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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

-v-

LH

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Before: Morgan LCJ, Gillen LJ and Stephens LJ

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MORGAN, LCJ (delivering the judgment of the Court)

[1] The applicant renews his application for leave to appeal his conviction on 4 July 2017 on 21 counts including sexual assault by penetration, false imprisonment, sexual assault, common assault and criminal damage perpetrated by the applicant against his former partner. The applicant was sentenced to an extended custodial sentence comprising a determinate sentence of 6 years and an extension period of 3 years. Mr McCartney QC and Mr Quinn appeared for the applicant and Ms McCormick QC and Ms Kennedy for the PPS. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The applicant and the complainant were in a relationship and had two children. The relationship was volatile and the pair eventually parted company. The children were in the care of social services. The relationship was, however, resumed in February 2013. The complainant claimed in evidence that she had kept the renewal of the relationship with the applicant a secret and had not reported the incidents the subject of complaint to anyone sooner, because she realised that if social services found out about the resumption of the relationship it would damage her chance of getting her children back. The complainant had a falling out with the applicant's sister who then told social services of the resumption of the relationship. The complainant claimed she finally ended the relationship in May 2013 and the incidents occurred between May and November 2013.

[3] Counts 1 and 2 concerned allegations of sexual assault by penetration and common assault. The prosecution case was that in mid-May 2013 in the complainant's home the applicant put his leg between her legs and stuck his fingers inside her vagina while she was in the bathroom. In her bedroom on that occasion he pulled her by the foot and shoulder from under the bed, stuck his head against her head, grabbed her by the throat, pushed her up against the wall with his right hand around her throat and then moved his face down to the bottom of her face as if he were going to bite or kiss her.

[4] Counts 3 and 4 alleged sexual assault and common assault again in the complainant's home on 3 July 2013 when the applicant allegedly pulled her round and grabbed her and then threw a glass filled with water at her causing her nose to bleed. Count 5 was an allegation of assault in the applicant's flat on 21 August 2013 when he grabbed her, squeezed her two cheeks and threw her down on the sofa.

[5] Counts 6-10 were allegations of two common assaults, two sexual assaults and one count of criminal damage to clothing alleged to have occurred on 24 August 2013 in a Belfast hotel room. It was alleged that the applicant grabbed the complainant and pushed her face against the mirror. He then grabbed her by the hair, pushed her head back, squeezed toothpaste down her throat and rubbed it on her face and hair. He put his foot on her shoulder and poured creams and soap over her. The applicant ripped the complainant's knickers, top and bra off her and ripped all the clothes she had bought. He put his hand between the complainant's legs, felt over her breasts and bit her below the stomach. The applicant slapped the complainant's cheeks with his penis, put his hands on her head and pushed her head and face into his penis.

[6] Counts 11 and 12 were allegations of false imprisonment and common assault on 21 October 2013 in the applicant's flat. The applicant locked the door and said the complainant was not getting out. When she was eventually able to make her way downstairs he grabbed her by the back of the neck pushed her up against the wall and stuck his knee between her legs.

[7] Counts 13-21 concerned three counts of criminal damage, two counts of common assault, two counts of sexual assault and two counts of sexual assault by penetration all occurring on 3 November 2013 in the complainant's home. The allegation was that the applicant broke two television remote controls and stamped on and broke a hairdryer. He came up behind the complainant, grabbed her by the ponytail and pulled her back. He grabbed the complainant by the hair and pulled her towards the bathroom. The applicant told the complainant to get into the bath and started to put shampoo all over her naked body. The complainant went to get the shampoo but the applicant grabbed her from behind, grabbed her vagina and stuck his fingers inside it. The applicant inserted his finger in the complainant's back passage.

[8] The complainant first reported the matter to police on 12 December 2013 and statements were taken from her on 21 February 2014 and 4 March 2014. In his police

interview later in March 2014 the applicant answered all questions put to him. He repeatedly insisted that nothing of a violent or non-consensual nature happened between them. He denied that he had ever damaged any of the complainant's property and denied that he had held her against her will in his home. He said that the hairdryer had been damaged by the complainant's daughter and that he had taped it back together. He said the throwing of the glass was an innocent incident which had caused the complainant a small cut on her nose. He said that he and the complainant had travelled to Belfast, went to a sex shop and then spent the night in a hotel. He accepted that the complainant had attended hospital the following day but claimed he was with her. The applicant claimed the complainant could not accept that he no longer wanted her. She wanted to rekindle the relationship but he was moving on with another partner. The applicant did not give evidence at trial.

