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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

REGINA

-v-

JB

Before: Sir JOHN GILLEN, DEENY LJ, TREACY LJ

DEENY LJ (delivering the Judgment of the Court)

Introduction

[1] This is an application for leave to appeal against the applicant's conviction on 28 October 2016 on 3 counts of indecent assault on a female contrary to section 52 of the Offences against the Persons Act 1861 and 8 counts of rape contrary to common law. (One of the counts of rape was also charged contrary to Article 18(1) of the Criminal Justice (Northern Ireland) Order 2003).

[2] The grounds of appeal cover two areas. Firstly, there had been two earlier trials in the second of which the jury had returned verdicts of not guilty in respect of alternative counts of incest. In the third trial the learned judge refused an abuse of process application based on that and refused to allow evidence of the previous not guilty verdicts to be adduced. The grounds of appeal challenge these decisions in a number of ways. Secondly, the evidence during this trial disclosed an inconsistency in the prosecution evidence on when and where the abuse started. As a result it was the position that the abuse allegedly started later than originally claimed (when the victim was 13 or 14 as opposed to 11 or 12). This led to the learned trial judge directing that the applicant be acquitted on indecent assault charges covering the earlier period of time (counts 1 and 4) and gross indecency charges, which had as an element that the victim was under 14 (counts 2, 5 and 8). The learned trial judge then also amended the indictment so that count 6, indecent assault, and count 9, rape) were alleged to occur during a period starting later than had been originally alleged in those counts. The grounds of appeal challenge this aspect of the case in a number of ways.

[3] Counsel for the applicant were Eugene Grant QC and Luke Curran. Counsel for the prosecution were Richard Weir QC and Peter Magill. The court had the assistance of helpful written and oral argument from counsel, who had all appeared at the trial of October 2016.

Reporting Restrictions

[4] Nothing should be done to identify the complainant. The applicant has been anonymised to deter jigsaw identification.

Three trials

[5] The first trial commenced on 14 April 2015 and ended on 24 April 2015 with the jury being discharged by HHJ Kerr QC at a late stage due to a third party having failed to comply with the third party ruling. No complaint is made of this.

[6] The second trial began on 27 May 2015 with the applicant being charged with 16 counts of indecent assault, gross indecency, and rape. At the conclusion of the evidence, the judge considered that 8 further counts of incest should be added as alternatives to the rape counts 8 to 16. The prosecution then adopted that suggestion, and, despite objection from the defence, eight counts of incest were added. On 9 June 2015 the jury failed to reach a verdict on counts 1 to 16 but said they could reach a verdict on the alternative counts 17 to 24. They were asked if they could reach a verdict on the first 16 counts and were given more time. When they were still unable to reach a verdict the judge discharged them from reaching verdicts on counts 1 to 16. They went on to give verdicts of not guilty on counts 17 to 24 i.e. incest. Following the conclusion of the trial the applicant applied for a stay on all counts. On 3 December 2015 HHJ Fowler QC refused to grant a stay, finding that there had been no abuse of process.

[7] The third and last trial began before HHJ Miller QC on 17 October 2016 at Belfast Crown Court. On 18 October 2016 the learned trial judge refused an application to stay proceedings as an abuse of process. During the trial he directed the jury to return a finding of not guilty on counts 1, 2, 4, 5, and 8 as set out above.

Factual background

[8] The victim accused her father of carrying out a campaign of sexual assault and rape against her from when she was approximately 11 to 13 years old until she was approximately 31. The charges cover a period from 1 January 1987 to 31 December 2007. At the time of the trial the victim was 41 years of age. The family also included the victim's mother and brother. All four family members gave evidence during the trial.

[9] The offences were alleged to have occurred in the family home and later in the victim's own home. It was alleged that the abuse began with sustained grooming starting with inappropriate comments when the victim was 10 / 11, progressing to touching when she was 11/12 through to digital penetration and rape also starting from when she was 11/12. The victim's allegations tied the activity not just to her age but also to location, namely to a house her family lived in which we will refer to as HG.

