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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

BETWEEN:

THE QUEEN

-v-

JAMES HUTCHINSON

_____

Before: Coghlin LJ, Gillen LJ and Deeny J

_____

GILLEN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal brought by James Hutchinson ("the appellant") against his conviction by a unanimous jury verdict on 30 May 2013 on 40 counts comprising:

- Six counts of rape.
- Two counts of attempted buggery, contrary to Section 52 of the Offences Against the Person Act 1861.
- 32 counts of indecent assault on a female child, contrary to the Offences Against the Person Act 1861.

[2] The complainants were at the time of the abuse two children, A and B. The offences were alleged to have been committed against A from 1980 to 1984 when A was aged 6 to 10 years of age and the appellant was aged 40 to 55. Those against B were alleged to have been committed from 1982 to 1987 when B was aged 6 to 11 years of age and the appellant was aged 42-48. A and B were two sisters. C was a younger sister residing with them and she has not made any complaints against the appellant.

[3] In the event that the appellant is unsuccessful in his appeal, he seeks leave to appeal against his sentence imposed of 20 years imprisonment on all the rape counts and concurrent sentences of 2 years on all the other counts. We indicated during the hearing that should the need arise this will be dealt with on a separate occasion.

[4] No details pertaining to the identification of the complainants must be revealed in any publication of any sort or released to the media.

Factual background

[5] The two complainants were brought up by their mother who also worked outside the house. When their mother was at work they were looked after by the appellant and his wife. The appellant also sometimes worked at the complainants' school as a tradesman. The abuse occurred when the complainants were in the care of the appellant and his wife at their home, at the complainants' home, and at their school.

[6] The full extent of the wicked abuse which the jury found the appellant visited upon these two girls makes for painfully uncomfortable reading. In the light of the succinct nature of the appeal mounted on his behalf by Mr Mallon QC, who appeared with Ms Connolly, a summary of the evidence given by A and B will suffice.

A's evidence

[7]

- Throughout the period of abuse the appellant regularly persuaded the child to wrap her legs around his waist rocking her back and forth at a time when he was clearly sexually aroused.

- At times he placed his hand down her pants rubbing his finger through her vaginal area/causing digital penetration.

- On occasions when she was at home in bed with her sisters, he put his hand up her nightdress, into her pants and again caused digital penetration.

- On occasions he put her on his knee in a blue van which he drove at a time again when he was sexually aroused.

- On another occasion, having brought A to a neighbour's house to look at some slides, the appellant brought her to the bedroom, removed her clothing from the waist down, digitally penetrated her, licked her vagina inserting his tongue, prevailed on her to masturbate him and then inserted his penis into her. Penetration was partial and when he did stop he made her rub his penis until he ejaculated.

B's evidence

[8]

- When a child at primary school where the appellant was working, he would frequently turn up in the female toilet area when she was there.

- He would lift her up, legs around his waist and press his penis against her private parts on numerous occasions.

- He frequently put his hand down the front of her pants rubbing her vaginal area.

- During an incident at the school boiler room he prevailed upon her to masturbate him. That became an on-going offence up until B was in P6/P7.

- When she was in bed sleeping at his house, he would waken her and digitally penetrate her.

- He would prevail upon her to engage in oral intercourse.

- In the main bathroom of the appellant's household on occasions he would try to sexually penetrate her, succeeding partially.

- On other occasions he attempted to bugger her although he did not succeed.

- In the appellant's garage he digitally penetrated B obliging her to touch his erect penis.

- There were regular incidents in his blue van where he prevailed upon her to take her lower clothing off, set her on his penis and rubbed himself up and down the outside of her vagina.

- In the neighbour's house, the appellant used lubricant to insert his penis into her vagina.

- He visited her in her own home giving her sweets and going into his bedroom where he put his hand under the duvet and digitally penetrated her. In the toilet of the house he made B perform oral sex.

- On the day that her mother remarried in 1985 when the girls stayed over at the appellant's house, he performed oral sex on B and also penetrated her vagina.

Reports of the offences

[9] Reports of the offences by the complainants played a not insignificant role in this case. The reports by the complainants were as follows:

- B told her mother about the abuse when she was about 10 years of age. The complainant's mother confronted the appellant and his wife who denied the allegations. The complainant's mother said she did not contact the police because B said she would not speak to them. A asserted that, observing the state her mother was in, she felt unable to say that she too had been abused.

