Neutral Citation No [2017] NICA 11

Ref:	**MOR10228**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**27/02/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

WAYNE JENKINS

Before: Morgan LCJ, Gillen LJ and Weir LJ

MORGAN LCJ (giving the judgment of the court)

[1] This is an application for leave to appeal against the applicant's conviction on 19 October 2015 at Downpatrick Crown Court on two counts of rape and 3 counts of indecent assault perpetrated on the applicant's two stepdaughters. The charges were as follows:

1. Indecent Assault on a female (E, D.O.B.: 12.01.94 - 12 years old at the time) contrary to section 52 of the Offences Against the Person Act 1861 between 11 January, 2006 and 12 January, 2007 in the County Court Division of Ards.

2. Rape of E contrary to Article 18(1) of the Criminal Justice (Northern Ireland) Order 2003 and common law between 11th January, 2006 and 12 January, 2007 in the County Court Division of Ards.

3. Indecent Assault on a female (E) contrary to section 52 of the Offences Against the Person Act 1861 between 11 January, 2006 and 12 January, 2007 in the County Court Division of Ards.

4. Rape of E contrary to Article 18(1) of the Criminal Justice (Northern Ireland) Order 2003 and common law between 11 January, 2006 and 12 January, 2007 in the County Court Division of Ards.

5. Indecent Assault on a female (H, D.O.B.: 28.05.92 – 15 years old at the time) contrary to section 52 of the Offences Against the Person Act 1861 between 31 December, 2006 and 1 September, 2008 in the County Court Division of Ards.

Mr Mallon QC and Mr Byrne appeared for the applicant in the appeal but had not appeared below and Mr McMahon QC appeared with Mr Magee for the PPS.

[2] Both complainants are entitled to automatic lifetime anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992, as amended. However, both have written letters to the court of trial indicating that they have waived their right to anonymity and the reporting of this matter at the time of conviction and sentence identifies the applicant by name and the complainants, without naming them, as his stepdaughters.

[3] The applicant lodged a Notice of Appeal against conviction on 1 October, 2015 which included an application for extension of time within which to apply for leave. The matter was referred by Master Bell to Gillen LJ on 15 October 2015 for a ruling on the extension application. In a written ruling Gillen LJ, applying the principles in the leading authority in this area (Brownlee [2015] NICA 39), noted the relative shortness of the delay and that the applicant apparently suffered from active mental health issues which may have contributed to difficulty in obtaining coherent instructions. While noting the absence of any transcript of the evidence or judge's charge he thought there may well be an arguable case on the merits of some of the grounds raised. He therefore allowed the extension. A Notice of Appeal against sentence was lodged in timely fashion on 14 October, 2015. Leave to appeal was subsequently refused by Colton J.

Background

[4] During the relevant period the applicant had been living in Bangor with C, since deceased in 2014, who had four daughters, including the two complainants, from a previous marriage. In fact there had been a period of overlap when that lady's first husband, Mr McC, and the applicant were both resident in the house in Bangor before Mr McC found alternative accommodation. The applicant was originally from England but had met C online and moved to Northern Ireland to set up home with her. He subsequently married her and she took the surname Jenkins. They had twins together and then a third child. The four daughters from the previous marriage all lived at the same address with them.

[5] According to the prosecution case, the first occasion of his offending was when the applicant was said to have gone upstairs with E (12 years old) following a row

with his wife. After lying under the duvet in bed talking to her about 'the birds and the bees' he explained sexual intercourse to her and then told her to go and put her pyjamas with shorts on and come back to the bedroom. He started to touch her intimately in the pubic area before producing his erect penis and telling her to put her mouth on it. He then pushed the back of her head back and forth to receive fellatio from her. After that he asked her if she could fit an adult sized penis inside her and he lay on top of her and attempted to penetrate her unsuccessfully with his penis. He then removed her shorts and penetrated her vagina with his penis. He commended her for being able to fit so much of his penis inside her and then showed her how to kiss with tongues.

[6] On the second occasion the allegation was that E had been looking after one of the applicant's young twins to allow her mother to go to bed early and rest. When she couldn't settle the child she sought the applicant's assistance. He settled the child and told E to come downstairs to the living room where he knelt in front of her as she sat on the sofa and attempted to touch her vagina. She attempted to push him away and said 'no' but he persisted and held her hands firmly away and took his erect penis and forced it inside her.

[7] H gave evidence that when the family moved to Portavogie on some date in 2007 she and E lived in a caravan parked in the garden. She was aged 15 at the time. On one occasion, possibly in winter, H was lying on a fold down bed in the living area of the caravan watching television in her pyjamas, E having gone to bed in one of the bedrooms. The applicant, who had consumed alcohol, came to the locked caravan and knocked to gain access. H got up and let him in and he told her that he had a row with their mother. She returned to the bed and he lay down beside her. As she was dropping off to sleep he placed his hand across her body and touched her right breast outside her pyjamas. She told the court that he asked her did she like that, was it nice? When she realised what was happening she got up and told him to leave, which he did, and she locked the door behind him.