[10] An unusual feature of the case was that the offending continued into the victim's adulthood. The prosecution characterised the evidence as showing that the applicant was a manipulating and controlling man who groomed his daughter from an early age to do as she was told without questioning and that, in effect, as the years went by she was stuck in a vicious circle. The defence case was that the evidence revealed the prosecution case to contain gross inconsistencies and a high degree of implausibility.

[11] The key inconsistency in the victim's evidence that emerged during the trial was that the family did not move to HG until the spring of 1989, by which time she was 14 years of age. This was established by the defence which adduced a Land Registry document indicating that the family did not move to that house until on or after 4 April 1989. At first the victim changed her account to say that the abuse had begun in the previous family home, but then reverted to saying that it had begun at the home at HG and must have begun when she was 13 or 14. Her evidence when challenged about this was that she must have been muddled, that she had tried to bury it. It was the defence case that this aspect of the evidence fundamentally undermined the prosecution case; that it meant that all the allegations relating to the period before the victim turned 14 were now gone because she had been caught out.

[12] Count 3 related to an indecent assault where it was alleged the applicant groped the victim's breast when she was behind the dining room door leading to the kitchen. It was alleged that he touched her neck and then moved down her body to her breasts and from there to her waist, squeezing her bottom and genitals, accompanied by words to the effect that they were going to mature into nice breasts. This incident lasted only a few seconds.

[13] Counts 6 and 7 were specimen counts of indecent assault and related to touching the victim's breasts and vagina both over and under clothing when she was 14 and 15. They were split into two counts because the law changed on 3 October 1989. Count 6 had originally been alleged to have occurred on dates between 27 February 1988 and 2 October 1989 but, as a result of the Land Registry evidence, the indictment was amended during the trial so that count 6 related to the period from 3 April 1989 to 2 October 1989, at which point the victim would have been 14. The victim's evidence was that the offending behaviour was occurring week by week and sometimes 3 to 4 times a week.

[14] The victim's evidence was that the behaviour progressed on to full sexual intercourse. She said that the first instance of rape, like most of the other activity, occurred in her parents' own bed in the house at HG when she was 11 or 12 (specific count 9). The indictment was amended to reflect that this count should be alleged to have occurred from 27 February 1989. She recalled on this occasion feeling pain after the applicant's penis entered her vagina. She said 'it hurts' and he withdrew. It was on this occasion that he said, according to her recollection, that he would inch it in to see how far he could get. Her evidence was that, at the time, she didn't know that this activity was classed as wrong, that she didn't know what you would expect to question a parent. On her account this behaviour was a constant feature occurring several times a week, the applicant often ejaculating in her vagina. There was no suggestion that a condom or other form of contraception was used.

[15] Counts 10 to 14 were then specimen counts of rape to denote the large number of times the victim said that sexual intercourse took place without her consent. These counts related respectively to the periods when she was 14, 15, 16, and 17 and then when she was 18 until she was 28, when her child was born. Count 15 was a specific count of rape relating to the victim's evidence of, on one occasion, having said no. Count 16 was a specimen count of rape covering the period up until she went to England when she was 32.

[16] The victim gave evidence that she left school and had several jobs while living at home, and that during this time the offending activity continued. In her early 20s she obtained a job at a hospital and moved to accommodation there. Notwithstanding what had happened, she continued to return home on her days off and weekends to see her family and, when there, the applicant's behaviour continued as before.

[17] When asked whether it occurred to her to leave home, the victim said: I suppose I was scared to leave and muck up, nobody can understand what it feels to be held over, the power, you know, what is to come.