- In 1994 A telephoned the PSNI. Sergeant McIntyre recorded an entry in an occurrence book as follows:

> "9 November 1994 3.30 am. Indecent assault. From Sergeant McIntyre Newry RUC (*A*, address, telephone number, date of birth). Alleged that she was sexually abused by (*the appellant*) 13 years ago when she was aged between 7-9. Her sister *(B*) was also abused during that period."

[10] This matter was passed to another female police officer to whom A made a statement. That statement was lost but the entry in the occurrence book was before the court. A said that she did not go forward with the complaint because B was not ready to go forward and A thought it would be better to wait until B was ready.

[11] In 2004 A again called the PSNI. The record in the occurrence book read:

> "Tuesday 26 October 2004. 19.30. Alleged historical abuse … (*A*) contacted a local police station to say that she and her sister (*B*) wanted to speak to the police in relation to making complaints against (*the appellant*) who used to live at (*address*). This allegation relates to incidents which occurred when both girls were young children."

[12] Letters were sent to both complainants to arrange a date to record statements. No reply was received as at 22 November 2004. The complainants were asked during the trial about this and they indicated that they did not feel able to proceed and were not up to it.

[13] In 2010 A called police a third time. The PSNI system had changed so that rather than an occurrence book the call was recorded in a computerised system. The time and date were recorded as 21/11/2010 at 03.34. The description read:

> "Caller wishes to report on behalf of herself and two sisters that they were abused by (*the appellant*). This occurred between the years of 1980 and 1985. Her

> two sisters are *(B)* and *(C)*. Caller wishes police call on her on the above number and not call at the above address as her elderly mother lives at the above address and she doesn't want her upset in relation to the incident."

The record also stated that A was called back and advised that CID would be in touch with her in the morning.

Other evidence

[14] When the appellant was interviewed by the police he initially denied ever taking the girls out in the blue van or going into their bedroom. However on further questioning he changed his account and said that maybe he had been with them in these places but that he had not done anything untoward.

[15] The appellant gave evidence at the trial in terms asserting that whatever may have occurred in lifting the girls into the air, it was innocent and any of the alleged activities that clearly could not have been innocent did not happen.

Grounds of appeal

[16] In a commendably closely focused argument, Mr Mallon essentially relied on two grounds of appeal namely:

(1) That the learned trial judge (LTJ) failed to provide the jury with a sufficiently careful direction on possible collusion in circumstances where;
- there had been considerable delay in reporting these allegations
- earlier complaints were attempted to be made to the police between 1994 and 2004 by the complainants but not pursued, and
- allegations were similar in content.

(2) That the LTJ failed to adequately direct the jury on evidence raising a possibility of innocent contamination.

[17] Mr Mallon candidly conceded that save for these two points, there was no further criticism that he had to make of the LTJ's charge.

The LTJ's charge

[18] This trial lasted 12 days. The LTJ's charge, as transcribed, filled 56 pages.

[19] The elements of the charge which are relevant to this appeal came towards the end of the charge immediately after he had addressed the third report to the police by A. That report noted that she had made reference to her *two* sisters being abused. The relevant extract from the charge of the LTJ is as follows:

"The defence say to that that there is an issue, was she not trying to collude, build it up, did the girls not collude and then try to present an impression that the youngest girl had been abused, because if words mean what they say the person taking the phone call and putting it into the computer, records that she wishes to report on behalf of herself and her two sisters that they were abused by (the appellant). They say there (the third sister), there is no charge against him in relation to (the third sister), what does that mean, that they were trying to collude or present a false account or an impression to the police? So they point to those records as being indicators of inconsistency. They say if any of this, and the frequency which had occurred went on it would have been picked up, it couldn't have gone unnoticed. …..

Sorry members of the jury, there is something else. There is two complainants here, you should only use what your findings are against him in relation to one of the girls. If you come to the conclusion – and I am not saying you should – that we are satisfied that what (B) described happened to her, and you are satisfied beyond a reasonable doubt, you can then use that in your deliberations about whether you are satisfied or not it happened to (A) and vice versa. What you must not do and I tell you is to say we are not sure about either but if you put the two together we are satisfied. So if you are satisfied beyond a reasonable doubt about the allegations of one of the girls, whichever it be, if you come to the conclusion, yes, all twelve of you say yes we are sure that (A) or (B), this happened in the way they described it, in spite of all the other cautions and prism factors that I have told you about, when you go on then to decide are we sure beyond a reasonable doubt about the other allegations to the second complainant, you can use your finding and say well there you are, same way that he did it, the same sequence, the same way he did it, but only when you are satisfied about what one of them has told you. Do you understand that? I can't see engaged here(*sic*). If you have any queries after you rise you can put a question of whatever it is that may agitate you, but I will repeat it: if you come to the conclusion in relation to one or either of the

> girls that you are satisfied beyond a reasonable doubt what she has told you that he did to her, yes, he is guilty of that, you can use that as bad character evidence into your scales and say well if he did it to her, as well the other sister is saying it happened, we can use the fact that he did that, we are sure, to the other sister."

