Neutral Citation No. [2016] NICA 43 | *Ref:* **WEA10080**

Judgment: approved by the Court for handing down | *Delivered:* **15/11/2016**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM BELFAST CROWN COURT

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-v-

MONTASSAR GHADGHADI

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Before: Gillen LJ, Weatherup LJ and Weir LJ

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WEATHERUP LJ (delivering the judgment of the court)

[1] The appellant appeals against conviction before His Honour Judge Kerr QC and a jury at Belfast Crown Court on 28 January 2016 on a charge of arson of property in Tandragee, County Armagh on 9 June 2013. Mr Duffy QC and Mr McGarrity appeared for the appellant and Ms McKay for the prosecution.

[2] The appellant's grounds of appeal are that the trial Judge was wrong not to discharge the jury after the deliberate disclosure of prejudicial material by a prosecution witness. The Single Judge, Keegan J, granted leave to appeal.

[3] Traci Reilly resided at the property in Tandragee. The appellant was the boyfriend of Ms Reilly's friend Rosalind who lived nearby. The relationship between the appellant and Rosalind was deteriorating. There was animosity between the appellant and Ms Reilly. The fire at the house occurred in the early hours of Sunday 9 June 2013. Ms Reilly was away from home that weekend staying in a caravan in Portrush. The house had been broken into and fires set at two locations.

[4] A part of the case against the appellant was that in the week before the fires he was alleged to have made a threat to Ms Reilly that he would burn down the

house. A neighbour saw the perpetrator and took a photograph which showed a man wearing clothing similar to that worn by the appellant. Another witness saw a man in the vicinity of the house and identified the appellant in a VIPER identification procedure. The appellant was arrested outside Rosalind's house that morning and some of his clothes recovered from the washing machine. Glass fragments were present on his jeans and shoes which were of the same type of glass as had been broken to gain access to the house where the fires had been set.

[5] The appellant denied that he had set the fires at the house. He maintained that the VIPER identification was mistaken and that he was not the person in the photograph wearing clothes similar to those he had been wearing. He alleged a conspiracy between Ms Reilly and Rosalind and her brother to implicate the appellant because of the animosity that had developed between them.

[6] Ms Reilly made three statements to the police which contained a number of allegations against the appellant. The statements did not include the alleged threat by the appellant to burn down the house, although Ms Reilly's evidence was that this had been discussed with police when the statements were made. The defence and the prosecution proceeded at trial on the basis that evidence would be given about the alleged threat by the appellant to burn down the house but that no evidence would be given about the other allegations made by Ms Reilly against the appellant. Ms Reilly was therefore warned not to introduce in evidence her allegations against the appellant, other than the threat to burn down the house.

<u>The evidence of Ms Reilly to which objection was taken.</u>

[7] Accordingly, on examination-in-chief, Ms Reilly gave her evidence that, in the week before the fire, the appellant and Ms Reilly had had an argument on the telephone and that he had issued a threat about burning down her house and that she had reported the threat to the police who had attended at her house that evening in response to her report.

[8] In cross-examination Ms Reilly was asked whether the appellant's relationship with Rosalind "was very much on the rocks" to which she replied –

> *"To get into that I would have to answer something that I am not actually to say in this court, sorry".*

[9] Counsel moved on to cross-examine Ms Reilly on the basis that in the three statements she had made to the police she did not include reference to the alleged threat to burn down the house. When this was raised by reference to the first statement of 5 June Ms Reilly replied –

> *"Sorry, can I just interrupt you one moment. I have actually been told I am not allowed to discuss this."*

[10] On Counsel suggesting that it would have been made clear to Ms Reilly by police that the contents of the statement would be important she replied –

> *"A. It wasn't made that clear to me, no, because it wasn't the first time I had to phone the police for the defendant in question."*
>
> *Q. Well can I suggest to you that if Montassar Ghadghadi had made a threat to you that he was going to burn down your house –*
>
> *A. It wasn't the first threat.*
>
> *Q. If –*
>
> *A. It was the first time I phoned the police –*
>
> *Q. Just listen.*
>
> *A. – to complain."*