[18] The victim entered a short-lived relationship with a man, H, who she lived with for 6 months. She became pregnant, there was an acrimonious break-up, and she returned home. Later she moved with her child to an address at EP. There the applicant decorated the property and stayed over every other weekend. The victim said that the abuse continued, and that she was not in agreement with any of it. She said that when the child was still a small baby in or about 2003 there was an occasion on which the applicant wanted sex and she told him no; that he went on ahead, got on top of her and had sex with her anyway (specific count 15). Her evidence was that she did not agree to any of this sexual intercourse that had been taking place and that she didn't know how to stop it.

[19] The victim moved to an address at A and the same pattern of behaviour continued. This was a terraced house with two bedrooms. Initially there were two beds in her child's bedroom. One of those beds was moved to her room and the applicant slept there with her and, on her account, continued the abuse.

[20] The victim moved to England in 2007 and did not return to Northern Ireland but her parents visited her. In England her brother lived close by. She said that when the applicant came to England there was no further abuse.

[21] The victim married a man, S. The applicant did not like S and said he was bossy and controlling and did not attend the wedding.

[22] Later the applicant's marriage broke down and contact between him and the victim ceased almost completely.

[23] In June 2013 the applicant made a complaint to police in England about the offending. At this time she complained to police that her husband, S, had also raped her. Three days later she made the complaint about her father's abuse. Her evidence was that the rape by her husband had occurred a month previously and, when asked about the delay in reporting, she said she had a previous experience of being sexually assaulted, of being raped 11 years earlier in Northern Ireland (by H), and that she felt that the police hadn't taken that allegation seriously.

[24] When asked why she hadn't done anything about what was happening with the applicant until 2013 she replied: I didn't ask for any of this to happen and I wasn't ready to

tell anyone about it. She said in evidence that she was frightened of not being believed and that she wanted to keep up the appearance of normality, that this was something that had gone on between her and her father. She said she wasn't ready until she walked into a police station in June 2013. She indicated that the allegations about S had lit a fuse; that she had until then been maintaining a façade. She suggested that as she saw her nieces grow up she couldn't remain silent any more.

[25] In her evidence she said that she did not tell anyone what was going on but that on one occasion about 15 years ago, in or about 2001, her brother, in a phone call, asked her if anything had gone on with Dad and she intimated that it had but did not give him any details. There was some dispute as to whether this was a face to face conversation in a particular room or a phone call from that room, but the victim ultimately accepted that it was a phone conversation. When her brother gave evidence he said it was a phone call. He said there was also a further brief conversation in 2007.

[26] The applicant's case was that none of the allegations were true. His evidence was that he was a good and loving father who supported his daughter along what was frequently a troubled path. He was there when she was a child and as she grew up and he welcomed her home when she had her days and weekends off. It appeared that the victim was not disputing that she had a good relationship with her father in other ways, but the prosecution case was that this had to be seen within the context of a manipulating, controlling, grooming sexualised activity.

[27] The applicant's evidence was that, when the victim's relationship with H turned sour and she was pregnant, it was he along with the police who helped her leave the flat and it was he who accompanied her. On this the victim said that her mother also accompanied her during court proceedings where she obtained a non-molestation order against H. The applicant said he welcomed the victim back home during the latter stage of her pregnancy, supporting her through the first few months after the birth, before then decorating her house in EP and calling round regularly to check that she and the child were all right because it was a rough neighbourhood. He did the same again when she moved to the address at A and he maintained contact when she left Northern Ireland. His evidence was that there was a constancy of contact and support both material and emotional right through to the confluence of the breakdown of his marriage, the deterioration in his health as a result of a serious road traffic accident in 2000, and the commencement of a relationship by the victim with S, a man of whom he did not approve. He said his wife didn't approve of S either. He said it was only then that the atmosphere changed and effectively from about 2011 contact was reduced to a point where it barely existed at all.

[28] A main aspect of the defence case was the suggestion of implausibility. If the applicant had behaved in the monstrous way alleged, why did the victim return to the house at the weekends and on her days off? The victim's response was that she wanted to see her mother, she didn't want to bring shame on her mother's side of the family, and so she kept quiet and she said well, why shouldn't I go home just because he's there. She was also asked why, when her parents were in different hospitals as a result of the road traffic accident, did she visit her father once or even twice a day. The jury were asked to consider was it just because he was more badly injured than the mother.