Requisitions by the parties

[20] At the conclusion of the LTJ's charge, Crown counsel requisitioned him on the basis that on the issue of cross admissibility the jury did not need to be satisfied beyond reasonable doubt about the allegation in respect of one complainant before they considered the case involving the other. In terms it was submitted that the LTJ had directed the jury in an overly restrictive manner when suggesting that the jury must be satisfied beyond reasonable doubt about the evidence of A before they could use that evidence in relation to B. Counsel added however that the jury could only do so if they were absolutely satisfied that there had been no collusion and that the LTJ should redirect the jury accordingly.

[21] Mr Mallon responded with a reference to cross-admissibility and the danger of collusion adding:

> "… If Your Honour were to bring the jury back and deal with the issue of cross-admissibility it would be important for Your Honour to direct the jury carefully about the dangers of innocent contamination …"

[22] In further exchanges between counsel, it appeared that Mr Mallon accepted that if the case was one of deliberate contamination, then the issue of innocent contamination would not arise.

[23] The judge expressed the view that any further direction would lead to confusion amongst the jury and, being satisfied on the direction that he had given, declined to recall the jury.

Relevant principles

[24] Evidence may be "cross-admissible" between counts in the indictment for two possible reasons, either:

(1) When independent but similar complaints of sexual offences are made against the same person, the jury may be permitted to consider the improbability that those complaints are the product of mere coincidence or malice i.e. a complainant's evidence in support of one count is relevant to the credibility of another complainant's evidence

on another count – an important matter in issue: article 6(1)(d) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. In such a case collusion must be excluded if there is any evidence of same.

(2) The jury may be sure of the accused's guilt upon one count and if, but only if, they are also sure that guilt of that offence establishes the accused's propensity to commit that kind of offence, the jury may proceed to consider whether the accused's propensity makes it more likely that he committed an offence of a similar type alleged in another count in the same indictment (Evidence of Propensity: article 6(1)(d) and article 8(1)(a) of the 2004 Order). In N (H) v Regina (2011) EWCA Crim. 730 Pitchford LJ, dealing with the comparable English legislation, added a cautionary note at [31]:

> "It will be in rare circumstances, if at all, that the jury might be directed to consider both these possibilities in the same case (although it is not so unusual for the jury to consider the effect of a relevant previous conviction as demonstrating a relevant propensity and the unlikelihood that similar but independent complaints are, as between themselves, coincidental or malicious). Whichever is the basis upon which the jury is directed that they may consider the evidence given in relation to one count as support for another, they will require careful directions as to their proper approach to the evidence and, in the case of an alleged propensity, a specific warning as to the limitations of such evidence."

[25] Thus dealing with the issue of credibility, the fact that several complaints of a similar kind are made by different witnesses who have not colluded or been influenced deliberately or unintentionally by the complaints of the others, may be powerful evidence that coincidence or malice towards the defendant (or innocent association between the defendant and the complainants) can be excluded. It is in this context that Crown counsel had exhorted the trial judge to give a direction on collusion in the instant case.

[26] If the evidence may be used to establish propensity, the jury should receive the conventional warnings about its limitation based on the factual context of the case, for example reminding the jury that a propensity to commit an offence of a certain type does not of itself prove that the defendant committed such an offence on this occasion. Propensity, if proved, is only part of the evidence in the case and its importance should not be exaggerated.

[27] Much will depend on the facts of an individual case whether a warning about the danger of collusion or contamination should be given. In R v McCalmont and Wade (2010) NICA 27 Higgins LJ said at [24]:

> "It is certainly not necessary in every case in which there are several complainants. … Given the regularity of contact between the complainants, understandable due to their residences and relationships, and the frequency of their conversations about what they were alleging and in particular the similarity in the complaints made between two of the complainants, this was a case which required some reference to the possibility of contamination either innocent or deliberate, conscious or subconscious."

