:

> "Well, not something that – maybe it has to be determined but they're entitled to come to the conclusion that the allegation is false. In fact your Honour would remember that one of the – your Honour actually required me to put it to the witness that the allegation was false."

The Judge replied:

> "… **but that's in the context of it being inconsistent**". [Our emphasis]

He then concluded:

> "I think the cross-examination can be done in such a way as is in accordance with the ruling that I've given …"

[27] AAG was called to give evidence on behalf of the appellant. He confirmed that he was questioned by police about AG's allegation, that he denied the allegation and that he was never prosecuted for it.

[28] Prosecution counsel cross-examined briefly concluding with the comment:

> "You have your version Mr G, he has his version on this matter."

[29] Further clarification of this ruling was given on 7 March 2019 when the trial judge explained again the point of admitting evidence in relation to the AAG allegation. He said he was admitting AAG's evidence to make it clear to the jury:

> "… you say it's false, AG says it's true, that's not the issue, the issue is, how did you forget, how did you overlook, how did you not mention this during the interview, is that not a major inconsistency in your evidence".

[30] He made it clear that he intended to permit evidence about:

> "… the failure on the part of AG during his ABE to make full mention of something which a jury may consider would have been uppermost in his mind at the time of making an ABE in relation to child sexual abuse against a cousin."

He continues:

> "… I permitted Mr Gallagher to assert that it was false and in turn, Mr MacCreanor said, well, he says it's true. That does not require the jury to determine the falsity of that allegation. That is – it is perfectly proper for Mr Gallagher to close this case to the jury by saying, in relation to the AAG allegation, well, ladies and gentlemen, how can you really account for that? Here you are, that's his ABE, that's what he says, he's talking about his cousins and yet, no mention of AAG. We say that's false.
>
> This jury do not have to determine the falsity of the complaint, that is the proper basis for the reception of this evidence and that is the proper use of it. Any use of this to assert that, we say this is false, if you think it's false, well, how can you trust that and then, of course, the allegation against DG must also be false. That's improper reasoning on the part of the jury. It's improper to invite them to that reasoning and it's something that should not be done. Do you all understand that ruling?"

All the counsel confirmed that they did understand.

[31] In due course defence counsel made his closing speech to the jury in terms which prompted immediate strong criticism from the prosecution side. This was discussed extensively on 11 March 2019.

[32] Defence counsel insisted that he had not exceeded the terms of the ruling. In counsel's own words:

> "What I essentially said in closing was two things. I referred to the ABE and the account, I then went on to say the – that the report later is false. But then, what I went on to do, is to show what the evidence was which supported my suggestion that it was false and I did spend quite a bit of time on it. I may have done it forcefully –
>
> …
>
> JUDGE: See, I think that's what's being complained about."

[33] The discussion on this issue ended with the following exchange about the meaning of the direction:

> "DEFENCE COUNSEL: … the nub of what your Honour was saying was that there can be no suggestion that the jury have to determine the falsity of it and no suggestion that because this is a false allegation against AAG, the allegation against DG must also be false. Those are the two things your Honour said and I said neither of those things.
>
> …
>
> JUDGE: Well, do we agree that a jury might be somewhat confused by you saying what you said and then going on to give evidence that you say supports AAG's allegation as being false. They'd need a pretty straight direction on that from me.
>
> DEFENCE COUNSEL: They would. I certainly accept that."

[34] When making his charge to the jury the trial judge gave them a specific written charge on this issue – the main terms of which are as follows:

> "In Mr Gallagher's closing speech he made reference to the statement made by AG about AAG. Whether this incident is true or false is not relevant to your deliberations and should form no part of your discussion.
>
> I direct you upon the law and you must follow my directions upon the law when you turn to decide the facts based upon the evidence.
>
> In law the only reason you heard about this later statement was to allow you to consider whether AG's failure to mention it during his video recorded evidence was something which you may consider relevant in your assessment of whether or not his account, in relation to what he alleges happened with DG, is consistent and reliable or inconsistent and unreliable.
>
> The truth or falsity of the statement in relation to AAG is **NOT** something that should form any part of

> your deliberations. The fact that AG did not mention it in his video recorded evidence is the issue that you should consider."

[35] There are two grounds of appeal related to the above issues. These are:

> "1. The Judge erred in giving an emphatic written direction to the jury that the truth or otherwise of an alleged false complaint by the first complainant against AAG was not relevant to their deliberations and should 'form no part of your considerations'.
>
> 2. Counsel were not given any advance notice of the content of the written direction."

Discussion

Grounds of Appeal 1 & 2

[36] Under ground 1 the applicant complains that the trial judge erred in law in giving his written direction to the jury. It was submitted that his direction was inconsistent with his earlier ruling which the defence asserts allowed the defence to "call evidence from AAG that the complaint was false".