[29] The defence also asked why at the age of 26 or 27 and when she was pregnant she went back home. Her response was it was the family home, that she had nowhere else to go. She said words to the effect "was I expected to live in a cardboard box ….". She talked also about going back home because it was home and you would go back there, that it was safe to be with your family. When she moved into the address at A she accepted that she never stopped the applicant from coming to the house. When asked about the second bed being moved to her bedroom in A she said that the applicant had done this. The applicant claimed they both did it. She was asked why she didn't move it back and she replied: I am not one for altercations. In hindsight I could have.

[30] The defence also suggested it was improbable that the abuse had continued or occurred so frequently over several years in the house at HG: it was a relatively small three bedroomed semi-detached property. They said it was implausible that the abuse would not have been interrupted by either the victim's brother or mother when one or both may have been in the property on occasions when activity was taking place. However the prosecution said that from 1990 the victim's brother was at university or in his room working and the victim's mother worked shifts, one of which was 3.00 p.m. to 11.00 p.m.

[31] In cross-examination the complainant was asked to explain what she meant when she said that she experienced pleasure during these sexual encounters and she was also asked about different positions, the inference being that she had adopted a different physical position voluntarily. The defence said it was implausible that someone being raped would describe such a violation in those terms. The prosecution said that she qualified the term 'pleasure' as a sexual sensation which she experienced in her mid-teens.

[32] The complainant was cross-examined regarding the fact that she claimed to have been raped not only by her father, but also by H and S. Mention was made of a phone call between her and her mother in 2013, shortly after she had made her complaint, and she basically informed her mother of what had happened and then asked whether her child reminded her of anybody. The prosecution claimed that if she was suggesting the child was

her father's, it was inconsistent for her not to have sought a DNA test. She said that this crossed her mind but that she wanted to protect the child.

[33] It was the defence case that the allegation of rape against S brought to an end the marriage with S which lasted seven months. The defence drew attention to the evidence that the applicant had not liked S and had not attended the wedding; and that that was a factor in the victim coming forward in June 2013 with accusations against her father, that is to say that she in some way blamed him for the break-up of her marriage. However prosecution counsel said that in cross-examination the applicant was unable to identify any basis for such motivations and said that he didn't know what was going through her head.

[34] The defence suggested another reason for the accusations was what the applicant described as the drying up of the cash cow; that he had been making modest financial contributions to assist her, but that from the end of 2009 he ceased to do so. In relation to this, prosecution counsel described the applicant's evidence as being full of equivocation and prevarication; she had not made complaints to police until some years later. The applicant had helped her with groceries, with money and if she got into debt, and there was evidence he had given her cheques for £500, £300, and £100, but it was argued that that was not such a highly significant amount.

[35] The complainant was cross-examined about cards she had sent to her father. It was suggested that the sentiments contained in them were totally inconsistent with the allegations. The jury were also asked to consider family photographs taken over the years, as well as a video taken at the time of the applicant's 60th birthday party. The victim's explanation was that she had to keep things normal.

[36] The complainant's brother gave evidence that his father was a controlling man and even still could put him down with his words; that he was a man well used to being in control of people. He described the relationship between his father and sister when they were growing up as being close. He described them being on the sofa and his legs being over hers and he said that their relationship made him feel uncomfortable. He said that in the conversation in 2001 he asked her had the applicant crossed boundaries with her. She answered in the affirmative but did not give details and he did not press her. He said there had been a second conversation in 2007, the tenor of which was that that situation still existed.

[37] The complainant's mother gave evidence. She confirmed that the applicant was very protective of his daughter and in her eyes favoured the daughter over the son; that he never

thought that any man was good enough for the daughter and was very jealous. She said that many times he discussed confidences with his daughter that he would not discuss and talk through with her. She said: I felt the outsider. She also made specific reference to the applicant's habit of coming out of the shower into the bedroom naked and she had asked him not to do so.