[11] Later Counsel noted the absence of a complaint about the threat in a statement made on 10 June 2013 and again in a statement made on 13 June 2013 and asked if Ms Reilly was really saying that the appellant had made a threat that was relevant to the burning of the house to which she replied –

> *"He made numerous threats, his brother also made numerous threats to the same effect."*

[12] Counsel then put it to Ms Reilly that the appellant's case was that he did not make the threat, to which she replied –

> *"Right, well then you see what I'm not allowed the discuss here and you have handed me, why was I assaulted then in the High Street mall by your defendant? It's here in black and white you have just handed me that."*

<u>The response to the evidence of Ms Reilly by the Defence and the trial Judge.</u>

[13] At the conclusion of Ms Reilly's evidence an application was made to discharge the jury. Counsel referred to Ms Reilly's references to the matters that she was not allowed to speak about but the gravamen of the complaint was that Ms Reilly had raised before the jury the issue of an assault in the shopping mall.

[14] The trial Judge refused the application on the basis that the matter could be dealt with adequately in the charge to the jury.

[15] In his charge to the jury the trial Judge stated, in relation to the parts of the evidence of Ms Reilly to which objection was taken -

> "They point to the fact, members of the jury, that she kept in her evidence saying things like 'oh, well, I can't say that, I was told not to say that', and what's being suggested is that she was trying to create an impression that somehow she was restricted in what she could say and it was somehow worse than she could say. Indeed at one stage she said something about 'oh, what about that assault?' Well let me be clear, members of the jury, there is no assault. There is no evidence of an assault, any such suggestion by her is put out of your minds. You are not considering any assault, you are considering an arson."

[16] Ms Reilly had a criminal record for dishonesty. The trial Judge referred to that record and cautioned the jury –

> "But where you have that history, members of the jury, it would be right for a jury to treat a witness such as that with caution. Be slow to act totally on her evidence. If you, having considered all those issues, having heard her evidence, consider there is evidence upon which you are willing to act that there was a threat to burn this house down you are entitled to do so, but I caution you to be slow in relation to that. It is a matter for you."

[17] A good character direction to the jury was neither sought on behalf of the appellant nor given by the trial Judge.

[18] On this appeal there was no complaint about the trial Judge's charge to the jury. The appellant contended that the introduction of the prejudicial evidence was not remediable by any form of direction by the trial Judge. The appellant emphasised the risks inherent in the trial Judge addressing the jury about prejudicial material introduced during the trial, the effect of which may be to re-emphasise the prejudicial evidence to the jury and defeat the impact of any warning that might be considered appropriate. Thus the focus of the appeal was on the trial Judge's refusal to discharge the jury.

<u>Discharge of a jury after prejudicial material introduced inadvertently.</u>

[19] Counsel referred to the principle that governs the discharge of the jury in such circumstances as stated in Archbold Criminal Pleading Evidence and Practice 2016 at paragraph 4-316 as follows –

"Where inadmissible, prejudicial material is inadvertently disclosed to the jury, the ultimate question for the judge, in determining whether the jury should be discharged, is whether to continue with the trial would or could, by reason of the disclosure, result in an unsafe conviction – R v Lawson [2007] 1 Cr. App. R. 20, CA."

[20] In R v Lawson the appellants were convicted of conspiracy to evade the prohibition on the importation of cannabis. In the summing up the trial Judge inadvertently told the jury about material prejudicial to the defendant that he had earlier ruled to be inadmissible. The convictions were quashed on appeal and Auld LJ stated:

> "[65] Whether or not to discharge the jury is a matter for evaluation by the trial judge on the particular facts and circumstances of the case, and this court will not lightly interfere with his decision. It follows that every case depends on its own facts and circumstances, including:
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> > (1) The important issue or issues in the case.
> >
> > (2) The nature and impact of improperly admitted material on that issue or issues, having regard, inter alia, to the respective strengths of the prosecution and defence cases.
> >
> > (3) The manner and circumstances of its admission and to what extent it is potentially unfairly prejudicial to a defendant.
> >
> > (4) The extent to and manner in which it is remediable by judicial direction or otherwise, so as to permit the trial to proceed.
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> We repeat, all these matters and their combined effect are very much an evaluative exercise for the trial judge in all the circumstances of the case. The starting point is not that the jury should be discharged whenever something of this nature is put in evidence through inadvertence. Equally there is no sliding scale so as to increase the persuasive onus on a defendant seeking a discharge of a jury on this

> account according to the weight or length of the case or the stage it has reached when the point arises for determination. The test is always the same, whether to continue with the trial would or could by reason of the admission of the unfairly prejudicial material, result in an unsafe conviction."

