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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

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_____

Before: Morgan LCJ Girvan LJ and Coghlin LJ

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GIRVAN LJ (delivering the judgment of the court)

INTRODUCTION

[1] This is an appeal by the defendant/appellant ("the defendant") with leave of the single judge, Gillen J, against his conviction in respect of multiple sexual offences arising out of historic sexual abuse by the appellant of his younger sister ("the complainant"). The appellant appeals on the ground the learned trial judge erred in not discharging a member of the jury when it was discovered that the juror knew the brother-in-law of the appellant and the complainant who was a witness in the trial. Alternatively, the appellant contends that the learned trial judge erred in not discharging the whole jury.

[2] Mr Rodgers QC and Mr Reel appeared for the appellant. Mr Mateer QC and Mrs Kennedy appeared for the Crown. The court is indebted to counsel for their helpful written and oral submissions.

[3] On 13 May 2013 the appellant was returned for trial at the Crown Court sitting in Londonderry on a total of 12 counts alleging sexual offences including rape and attempted rape. At his arraignment on 4 June 2013 he pleaded not guilty to all counts. On 30 September 2013 two of the counts were severed from the indictment to be proceeded with on a separate indictment and trial. The appellant's trial on the remaining 10 counts commenced on 30 September 2013 before His Honour Judge Fowler QC sitting with a jury. On 7 October 2013 the jury returned the following verdicts:

Count 1	Indecent assault on a female contrary to section 52 of the Offences Against the Person Act 1861.	Guilty (Unanimous)
Count 2	Indecent assault on a female contrary to section 52 of the Offences Against the Person Act 1861.	Guilty (Unanimous)
Count 3	Indecent assault on a female contrary to section 52 of the Offences Against the Person Act 1861.	Guilty (Majority 9-1)
Count 4	Indecent assault on a female contrary to section 52 of the Offences Against the Person Act 1861.	Guilty (Majority 9-1)
Count 5	Indecent assault on a female contrary to section 52 of the Offences Against the Person Act 1861.	Guilty (Majority 9-1)
Count 6	Incitement to commit an act of gross indecency contrary to section 22 of the Children and Young Persons Act (NI) 1968.	Guilty (Majority 9-1)
Count 7	Incitement to commit an act of gross indecency contrary to section 22 of the Children and Young Persons Act (NI) 1968.	Guilty (Majority 9-1)
Count 8	Indecent assault on a female contrary to section 52 of the Offences Against the Person Act 1861.	Guilty (Unanimous)
Count 9	Attempted rape contrary to Article 3(1) of the Criminal Attempts and Conspiracy (NI) Order 1983 and Common Law.	Guilty (Majority 9-1)
Count 10	Rape contrary to Common Law.	Guilty (Majority 9-1)

[4] On 22 November 2013 the judge sentenced the appellant to a total of 14 years' imprisonment and to be subject to a licence under Article 26 of the Criminal Justice (NI) Order 1996 upon his release. He further notified the appellant that he would be subject to the notification requirements under Part 2 of the Sexual Offences Act 2003 indefinitely, that he will be placed on the Children Barred List by the Independent Safeguarding Authority and that he may be placed on the Vulnerable Adults Barred List.

[5] The appellant lodged his notice of appeal on 4 November 2013. On 13 March 2014 Gillen J, acting as the single judge, granted both leave to appeal conviction and leave to appeal sentence. We will deal with the appeal against sentence at a later time.