[38] The victim's brother and mother agreed that within the home neither of them saw or heard anything of a sexual nature between the applicant and the victim despite the fact that the houses they lived in were small.

[39] The other evidence before the jury was that of the police interviews.

[40] In terms of the defence case, the applicant's evidence was that he was in employment until 2000 when he was involved in a serious road traffic accident and sustained significant injuries. He denied all the allegations. He agreed he was protective of his daughter and helped her in many ways as a father would. He said he treated his daughter and his son equally. He provided a home for his daughter, he decorated her houses when she moved out and he stayed over to protect her and to help look after her child. He stressed that throughout all his dealing with his daughter he never behaved in any sexually inappropriate way.

[41] As to walking between the bathroom and the bedroom naked, he said it happened once. When he had been asked about this by police he said he certainly wouldn't have done that but he said certainly from the bedroom to the bathroom possibly. He was then asked: "And was there any chance that the children would have seen you" and his response was: "Every possibility". There were a number of other questions which focused on the police interviews. It had taken the applicant a very long time before he accepted that he knew well in advance of going to be interviewed by police why they wanted to talk to him. He received a first phone call from police on 14 November 2013 telling him the nature of the allegations and who was making them and advising him of his right to legal representation. That was followed up with a reminder on 27 November 2013. The interview took place on 29 November 2013.

[42] He was asked to explain what were suggested by the prosecution to be apparently equivocal answers to some of the police questions. He had at interview denied the allegations. Part of the transcript then included the following:

"Question: Have you had any sexual contact with [your daughter]?

Answer: Not to my knowledge.

Question: Is that that you can't remember or?

Answer: I don't recall.

Question: Have you ever touched her inappropriately?

Answer: Like I said, we were a pretty close family. So.

Question: Did you ever touch [your daughter's] breasts?

Answer: I don't recall that.

Question: Okay. Have you ever touched her on her vagina?

Answer: Not that I am aware of.

Question: Have you ever inserted your fingers into her vagina?

Answer: I am not aware of that either.

Question: Did you ever show [your daughter] your penis?

Answer: No.

Question: Have you ever asked [your daughter] to touch your penis?

Answer: No.

Question: Have you ever had any sexual intercourse with [your daughter]?

Answer: No.

Question: So you are saying that you have never had any sexual relationship with [your daughter]?

Answer: Yes."

[43] It was the prosecution's case that such responses provided an insight into the truth behind the case, that the applicant didn't say no because he knew that he had sexually abused his daughter.

[44] When he was being cross-examined he also used phrases such as 'I don't recall'. He admitted sleeping in the same room as his daughter when she lived at the house at A. He

accepted he had not liked H and S but rejected any suggestion that this was due to jealousy or a desire to keep the victim to himself for sexual motives. He was cross-examined in relation to playing any role in the break-up of the victim's marriage. He made clear that he had no part in that; he disliked S but that his former wife disliked him too. He agreed in cross-examination that his son was an honest and truthful person. When cross-examined about the victim's motivation he said it was because the cash cow had dried up or the gravy train had stopped. During police interview, he said that he could think of no motive as to why she would make the allegations.

[45] On 28 October 2016 a jury of 11 found the applicant guilty of 3 counts of indecent assault and 8 counts of rape against his daughter as shown below. The counts of indecent assault related to incidents between 27 February 1988 and 3 April 1990. The counts of rape extended over 18 years from 1 February 1989 and 31 December 2007.

Consideration of the grounds of appeal

[46] The two principal grounds of appeal advanced on behalf of the application were, as set out at [2] above, that to retry him on the original count in the indictment after he was found not guilty on the incest counts was an abuse of the process of the court and that if he was to be tried his counsel should be allowed to refer to the not guilty verdicts of the previous jury. It is not necessary to refer to the first such application before HHJ Fowler but it is convenient to set out in extenso the ruling given by HHJ Miller on this topic on 18 October 2016.