[21] Ms Reilly's first comments drew attention to the existence of matters she was not to discuss before the jury. The later comments related to other alleged threats reported to the police. The last comment concerned the alleged assault in the mall.

[22] The appellant contended that in the present case the only defence witness could have been the appellant and his credibility was central to the defence to the charge. The case against the appellant was circumstantial. The alleged threat to burn the house was in dispute between the appellant and Ms Reilly. To introduce the additional allegations against the appellant and to hint at other undisclosed incidents served to undermine the defence. The cumulative effect of Ms Reilly's evidence was said to be to indicate to the jury that there were other matters of which she had cause for complaint. The defence alleged conspiracy by Ms Reilly, Rosalind and her brother, the witness introducing the prejudicial material was alleged to be a party to the conspiracy and Ms Reilly's evidence was said to have been designed to undermine the appellant.

[23] In relation to the appellant's case on conspiracy, Ms McKay for the prosecution referred to the limited extent to which the conspiracy defence was utilised in the trial. In cross-examination of Ms Reilly, Counsel stated:

> *"Can I ask you, the defendant's case in fact is that as far as these allegations are concerned that he is the victim of a conspiracy and that his ex-partner, Rosalind, is part of that conspiracy: do you know anything about that?*
>
> *No, because I don't even speak to the girl anymore."*

[24] It was not put to Ms Reilly that she was a party to a conspiracy.

[25] An important issue in the trial was the credibility of the appellant. It was submitted that the allegation of assault on Ms Reilly had the capacity to impact on the assessment of the appellant's credibility. The existence of unspecified allegations against the appellant also had the capacity to impact on the credibility of the appellant. The appellant's credibility went not only to his denial of the offence but to his assertion of a conspiracy by Ms Reilly and Rosalind and her brother.

[26] Counsel placed reliance on Arthurton v The Queen [2004] UKPC 25. The defendant was charged with unlawful sexual intercourse with an underage girl. He had no previous convictions and under cross-examination a police officer stated that the defendant had previously been arrested and charged with a similar offence. The

trial Judge refused to discharge the jury. In his summing up the trial Judge gave a good character direction. The trial Judge also directed the jury not to consider the reference to the defendant having been arrested and charged for a similar offence. The defendant was convicted and the appeal was allowed.

[27] Dame Sian Elias delivering the opinion of the Privy Council in Arthurton stated *(italics added)* -

> "[29] The central issue for the trial was whether the complainant was to be believed. The appellant's good character was critical to that inquiry. It entitled him to a credibility direction in respect of his statement denying intercourse with the child complainant and to a direction that his good character was relevant in assessing the likelihood that he would have offended in the way alleged. Although the judge gave these directions, as she was required by law to do, *the evidence that the appellant had been arrested on suspicion of similar offending on another occasion bore directly on the issue of propensity. As such, it directly undermined the propensity limb of the good character direction and with it a major plank in the defence case.* The disclosure here was far more serious than the unspecific references in Weaver [1968] 1 QB 353 and Palin [1969] 1 WLR 1544.
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> [30] It is to be expected that juries will conscientiously apply the directions given by a trial judge. If good character had not been so critical to the defence, any prejudice in disclosure of previous offending (particularly if of offending unrelated to the charge) might well have been adequately addressed by directions not to reason to guilt from the separate offending and characterisation of the evidence as irrelevant. That is not the case here."

[28] Arthurton illustrates the importance of the context, the specific issues in the trial and the significance of the prejudicial material to those issues, in particular to the nature of the defence advanced by the defendant.