THE OFFENCES

[6] The complainant who is now 33 lived in the family home in Londonderry with her mother, father and nine brothers and sisters. From the age of eight she alleged that she was sexually abused by her brother, the appellant, who was seven years older. The first alleged incident of indecent assault on her occurred when she was at primary school. She told the court that some children in school received a letter informing them there were children in school who had threadworms and advising that pupils should be checked out for this. The appellant said he would check her and she allowed him to do so. The first occasion he did this relates to Count 1 on the indictment. He took her into the bathroom, told her to take down her pants and to bend over. He then put a cotton bud up her anus. Sometime later he checked her again and on this occasion he put his finger up her anus hurting her (Count 2) ("the worms incidents"). He threatened her not to say anything to her mother because everybody else in the house would get worms and that her mother would 'crack up'. She said that until then the defendant had never done anything bad to her, that he had never hit her, he had always got her sweets, she looked up to him, he was her big brother and he stuck up for her. It was her case that inspection of the complainant for worms was a pretext and a deceit which the defendant used to get a child into a position to sexually abuse her and to get her slowly introduced to sexual activity with him It was the complainant's case that things did not stop there but progressed. The appellant progressed to regularly taking the complainant to the toilet where he would sit on the toilet and he would set the child complainant on top of himself and then rub himself up and down against her. This is reflected in Counts 3, 4 and 5. This happened so often that it became the norm in her very young life. The defendant's conduct further progressed and he began to force the complainant to rub his penis, both over his clothing and under his clothing, masturbating him. This alleged conduct is the subject of Counts 6 and 7. The defendant then began to abuse the complainant in the bathroom by simulating sex with her. On one occasion, he was on top of her and he was rubbing himself up and down against her (when they were in the bedroom) and the defendant's brother walked in to the bedroom. This sexual abuse continued to escalate from looking and touching with a cotton bud to touching her anus with his finger, to rubbing himself against her bottom, touching his penis initially over his clothing, to touching his penis under his clothing, to simulated sex on top of her and then an incident of attempted rape. On this occasion the complainant was in the bathroom with the defendant who took his trousers down. He forced the complainant to masturbate him and made her take down her pants. He made the complainant sit on top of him but despite his best endeavours he was unable to penetrate her on this occasion. She

was about 13 or 14 years old at this time. That relates to Count 9 (attempted rape). The final incident of alleged abuse was an incident of rape which was reflected in Count 10 on the Bill of Indictment. The complainant was in her bedroom doing her homework when the defendant came into the room. He lay on top of her on the bunk bed and asked her to play with him and to masturbate him. He also asked her to put his penis in her mouth but she refused. He offered her money and she continued to refuse but he persisted, got on top of her and raped her. The defendant was 22 years old at this time and the complainant about 15 years of age.

THE APPEAL AGAINST CONVICTION

[7] The trial commenced on 30 September 2013. On 2 October 2013 S, the sister of the appellant and complainant, gave evidence. During the course of her cross-examination the court rose for a short break. During this break one of the jurors informed the judge that he believed he knew S's husband, E. The judge discharged this juror. E informed prosecuting counsel that he knew another of the jurors through his place of work. The learned trial judge, therefore, asked the jury as a whole if any of them knew E. 2 jurors, No.88 and No.124, responded that they did. Juror No.88 indicated that he knew E and his family well and that, although he could discharge his duty as a juror fairly, he felt compromised. That juror was discharged.

[8] Juror No.124 advised that she knew E through her place of work but that she felt she could discharge her duty as a juror fairly. The transcript of the exchange between the learned trial judge and the juror reads as follows :

JUDGE FOWLER: … Hello, you're juror number 124. I'm not going to call you juror 124... I don't know your names, or anything about you but in relation to the issue that I raised just before we were just about to start there, you have given me your number because you perhaps know, or know to see [E]; is that correct.

JUROR 124: Yes.

JUDGE FOWLER: And do you know him to speak to? Do you know anything about him, or his family, or anything like that?

JUROR 124: I know him to speak to.

JUDGE FOWLER: You know him to --

JUROR 124: "Hello."

JUDGE FOWLER: Just to say "Hello."

JUROR 124: H'mm h'mm.

JUDGE FOWLER: Or would you have any lengthier conversations than that?

JUROR 124: No, not really, no. No.

JUDGE FOWLER: And would that be in a social setting or --

JUROR 124: Work.

JUDGE FOWLER: A work setting?

JUROR 124: Yes, work, mm.

JUDGE FOWLER: Yes. Do you feel that it would, in any way, influence your determination in this case, either consciously or subconsciously?

JUROR 124: No, I don't think so.

JUDGE FOWLER: You don't believe so?

JUROR 124: No.

JUDGE FOWLER: Thank you very much. If I could ask you, if you could just go to another room just...

[9] Following submissions from the defence and prosecution, the learned trial judge gave the following ruling:

> "I've had a note from two jurors - juror 124, juror 88. Juror 124 has indicated that she knows the witness's that is to say [S's] husband, [E] from work, to speak to, and she would have spoke [sic] to him on very few occasions. She does not feel that this...does not believe that this would influence the way in which she has to deal with her role as a juror, and the oath that she has taken. I do not propose to discharge her as a juror. In relation to number 88, he has indicated that he knows [E's] family very well, and has indicated that in a note, and he has indicated that, perhaps, indirectly that he in some ways would feel compromised if he were to meet the [E's] family after this case were over. I take the view that I will discharge juror number 88 but I feel that there is not the high degree of need that is requisite before I should discharge a jury which is

> properly in charge of the defendant, in this case, so I refuse the application to discharge the jury, but intend to proceed with 10 jurors."