[28] In the instant case the complainants were obviously well known to each other. There was evidence that A and B had spoken amongst themselves on many occasions about what they alleged in general terms had occurred at the hands of the appellant albeit they both denied discussing the specific acts of abuse.

The submissions of counsel

The appellant's case

[29] Mr Mallon contended as follows:

- Despite the fact that A and B had been cross-examined on the basis that A and B had "sat and discussed and colluded", the LTJ had made only a passing reference to collusion in the context of the third call to the police in 2010 when the person in police employment had recorded an allegation that the youngest sister C had also been abused according to A. A in evidence denied having said this and had asserted that the police employee had mistakenly recorded it. We note, as the judge did, that the same record erroneously recorded A's name. The relevant point was that the youngest sister had never made any complaint. The LTJ had confined his comments to this aspect of the case in any event as being an indicator of inconsistency.

- The LTJ in this context failed to draw attention to the alleged implausibility of the assertions by A and B that:
    1. they had never discussed in detail the allegations but had confined such discussions to generalities,
    2. although it was admitted that they had sat and discussed the matters generally into the late hours, neither girl was aware of the specific details of the allegations,

3. notwithstanding this contention, A had been able to assert that she considered B had been more seriously abused than her. How would she know this absent detailed discussion?

- In these circumstances the jury required careful direction about the dangers of guilty collusion and conscious/unconscious contamination. He had ignored the requisitions of both counsel to this effect at least as to the former.
- A single reference to collusion referred in the charge focused solely on whether there had been some possible attempt at conclusion in seeking to present the younger sister as a victim of abuse.

- The issue of the complainant's credibility at trial was critical and thus the real risk of collusion and contamination demanded a careful direction.

The respondent's submissions

[30] Mr McCollum QC, who appeared on behalf of the prosecution with Mr Chambers, in an equally focused argument, contended as follows;

- Collusion did not feature in any major way in the case. There was no evidence whatsoever A and B had actually colluded together.

- Cross-examination on the issue of collusion by the defence counsel had played an exiguous part of the whole exercise over three days of cross-examination.

- In the circumstances the LTJ was entitled to take the view that a specific direction using the word collusion was unnecessary.

- The LTJ's charge had been unnecessarily favourable to the accused in directing them that they should not take into account what one complainant had said to assist them in determining whether the other had told the truth unless they were firstly satisfied beyond reasonable doubt about the first complainant's allegation.

- Contrary to the requisition of Crown counsel in effect the LTJ had given no direction on the question of cross admissibility on the issue of credit and this was to the advantage of the appellant.

- Innocent contamination did not arise on the facts of this case.

- Whilst it appeared to be the case that the LTJ had directed the jury on the basis of propensity (and not on cross admissibility with reference to credit as urged on him by Crown counsel) without the conventional warning, that did not render the conviction unsafe bearing in mind the strength of the evidence and the "defence weighted charge" of the LTJ.

Discussion

[31] The role of a judge in delivering a charge to a jury is to provide a succinct and focused summary of the evidence that he considers to be of salient significance and to explain how the law applies to the allegations against the accused. In a trial of this length – lasting over 12 days – a judge has to be selective in the facts to which he refers. He is not required to cast fretful backward glances at every piece of evidence adduced. To do so would be to elongate the charge to unacceptable levels and, more importantly, would deflect the jury from the key issues in the case. There is no algorithmic formula or fixed ledger of facts to distil what has to be introduced into a charge to a jury. It is a matter of judgement and discernment. This LTJ was compressing the evidence of a 12 day trial, including the contents of closing speeches, into an accessible direction to the jury which he considered most helpful to the jury.

[32] So far as collusion or contamination is concerned, much will depend on the facts of the individual case as to whether or not a warning as to the risk of such collusion or contamination must be given.

[33] In the event in the instant case, collusion had not loomed large and innocent contamination had scarcely featured at all. The essential thrust of the defendant's case was that A and B had manufactured these allegations and were unreliable and lacking in credibility. We are therefore not convinced that this was a case that necessarily merited a warning as to the risk of collusion or contamination beyond the reference made by the LTJ. There was no evidential basis at all for raising innocent contamination.

[34] That collusion was not a central issue in this case is evidenced by:

- The paucity of reference to collusion in the course of the lengthy cross-examination of the complainants over three days. Indeed the word collusion was never raised with witness B albeit it was mentioned in brief to witness A.