[29] The nature of the comments went to the existence of other complaints by Ms Reilly against the appellant. That there was animosity between the appellant and Ms Reilly was common case. That the animosity had reached the scale that the appellant had made a threat to burn down the house was in dispute. However that allegation was before the jury. That there was a history of tension between them would have been apparent to the jury. The alleged assault was of a different

character to the charge of arson. There were other unspecified complaints. The evidence of Ms Reilly was not direct evidence in relation to the setting of the fires or the whereabouts of the appellant in relation to the burning of the property. Rather her evidence was to the background relationship and the alleged threat made by the appellant.

[30] Against that background the prosecution case had the strength first of all of a photograph taken at the scene which appeared to show a person wearing clothes matching those of the appellant, secondly of a description of a person at the scene matching the appellant, a person who was identified by the VIPER identification procedure as the appellant and thirdly the similarity of glass fragments from the house with those found on the appellant's clothes and shoes, which the forensic witness described as providing support for the proximity of those items to the broken glass from the house. All of this evidence was independent of those persons alleged to be part of any conspiracy against the appellant.

[31] The appellant's defence was not strong. It involved the appellant arriving at Rosalind's house in the early hours of the morning in question. There was the coincidence that a photograph was taken of a person at the scene who appeared to be wearing clothes that matched those of the appellant. There was the suggestion by the appellant that if the person in the photograph was wearing the appellant's clothes that someone had taken, worn and returned his clothes. There was the underlying case that the appellant was the victim of a conspiracy as a result of a fractured relationship.

[32] The comments of Ms Reilly were not inadvertent. However Counsel for the defence had a difficult task and had to tread carefully when questioning the witness about the contents of her statements when those statements contained allegations that had been excluded from the evidence. Some of the authorities refer to occasions when the questioning of defence Counsel is said to have invited the answers to which objection is taken. We do not consider that Counsel by his line of questioning invited the responses given. Nor do we accept, as argued on behalf of the appellant, that the evidence was not prompted by questioning from defence Counsel. The prosecution characterise some of the responses as being reactive to challenges to the witness concerning her dishonesty convictions and to her threatening the appellant with a paramilitary organisation. As we have noted, defence Counsel had to tread the difficult path of relying on the statements to establish the absence of reference to the alleged threat to burn down the property, while risking a response from Ms Reilly as to the other content of the statements. Ms Reilly appears to have taken the opportunity to convey to the jury that there were other issues between her and the appellant and they involved other threats and an assault. The existence of animosity between the parties would have been apparent to the jury.

[33] In all the circumstances we conclude that the impact of the material and the potential prejudice to the appellant were limited. We are satisfied that the trial Judge was correct to refuse the application to discharge the jury. Remedial action was

taken by the trial Judge in his charge to the jury, clearly focussing the jury on the charge of arson and cautioning the jury in relation to the evidence of Ms Reilly on the threat to burn down the house.

[34] A further matter raised on behalf of the appellant was that the trial Judge may been improperly influenced by the history of the proceedings when he refused to discharge the jury. There had been a number of attempts to complete a trial of the appellant from September 2014. On the first occasion the jury was discharged because of their conduct outside the Court. In February 2015 a jury was discharged because of complaints of hostile conduct directed at the jury. Again in February 2015 a jury was discharged by reason of the inadvertent disclosure of prejudicial material by a police witness. In June 2015 a jury was discharged by reason of the manner in which an exhibit was presented to the jury. In January 2016 a jury was discharged after a juror was spoken to by a witness. Again in January 2016 a jury was discharged because of inadvertent reference to inadmissible forensic evidence by the prosecution. On the seventh occasion the trial was completed. We have no evidence or reason to suppose that on this occasion the trial Judge's response to the application to discharge the jury was based on anything other than the circumstances prevailing in that trial at that time.

[35] Ultimately the question for this Court is whether the conviction of the appellant was unsafe. The Court of Appeal in R v Pollock [2004] NICA 34 set out the approach -

> "(1) The Court of Appeal should concentrate on the single and simple question "Does it think that the verdict is unsafe".
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> (2) This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
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> (3) The court should eschew speculation as to what may have influenced the jury to its verdicts.
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> (4) The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[36] Having considered the evidence and the conduct of the trial we do not believe that the verdict is unsafe. Nor do we have any sense of unease about the correctness of the verdict based on the evidence. Accordingly the appeal is dismissed.