GROUNDS OF APPEAL

[10] The appellant's grounds of appeal against conviction may be summarised as follows:

(i) the judge erred in refusing to discharge Juror No.124 when it was discovered she knew E, the appellant's and complainant's brother-in-law;
(ii) in the alternative, the learned judge erred in refusing to discharge the whole jury following the previous discharge of two other jurors and his refusal to discharge Juror No.124.

THE PARTIES' SUBMISIONS

[11] The appellant argues that the judge failed to properly consider the factual circumstances giving rise to the possibility of bias; that the credibility of S, E's wife, was seriously in issue in the trial and that Juror No.124 and E would likely have subsequent meetings through her place of work; that he relied too heavily on Juror No.124's assertion that she could discharge her duty fairly; and he failed to have sufficient regard to the fact that out of the three jurors who advised that they knew E, Juror 124 was the only juror whom E had recognised. In those circumstances, a fair-minded and informed observer would have concluded that there was a real possibility, or a real danger, that Juror No.124 was biased (Re Medicaments and Related Classes of Goods (No.2) [2001] 1 WLR 700. Furthermore, and in the alternative, given the difficulties relating to Juror No.124, the fact the jury had been reduced to 10 and the relatively early stage of the trial, the whole jury should have been discharged.

[12] The prosecution argues that the only evidence given by S capable of having any bearing on the weight of the evidence to be taken into account by the jury relates to the conversation S said the appellant had with her in which he admitted to checking the complainant for worms, a conversation which the appellant denied ever occurred. The judge was correct to draw a distinction between Juror No.88 and Juror No.124. While the former claimed he knew the complainant's family "very well", the latter claimed she only knew E to say "hello" to. Moreover, Juror No.124 unambiguously said that her knowledge of E would not prevent her from discharging her duty as a juror. The prosecution contended that that the juror's impartiality must be presumed until proof exists to the contrary (Sanders v UK (2001) 31 EHRR 44) and that the circumstances were insufficient to give rise to the appearance of bias (Re Medicaments and Related Classes of Goods (No.2) [2001] 1 WLR 700).

CONCLUSIONS

[13] The extent of the jurisdiction to discharge a juror is a matter of common law. At common law a jury could be discharged "in cases of evident necessity" (*Blackstone's Commentaries* 1857 Edition and see also Esher CJ's judgment in Winsor v R (1866) LR 1 QB 390 where he refers to "a high degree … such as … might be denoted by the word necessity"). Until the introduction of the statutory power to continue a trial with a reduced number of jurors, if one juror had to be discharged then so had the whole jury. As pointed out in *Blackstone* (2014) at D. 13.53 the current test to discharge a juror must be the same as the old test for discharging the whole jury, namely has an evident necessity arisen. The test of necessity is undefined and is not limited to illness or other cause making it literally impossible for the jury to continue to act. In S [2009] EWCA Crim. 104 it was stated that the test for discharge of a juror, where there was potential for prejudice, was whether the presence of the juror might deprive the jury of a fair jury deliberation.

[14] In the present case the issue was whether the decision not to discharge Juror No.124 created the real possibility or danger that the tribunal of fact would be biased in its analysis of the evidence. The test derives from Re Medicament and Related Classes of Goods (No. 2) [2001] 1 WLR 700 approved in Porter v Magill [2002] 2 AC 357. The test is whether the fair-minded and informed observer would conclude that there was a real possibility or a real danger (the two being the same) that the tribunal would be biased. In Sanders v UK [2000] Crim. LR 767 the European Court of Human Rights indicated the need for any allegation of bias to be looked at from an objective as well as a subjective standpoint. There must be "sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the court". The issue is whether the circumstances warrant the conclusion that there are objective legitimate doubts about the impartiality of the court and, if so, have those doubts been dispelled.

[15] In R v Khan [2008] 3 All ER 502 Lord Phillips CJ pointed out that there is a distinction between partiality towards the case of the one of the parties and partiality towards a witness. Association with a partiality towards a witness will not necessarily result in the appearance of bias. Because a juror may feel partial to a witness does not mean that he will be partial to the case in support of which the witness is called, though it may do so if the witness is so closely associated with the prosecution that partiality to the witness is equated to partiality to the party calling the witness. The questions arising are:

(a) Would the fair-minded observer consider the partiality of the juror to the witness may have caused the jury to accept the evidence of that witness? If so

(b) Would the fair-minded observer consider that this may have affected the outcome of the trial?