The issues in the appeal

[8] After the conviction a medical report was obtained from Dr Ken Yeow, a consultant psychiatrist specialising in eating disorders, in respect of the harm caused to E. She had a history of eating problems which began in about 2008 and which were of such severity that she required admission to hospital on a number of occasions. E had also a history of overdosing on paracetamol tablets. Dr Yeow's report indicated that childhood sexual abuse was a significant aetiological factor in E's condition. The applicant's advisers decided that they should obtain a report in

relation to her condition and the medical notes and records held by the court were made available to Dr Harbinson who prepared a report dated 15 September 2015.

[9] Dr Harbinson's report gave a detailed account of E's treatment in relation to eating disorders and subsequent medical conditions which required hospital admission. It was noted within the relevant medical notes that her father had tended to be angry rather than supportive regarding her mental health difficulties. It was also noted that he had used some of her benefits to pay off his bills, that he had threatened to ask her to leave home if she did not follow the rules about eating and that she wanted to move away from her father but felt that she had no alternative if she wanted to complete her education. E also stated within the notes that her father had erected a pole in her bedroom for pole dancing exercise and that she had taken part in a pole dance performance attended by men. The medical notes also recorded that E was subject to physical and emotional abuse by her maternal grandmother who at that time had been drinking excessively.

[10] In the course of his police interviews the applicant had suggested that the allegations against him had emerged as a result of Mr McC putting the children up to it. It was contended that the material within the medical notes and records would have been of assistance to the applicant at the trial. Mr McC was called at the trial and this material could have been put to him to deal with his assertion that he had tried to be the best father that he could under the circumstances.

[11] In our view there is no substance in the submission. There was nothing within the notes and records to indicate that there was a relationship between E and her father which would have supported the suggestion that E was in any way susceptible to being induced by her father to pursue a false case against her stepfather. The medical notes and records indicated that the relationship between E and her father was poor and if anything that she was hostile to him. Her father had not been told about the allegations of abuse until E had herself made a report to the police and evidence was given of the circumstances in which E and a friend went to see her father to tell him what had happened after she had reported these matters to police. This ground of appeal is, therefore, totally without foundation.

[12] The next ground of appeal concerns the admission of evidence of complaint by H. In her evidence H stated that she had informed her mother shortly after the incident that the applicant had touched her right breast when she was on the sofa bed in the caravan. H then referred to him as a pervert. Her mother asked why she was doing so and she explained what had happened. She said that when he was confronted with this he said that he was drunk and thought H was her mum. H stated that her mother then rang the police who attended the family home on

19 April 2007. She said that she told the male and female police officers what had occurred and that they stated that H and her mother could contact the police again if they wished to go ahead with the allegations. The police report confirmed that police attended at the home on that night but the complaint was recorded as being in the nature of a domestic violence incident which was attended by two male police officers. The learned trial judge directed the jury carefully on the discrepancies between the police records and H's account.

[13] The law in relation to complaint evidence is now found in Article 24 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. By virtue of Article 24(4) of the said Order a previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible *inter alia* if the conditions specified in Article 24(7) are satisfied:

(a) the witness claims to be a person against whom an offence has been committed,

(b) the offence is one to which the proceedings relate,

(c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence,

(d) the complaint was made as soon as could reasonably be expected after the alleged conduct,

(e) the complaint was not made as a result of a threat or a promise, and

(f) before the statement is adduced the witness gives oral evidence in connection with its subject matter.

[14] Unhelpfully there was no reference to this statutory provision in the submissions made on behalf of the applicant. The application for leave was advanced on the basis of the old law concerning the introduction of evidence of recent complaint as evidence of consistency. In our view it is plain that in this case each of the conditions set out in Article 24(7) of the 2004 Order was satisfied and that the evidence was properly admissible. Once the legislative provision was pointed out by the court there was no real debate about this.

[15] The final point made on behalf of the applicant was that the learned trial judge did not specifically address the jury in relation to any complaint from H not constituting independent evidence that the offence was committed. The learned trial judge directed the jury carefully on the conflict between H's account and the reports

of the investigation conducted by the two police officers who attended on 19 April 2007. He examined the issue of the complaint in the context of how it might have put the applicant on notice of this allegation long before the police interviewed him.

[16] It seems clear that the decision to approach the complaint evidence on the basis that it was material only to the delay question was intended to favour the defence. The issue of whether the jury should have been instructed in relation to that evidence not constituting independent evidence against the applicant was actually raised by the crown in requisitions and for tactical reasons the defence did not wish the jury recalled on that issue. That was an entirely proper course to take in the context of the trial and there is no basis upon which that proper decision can now become a proper ground of appeal or give rise to any sense of unease about the safety of the conviction.

Conclusion

[17] For the reasons given we are not satisfied that the conviction is unsafe and the application for leave to appeal is refused.