[37] In fact the trial judge decided the Article 28 application in two parts. The first part relates to the very fact that this report of previous sexual conduct with AAG was made at all. This is relevant to the trial because in his ABE evidence the complainant refers back to his childhood and times spent playing around their grandparent's farm with his cousins and says that nothing untoward had happened with <u>any</u> of these cousins. However, several months later he made a further report to police alleging that an incident of mutual masturbation had also occurred and it had involved one of the cousins he'd referred to in his ABE statement. The trial judge concluded:

> "It's an inconsistency – it affects his credibility and reliability … I'm satisfied under Article 28 that it is admissible <u>for that purpose</u>."

[38] This ruling allows **the fact** of the May 2017 report to the police concerning his cousin AAG to be introduced in evidence. It can be introduced so the jury can understand that later material relating to the history and context of the offending in this case also exists. It can be introduced to enable them to evaluate whether this later material affects the credibility of his ABE statement in their minds.

[39] In his ruling the trial judge noted that the defence application "strayed into the realms of a bad character application". He considered that whether or not this is

a false complaint "is a much more fraught determination" because of inconsistencies in the authorities in this field.

[40] The trial judge had reviewed the relevant authorities in this area and was aware that questions about alleged previous false complaints were not permissible unless there was "some evidential underpinning in front of a jury, that … the jury could be satisfied that it's a false complaint."

[41] In applying the authorities to the case before him the trial judge preferred R v D in which he said:

> "It was held that the early authorities were not to be regarded as authorising the use of a trial to investigate the truth or falsity of a previous allegation merely because there is some material that could be used to try and persuade a jury that it was, in fact, false. The court should employ a degree of understanding of those who make sexual allegations. The mere fact that a complaint was raised and not pursued, does not necessarily mean it is false".

[42] On a careful review of the terms of his ruling it appears that the trial judge was prepared to admit evidence and allow cross-examination of AG in relation to the inconsistency between his ABE evidence and his later report of previous sexual behaviour with another cousin but was also ruling against any investigation of the truth or falsity of this report. His justified concern to avoid irrelevant questioning was based on the warning contained in R v D [2009] EWCA Crim 2137 where it was stated that early authorities are:

> "… not to be regarded as authorising the use of a trial as a vehicle for investigating the truth or falsity of an earlier allegation merely because there is some material which could be used to try and persuade a jury that it was in fact false. As was pointed out in the case of E, if the cross-examination elicited assertions that the allegation had been true, the trial court would have been faced with the dilemma of either letting those assertions of criminal conduct on the part of a named third party stand unanswered, or 'descending into factual enquiries with no obvious limit and wholly collateral to the issue in the case'. We agree with those comments. Nor does the mere fact that the police decided that there was insufficient evidence to prosecute on the past complaint amount to evidence that that complaint was false."

We share the trial judge's concern and agree with his approach which is reinforced by the commentary in Blackstone (2021) paras 7.30-7.31 and Rook & Ward on Sexual Offences (5th Edition) at paras 26.151-165.

[43] A review of the conduct of this trial indicates that this distinction between admitting permissible material that went to the general credibility of AG's ABE interview in light of what he later said about AAG, and excluding impermissible material aimed at testing the truth or falsity of the report re AAG was the consistent distinction that the trial judge tried to enforce throughout the whole course of this trial.

[44] Prosecution counsel understood this and complied with the ruling. Defence counsel asserted that he understood the limits but the transcript suggest this may not have been so. In his first ground of appeal he complains of an alleged inconsistency between the trial judge's written direction to the jury and his ruling in open court that it was open to the defence to submit in closing to the jury that the complaint against AG was false. Read correctly and seen in the context of all the discussions between the trial judge and counsel on both sides of this case, no such inconsistency exists. We are quite satisfied that there is no merit in the first ground of appeal which we accordingly reject.

[45] The second ground of appeal is equally ill-founded. Here counsel complains that the trial judge gave the jury a written direction in the course of his charge and that:

> "Neither the defence nor the prosecution were given any advance notice of the content of this written direction depriving all parties of making submissions in respect of its content."

[46] Again, a careful review of the transcript shows that this was a case where there was a disputed closing by the defence. The complaints of the prosecution were investigated in detailed discussions at which all counsel were present and which we have already addressed above. The outcome of the discussion was, on agreement between the trial judge and defence counsel that the jury would need "a pretty straight direction" and this is what the trial judge then issued, in writing, to the jury.

[47] It is accepted by all parties that the precise contents of the written direction were not known by either counsel before the direction was given. However, no allegation is made, or could be validly made, that counsel were blind-sided by the issuing of this direction. It cannot plausibly be argued that counsel were not broadly aware of what the trial judge's direction would say. Nor can it be asserted that there was no agreement among counsel that such guidance needed to be issued in this case. It is accepted that the precise terms of the written direction were not shown to counsel in advance of them being issued to the jury and that is a breach of guidance

from the Lord Chief Justice in R v Cruikshank & McEleney [2012] NICA 46 where he stated:

> "Although written directions can be of considerable assistance to juries in complex cases it is absolutely vital that an appropriate opportunity for submissions in relation to those directions is provided before the parties begin their speeches to the jury".

[48] The question for this court is whether this formal irregularity is an issue which prejudiced the appellant in any way or threatened the safety of his convictions or the fairness of the trial.