If the answer to the first or second is "No" then the safety of the verdict will not be affected and there will be no reason to consider the trial unfair. A final decision in any given case about the fairness of the trial, where unfairness consisting of bias is alleged, can only be made on examination of the facts of the trial after its conclusion (per Lord Carswell in R v Abdroikov [2008] 1 All ER 315.

[16] In R v I [2007] EWCA Crim. 2999 the Court of Appeal pointed out that:

> "It is necessary for the judge to make all appropriate factual enquiries. Usually this is by posing questions either in court or in writing to the potential juror. The manner in which the questions are asked will depend on the circumstances. Sometimes a few questions in open court will suffice. In other cases where the information might be sensitive and more detail is required the matter may have to be dealt with in writing."

[17] R v I was a case in which one of the jurors was a police officer who knew four of the police witnesses in the case. The court in the context of that case stated that it would have been helpful to have known how well the juror knew the police witnesses; whether he worked with them on any particular matter or in a particular project; how often he saw them in the context of his work, and the circumstances in which he met them.

[18] As the Practice Direction (Crown Court – Jury Irregularities) [2013] 1 WLR 486, issued at the direction of the President Sir John Thomas P on 19 November 2012, indicates, the judge's enquiries are to be directed towards ascertaining whether the juror can remain faithful to his oath. The Practice Direction indicates that it may be appropriate for the judge to ask the juror whether he or she feels able to continue and remain faithful to his or her oath. We see no reason why the approach formulated in the English Practice Direction should not apply equally in this jurisdiction.

[19] Applying the relevant principles we conclude that the appellant has not established that the verdicts were unsafe. We reach this conclusion for the following reasons:

(a) Once the issue of jurors' knowledge of E was raised the judge very properly proceeded to carry out an investigation which elicited the information that jurors 88 and 124 did have some knowledge of E. He investigated the question in the presence of counsel who were free to make appropriate submissions and satisfy themselves whether the issue had been adequately investigated. In particular, defence counsel in no way criticised the judge's handling of the investigative process in

relation to Juror No.124 and did not indicate any further lines of enquiry. A fair-minded observer, recognising that the process was subject to judicial oversight, would be bound to take account of the way the questions were posed, the defence role in the process, the answers given and the judge's assessment of the juror's demeanour and honesty.

(b) While it would have been possible, and perhaps more desirable, for the judge to have formulated his questions in a more structured way, a fair reading of the evidence indicates that the juror (who had very properly and honestly brought to the attention of the court her knowledge of E) disclaimed any close relationship with E, who was merely somebody that she knew in passing at work and with whom she had such a limited acquaintance that it only involved saying "hello" on occasions. While they both worked in the same place, her evidence properly and fairly interpreted disclaimed any relationship other than one in which she would say "hello" in passing. The factual context was quite different from that which arose in R v I.

(c) E was himself a peripheral figure in the case. He was the spouse of a witness whose evidence, though of significance in the case, was not in itself decisive in relation to the case or the great majority of the alleged incidents specified in the Bill of Indictment. Her evidence was supportive though not necessarily decisive in relation to the complainant's allegations in relation to the worms incidents which, while serious and unpleasant, were by no means the most serious of the complainant's allegations.

(d) As noted, the judge was entitled to, and did, ask the juror whether she would be influenced by her knowledge of E and she answered in the negative. There was no reason to doubt the veracity or integrity of the juror who, as noted, honestly drew her knowledge of E to the attention of the court when asked. Furthermore, there is no suggestion that the judge in his charge to the jury did not, as is invariably the case, remind the jury of their duty to determine the case solely on the evidence and to leave out of account extrinsic considerations.

(e) At the end of the day, the jury had to be satisfied beyond reasonable doubt that the defendant committed the individual acts which were the subject of the separate counts. This necessarily involved a careful consideration of the evidence of the complainant, the defendant and any additional supportive evidence called. It is clear that the jury believed the complainant's evidence. There is no reason to conclude that, contrary to her oath and contrary to what she said to the judge, the juror failed to dispassionately assess the overall evidence in the case. In the light of the judge's investigation and the material relating

to the juror's very limited knowledge of and involvement with E there was no objectively justified or legitimate doubt as to her impartiality. Following the approach adumbrated in Sanders v UK, we are satisfied that the judge's inquiry and the answers given dispelled any doubts about the risk of bias and excluded any real possibility of questionable partiality.

[20] In the result we must dismiss the appeal.