- The LTJ invited counsel to indicate to him the main issues he should address in his charge. It is perhaps not without significance that Mr Mallon could not recall whether or not he had asked the judge to deal with collusion/contamination. Had it loomed large one would have expected such recollection to be crystal clear.

- Mr Mallon's closing speech made one, or at best two, extremely brief references to the concept of collusion but it certainly did not form part of the central thrust of his speech.

- During the requisitions Mr Mallon did not specifically invite the judge to give a freestanding direction on collusion and insofar as he dealt with the matter

on the cross-admissibility issue, it is not without significance that he is recorded as saying "if Your Honour were to bring the jury back", thus couching this request in very conditional terms.

[35] None of this is the slightest criticism of Mr Mallon. Perusal of the papers illustrates that he left no stone unturned in presenting his client's case. However it does reflect our view that collusion played a very peripheral role in this case which is reflected in the lack of detailed analysis of the concept by the LTJ. Hence we find no measure of concern in the absence of detailed analysis of collusion in the charge of the LTJ.

[36] In any event over the 12 days of the trial, it must have been patently obvious to the jury that A and B had been living together as children over the years of the alleged abuse, that they had discussed at least generally the abuse by this appellant and that as sisters it was likely they shared confidences. In truth the failure of the judge to rehearse such matters cannot have served to exclude these facts from the mind of the jury.

[37] This appeal ought not to be left without the observation that greater clarity should perhaps have been brought to bear on that aspect of the charge which dealt with the issue of cross-admissibility. It seems likely to us that the LTJ, whilst not specifically referring to it, was by implication giving a direction on propensity rather than credibility. There remains the possibility that he was also intending to direct the jury to consider both of these possibilities in which event he clearly overstated the obligation on the prosecution in terms of the evidential burden of proof as regards the latter. If, which seems more likely, the jury was not directed about the cross-admissibility issue in terms of credibility and insofar as the matter was dealt with on the basis of propensity, the conventional warning about the limitations of such evidence ought normally to be given. However the absence of that required desideratum in the instant case could not have caused any prejudice to the accused in circumstances where its absence was outweighed by an all too favourable direction concerning the burden of proof in such circumstances and where the clear thrust of the defence case was purely that both complainants had manufactured their allegations with collusion playing a very minor part indeed.

[38] In all other respects moreover, this charge was scrupulously fair to the appellant probing the prosecution case with objective thoroughness. Indeed there is some merit in the suggestion by Mr McCollum that the charge overall was "defence weighted". Again and again the LTJ emphasised the need for the jury to be certain beyond reasonable doubt of the guilt of the appellant, he fully advanced the defendant's case to the extent of an all too favourable reference to the test on cross-admissibility and in some instances he declined a clear opportunity to comment adversely on the defendant's case e.g. the issue of the defendant's change of tack on locations where he had been with these children when being interviewed by the police.

Conclusion

[39] Section 2(1) of the Criminal Appeal (Northern Ireland) Act 1980 provides that the Court of Appeal shall allow an appeal against conviction if it thinks that the conviction is unsafe and shall dismiss such an appeal in any other case. In 1995 the various grounds set out were replaced by the simple formula that the Court of Appeal should allow the appeal "*if it thinks that the conviction is unsafe*".

[40] In the context of potential lack of clarity that may have arisen out of the direction concerning cross admissibility (see paragraph 36 above) we are conscious of the cautionary words of Lord Bingham in Graham (1997) 1 Cr. App. R. 302 who, when speaking of the new provision, said:

> "This new provision … is plainly intended to concentrate attention on one question: whether, in the light of any arguments raised or defence adduced on appeal, the Court of Appeal considers a conviction unsafe. If the court is satisfied, despite any misdirection of law or any irregularity in the conduct of the trial or any fresh evidence, that the conviction is safe, the court will dismiss the appeal. But if, for whatever reason, the court concludes that the appellant was wrongly convicted of the offence charged, or is left in doubt whether the appellant was rightly convicted of that offence or not, then it must of necessity consider the conviction unsafe."

[41] In R v Pollock [2004] NICA 34, the Lord Chief Justice said at [32]:

> "The following principles may be distilled from these materials:
>
> (1) The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.
>
> (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.
>
> (3) The court should eschew speculation as to what may have influenced the jury to its verdict.

> (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."

[42] We have no lurking doubt or sense of unease about the correctness of the verdict in this instance. The jury had ample opportunity to assess the credibility of the complainants and we find nothing in this appeal which merits disturbing the unanimous conclusion that was reached.