[47] In dealing with the application to stay proceedings for abuse of process or admit evidence of the acquittals the learned trial judge gave the following ruling, having outlined the history of the matter.

> "This morning, the jury having been sworn yesterday, Mr Curran, who appears with Mr Grant QC on behalf of the defence, made two applications before this court, first a renewal of the abuse application and secondly an application that this court should allow the admission of the not guilty verdicts on the incest counts to be made known to the jury in this trial.

Mr Magill who appeared originally with Mr Mateer QC and who now appears with Mr Weir QC has adopted his earlier submissions and in terms asked this court to refuse the stay application and also to rule the previous verdicts of not guilty as being inadmissible in this trial. So that is by way of background. As I've said it is an unusual set of circumstances which leads the court to deal with these matters. The defence ... the thrust of the argument is that the verdicts of not guilty clearly must mean that the jury have determined that sexual intercourse between the defendant and the complainant had not occurred and that rape, being the primary charge, and incest, in terms, the subsidiary alternative, that for the jury to have reached a verdict of not guilty in circumstances where the relationship between the parties was not in issue, namely that it was a father daughter relationship, that the only logical conclusion one could reach is that they had rejected the complainant's case that intercourse had taken place at all. That being so, then logically speaking, not guilty verdicts should have been returned in respect of the rape but the defence argue that in fact the issue that has been determined goes to the core of the case.

The Crown argue in terms that the verdicts are not determinative of this issue at all and that, on one interpretation at least, it would be open to a jury to return not guilty verdicts on the incest counts where the issue was one of consent and the jury were satisfied that intercourse had taken place but were unsatisfied as to whether or not there was consent and had been unable to reach a verdict on that. That may be stretching matters but the reality is that, as with any verdict of a jury, it is an unreasoned verdict by which I mean that no reasons are given, no means by which decisions are determined are set out and the general principle is that a jury, if I may take the second issue first, that a jury at a subsequent trial should not know the verdicts of an earlier jury because it is a matter for this jury to determine the facts as they find them to be and to apply the law to that.

I have considered the abuse of process application arguments that have been cogently set out in the written submissions and ultimately I have to make a written determination and I am satisfied that a stay of these proceedings is not warranted in this case. The defendant will face on this bill of indictment the same bill of indictment that he faced in trial 1 and for the main part of trial 2, these being the 16 counts relating to indecent assault, gross indecency, and rape charges. One cannot look behind the jury's verdict. There is no doubt, however, that the not guilty verdicts mean that the alternative counts to rape are no longer available. It will be for this court to assess the evidence and to ensure that throughout the process of the trial that all matters are kept under careful scrutiny so as to ensure that the defendant does have a fair trial. This will include most obviously the fact that in the directions to the jury on the rape counts, obviously the jury have to be satisfied of all the essential ingredients of rape which of course includes they must be satisfied beyond reasonable doubt that consent did not take place and the jury can and will be properly directed to the effect that if they have a doubt over that there can be but one verdict and that is not guilt.

The absence of any reference to the charges upon which the defendant was acquitted in no way hampers the defendant in the cross-examination of the complainant or the presentation of this case. This was and remains a complete denial on his part of any sexual activity. I am satisfied having considered the authorities that have been placed before the court and having considered in particular the 2017 edition of Blackstone, paras. F12.21 to 12.23 at pages 2625 to 2627 that in terms there is no prejudice to this defendant. He remains in the position he was before the charges were added save, as I have indicated, that the Crown can no longer rely upon the alternative counts which were previously before the jury at the second trial. I am therefore refusing to stay the proceedings and I also have determined that the acquittals of the former jury are not admissible as evidence in this case and that's the ruling of this court."

[48] We have had the assistance of a detailed and learned argument from counsel for the applicant. They referred us to the oft cited statement regarding abuse of process by Lord Lowry in *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42 at 74:

> "I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case. I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct."