[49] In our view the present case is a world away from a Cruikshank situation because, although counsel did not have notice of the precise wording of the written charge, they were constantly aware of the ground that it would cover in general terms. In these circumstances, and on the specific facts of this case, the failure to provide counsel with advance notice of the precise terms of the written direction does not put the safety of the convictions at risk and this ground of appeal is therefore dismissed.

The Remaining Grounds of Appeal

Ground 3

[50] The background to this complaint is that in his ABE the complainant said he had told his cousin CG about the sexual abuse by the appellant. In a police statement dated 24 March 2017 CG said AG did tell him in 2008-2009 that he had been sexually abuse by the appellant when he was younger. The prosecution applied to adduce hearsay evidence from CG under Articles 18 and 24 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 and the trial judge granted the application. Ground 3 of this appeal seeks to challenge the admission of this evidence on two grounds namely that the evidence did not comply with Article 24(4)(b) and Article 24(7)(d) of the Order.

[51] Insofar as relevant the Order states:

> "24.—(1) 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— ….

(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—

(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…."

[52] The defence argued that, in breach of Article 24(4)(b), AG did not give evidence that to the best of his knowledge and belief he had made the statement alleged by CG and to the best of his knowledge and belief that statement was true. It also argued since the complaint was made some 27 years after the alleged abuse occurred it had not been made 'as soon as could reasonably be expected' as required by Article 24(7)(d).

[53] On the first point the trial judge followed R v Bradley [2013] NICA 36 and decided that the complainant's agreement to tell the truth at the start of his ABE interview satisfied the condition of Article 24(4)(b). On the second point he followed the dictum of Gillen J in R v King [2007] NICC 17 at para [38] in which he said that the test of whether or not a complaint was made as 'soon as could reasonably be expected' was not a 'linear temporal equation' but a question of what could be reasonably expected in the particular context of each case'. Applying this test to the factual matrix in the present case the trial judge declared himself satisfied that the complaint was made as soon as could reasonably be expected and he allowed the prosecution's application.

[54] We consider that the trial judge reviewed all the relevant material and came to perfectly proper conclusions on each matter. We dismiss this ground of appeal.

Ground 4

[55] This ground asserts that evidence wrongly suggesting the complainant had worked with children with special educational needs had biased the jury in favour of the complainant and that therefore the jury should have been discharged when the defence made an application seeking such a discharge.

[56] The decision to discharge the jury is a matter for the judge's discretion. The test is whether any conviction would be unsafe in view of the revelation of the prejudicial material R v Lawson [2007] 1 Cr App R 20 (277) para 65. This involves a consideration of the nature of the prejudicial material, the circumstances in which it

was revealed, the strength of the respective cases and the extent to which the harm is otherwise remediable.

[57] The defence offered no realistic basis for the contention that the incorrect suggestion that the complainant worked with children with special educational needs could have caused the jury to become prejudiced in his favour. Insofar as this is considered to be a real risk, the trial judge dealt with it his ruling where he said he was 'absolutely satisfied' that any harm caused could be remedied by his charge to the jury. He said he would ask the jury to set aside all prejudice and sympathy and to decide the case purely on the evidence and he did so in his charge. We consider that the trial judge was entitled to approach this matter in the way in which he did and accordingly we dismiss this ground of appeal.

Ground 5

[58] This ground relates to the following excerpt from the appellant's police interview:

> "EG told me she got a letter from KG saying AG has made allegations against DG I hope it doesn't affect our relationship."

[59] The ground of appeal is that this excerpt is hearsay evidence and it was wrongly used to support the evidence of the second complainant.

[60] Secondly it is claimed that:

> "This evidence was also evidence of complaint made by the first complainant to EG (the applicant's sister, who was not a witness). This would have required an application pursuant to Article 24 of the Criminal Justice (Evidence) (NI) Order 2004."

[61] Dealing with the second element first, defence counsel assert in this ground that the extract quoted was evidence of a complaint made by AG to EG whereas in fact it related to a letter from KG to EG.

[62] In his ruling on this matter on 28 January 2019 the trial judge decided that the extract was not hearsay evidence because the prosecution was not seeking to establish the truth of what EG said or the contents of the letter. The trial judge said that if he was wrong on the hearsay point then he would admit the extract under the provisions of Article 18(1)(d) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 as it was in the interests of justice do so within the context of the case as a whole.

[63] We consider that the trial judge was entitled to treat the material in the way he did and we do not consider that this point raises an arguable ground of appeal.

Ground 6

[64] This apparent make-weight ground is couched in the following terms:

> 'The above mis-directions, erroneous evidence and inadmissible material contaminated the jury's consideration of the count relating to KG."

[65] Although it appears in the particulars set out in Form 3 - the official 'Grounds of Appeal' document, it is not mentioned in the skeleton argument on behalf of the appellant and no material is advanced to substantiate the ground. We conclude that this ground has no merit.

Conclusion

[66] For the reasons set out above we conclude that no material has been submitted which would cause us to question the safety of the verdicts in this case. We dismiss this appeal.