See also *R v McNally and McManus* [2009] NICA 3 per Kerr LCJ.

[49] The eight counts of incest on which the applicant had been acquitted by the jury were added at the conclusion of the evidence in the second trial. That was suggested by the judge and adopted by the prosecution, presumably on the basis that that was a view which both thought could properly be taken of the evidence before the court i.e. a sexual relationship between father and daughter but with her consent. It might be thought paradoxical if the fact that those counts, added belatedly to the indictment, having led to verdicts of not guilty, should lead to the dismissal automatically of the rest of an indictment on which the second jury had been unable to reach a verdict.

[50] The thrust of the applicant's case is that the only interpretation of the jury's decision to acquit on the incest counts is that they were not satisfied that sexual intercourse had taken place between the applicant and his daughter. That is certainly the most obvious inference to be drawn. But the jury were being asked to consider this as an alternative to charges of rape. As O'Hara J put it when refusing leave to the applicant to appeal:

> "It is contended for the applicant that the acquittals on the incest counts 'represent clear and unequivocal verdicts that said intercourse did not occur'. I do not agree - it seems to me that a jury could well have been divided on whether the victim was raped and whether there had ever been sexual intercourse but could agree that the alternative lesser charge of incest was not the appropriate finding on either approach."

[51] To put it another way the jury may have thought the real issue was consent or no consent and agreed that the incest charges were not an appropriate verdict to find.

[52] This court is not persuaded that the judge was in error in ruling as he did in this matter. It was within his discretion to do so. The ground does not reach the high standard required for dismissal of the whole indictment here.

[53] In saying that we have taken into account the case law to be found referred to in Blackstone paras F1221 to 1223 and referred to by the judge in his ruling.

[54] The judge also ruled against the alternative submission of counsel that they should be entitled to refer to and adduce evidence of these acquittals in the third trial. Evidence of an earlier acquittal is generally irrelevant and therefore inadmissible, but an exception exists where a witness's credibility is directly in issue and there is a clear inference from the earlier verdict that the jury in that trial rejected his evidence because they did not believe him (*D* [2007] EWCA Crim 684). It may have been open to the judge to consider this an exception when set in the context of a historic sex abuse trial in which the complainant had been found to be wrong in an important part of her evidence regarding the alleged offences in her childhood i.e. she was wrong as to her age at the time or as to where they took place. However, it could not be said that the acquittals on the issue of incest carried the clear inference that the complainant was viewed by a previous jury as untruthful. We conclude therefore that the judge was entitled to arrive at this ruling also.

[55] Towards the end of the third trial the prosecution accepted that in the light of the matter just referred to i.e. establishing the date when the family moved to the address at HG they could not stand over certain counts in the indictment. The judge accepted that and directed the jury to enter not guilty verdicts in respect of counts 1, 2, 4, 5 and 8. Counsel for the applicant complained that, in effect, the underlying evidence relating to those counts might nevertheless have been taken into account against the applicant.

Judge's direction to acquit the applicant on counts 1, 2, 4, 5 & 8

[56] The charge to the jury includes the following explanation of why they were directed to return a not guilty verdict for counts 1, 2, 4, 5 and 8.

> "You will recall that at the outset of this trial there were 16 counts on the Bill of Indictment and that at the close of the Crown case I told you that I would give you a direction to acquit the defendant and return not guilty verdicts on Counts 1, 2, 4, 5, and 8. The time is now and I will, therefore, direct that those not guilty verdicts be recorded. I should make it clear that my direction on these counts follows on a ruling I made on the law and you are entitled to know the basis of that ruling.
>
> You will see that Count 1 is a count of indecent assault on a female child and it is what is known as a specific count….. Counts 2, 5, and 8 are counts of gross indecency with or towards a child, and Count 4 is another count of indecent assault.
>
> I will take the three counts of gross indecency with or towards a child to illustrate the point. Gross indecency with or towards a child is an offence that can only be committed against a child, and the word 'child' is defined by the Children and Young Persons Act (Northern Ireland) 1968. The statutory definition of a 'child' at the relevant time was a person under the age of 14.
>
> In her evidence the complainant said that the activities she alleged the defendant committed against her commenced when she was about eleven or twelve years of age. She also said, however, that these activities commenced when the family moved to the house at HG. You will recall that it was only this week, yesterday in fact, that evidence was produced which definitively established that the family moved to that property in or after April 1989. [The victim] was born on 28th February 1975, so by April 1989 she was

> already at least one month past her 14th birthday. So, so far as the charges of gross indecency are concerned, they could not be made out on that legal basis.
>
> With regard to the two indecent assault charges, Counts 1 and 4, although there is no age limitation on such charges, again these counts were placed on the indictment to reflect the complainant's claim that she had been assaulted at the age of eleven or twelve years, but of course, when she was eleven or twelve the family had not yet moved into the HG house, which is where they were living when, on her account, the abuse began."

[57] The judge also adverted to the issue at page 17 of his charge on 27 October 2016.

> "That puts the legal position regarding my direction into context, but I want to make clear that doesn't mean that I am directing you to make a finding on the facts, that is whether you accept or reject the victim's account of what actually happened, the activities that she said happened. Clearly her evidence was wrong when she told you she was eleven or twelve when the family lived at HG and you will have to consider the impact of that detail and the quality and reliability of her evidence as a whole. That will be a matter entirely for your determination taken within the context of the directions on the law I shall give you."

[58] From page 18 onward of the charge on 27 October 2016 the learned judge went through the remaining charges on the indictment.

[59] It might be thought that the learned trial judge gave a clear direction on this issue at page 6 of the charge on 28 October 2016:

> "Well, members of the jury, it is a matter for you to make a judgment on that point. Does the fact that she was plainly wrong in saying that the abuse began in the house at HG when she was 11 or 12 mean that her account of what she alleges her father did to her is also lacking in credibility and beyond belief. Her accounts of how her father treated her and how his behaviour on her account developed from touching over to under clothes, making contact with her breasts, her bottom, her genitals, leading to digital penetration, all paints a picture of what the Crown say is his grooming of his daughter. When asked why she did not react she responded that he was her father, he was senior. She gave evidence of him kissing her on the cheek, the lips, the neck and she told you she didn't know any other way. You have heard her say that he got her to touch his penis and to rub her hand up and down it, this activity of course was originally led as evidence to ground the charges of gross indecency upon which I have directed you to enter verdicts of not guilty. You cannot therefore use this evidence, evidence of this activity to base a conviction on any of the remaining counts and as I have already pointed out you will have to consider carefully whether her assertion wrongly made that this activity happened when she was at a much younger age undermines her credibility and reliability as a witness of truth and, as I have said, this is a matter for you. The fact that she got the timeframe wrong may lead you to reject her evidence as unreliable but on the other hand you may take the view, regardless of the inaccuracy over timing, that what she says the defendant did do to her actually did happen in the manner she describes."

[60] The court considers that the learned trial judge did properly direct the jury on these issues. Some of the amendments were not objected to by the defence and the others were again decisions within the discretion of the trial judge. A judge could have put more strongly the warning about the complainant getting either the age of the first offences wrong or the location but he did put these matters before the jury squarely and not in a way which this court would condemn.

Conclusion

[61] The test to be applied by the court has previously been set out by Kerr LCJ in *R v Pollock* [2004] NICA 34 and endorsed in *R v BZ* [2017] NICA 2.

> "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 a 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."

It is relevant to note that in this case the complainant's evidence, at least so far as a sexual relationship with her father is concerned, is supported to a degree by his own statements and the evidence of two close relatives.

[62] The Court, having considered all the grounds of appeal put forward on behalf of the applicant, grants leave to appeal but has not been persuaded that the verdicts are unsafe and the appeal fails.