The issues in the appeal

Bad character

[9] Article 6(1)(d) of the Criminal Justice (Evidence) (NI) Order 2004 ("the 2004 Order") provides that in criminal proceedings evidence of the defendant's bad character is admissible if, but only if, it is relevant to an important matter in issue between the defendant and the prosecution. Article 6(3) provides that the court must not admit evidence otherwise admissible under the said subsection if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

[10] Article 8 of the 2004 Order provides that in respect of Article 6(1)(d) the matters in issue between the defendant and the prosecution include –

> "(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
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> (b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect."

[10] The equivalent provisions in England and Wales were considered in R v Hanson [2005] EWCA Crim 824 which has been consistently followed in this jurisdiction. Where propensity to commit the offence is relied upon there are essentially three questions to be answered. First, does the history of convictions establish a propensity to commit offences of the kind charged, secondly, does that propensity make it more likely that the defendant committed the offence charged and thirdly is it unjust to rely on convictions of the same description or category and in any event will the proceedings be unfair if they are admitted in evidence.

[11] At paragraph [17] of that judgment the court said that in a conviction case the prosecution needs to decide at the time of giving notice of the application whether it proposes to rely simply upon the fact of the conviction or also upon the circumstances surrounding the conviction. The example was given of a burglary case with a succession of convictions for dwelling house burglary where no further evidence other than proof of the fact of the convictions may be necessary. In other cases the prosecution may wish to rely on the circumstances leading to the convictions as having some probative force. The prosecution and defence are expected to co-operate with the court in finding an appropriate way to introduce the convictions where they have been ruled admissible.

[12] In the case the subject of this application the prosecution applied to admit eight previous convictions of the applicant as evidence of a propensity to commit offences of the type charged. The learned trial judge decided that she should admit four of those convictions each of which consisted of a conviction for an assault upon a previous partner including in one case a conviction for actual bodily harm in relation to the complainant. In respect of each conviction the prosecution appended a detailed summary of the prosecution case. No contrary evidence was adduced on behalf of the defence. It was contended that the defence were disadvantaged as a result of the applicant's need for a registered intermediary in respect of the giving of evidence. We do not accept that submission. The purpose of the provision of a registered intermediary is to help a person such as the applicant to give evidence at a pace and in a manner which enables him to best present his evidence. It cannot be used as a justification for a failure to address relevant evidential matters. The substance of the prosecution application was that this was a man who in the relatively recent past had assaulted four female partners. That was evidence that was plainly appropriately placed before the jury in this case and we do not accept that there was any failure of investigation beyond the circumstances made available to the learned trial judge.

[13] In respect of one of those convictions the applicant had contested the charge. The initial charge had been one of grievous bodily harm but the conviction was for assault occasioning actual bodily harm. The learned trial judge plainly made enquiries to establish that the contest related to the substance of the charge and although there is nothing in the portions of transcript made available to us there is no reason to doubt that the learned trial judge was satisfied that the applicant had contested the substance of the charge.

[14] The prosecution relied upon this as evidence of a propensity to be untruthful. The court in Hanson gave some guidance on propensity to untruthfulness. It noted that untruthfulness was different from dishonesty and reflected a defendant's account of his behaviour, or lies told by committing an offence. Previous convictions whether for dishonesty or otherwise were therefore only likely to be capable of showing a propensity to be untruthful where truthfulness was in issue and there was either a plea of not guilty and the defendant gave an account on arrest at interview or in evidence which the jury must have disbelieved or by the way in

which the offence was committed showing a propensity for untruthfulness such as making false representations. The court noted that demonstrating such a propensity might depend on the number of relevant convictions, any gap in time between the date of such convictions, the date of the alleged commission of the offence and whether the evidence tended to show some unusual behaviour or circumstance demonstrating probative force in relation to the offence charged.

[15] The England and Wales Court of Appeal again addressed propensity to untruthfulness in R v Campbell [2007] EWCA Crim 1472. The critical passage in that case is set out at paragraphs [30] and [31]:

> "30 The question of whether a defendant has a propensity for being untruthful will not normally be capable of being described as an *important* matter in issue between the defendant and the prosecution. A propensity for untruthfulness will not, of itself, go very far to establishing the commission of a criminal offence. To suggest that a propensity for untruthfulness makes it more likely that a defendant has lied to the jury is not likely to help them. If they apply common sense they will conclude that a defendant who has committed a criminal offence may well be prepared to lie about it, even if he has not shown a propensity for lying whereas a defendant who has not committed the offence charged will be likely to tell the truth, even if he has shown a propensity for telling lies. In short, whether or not a defendant is telling the truth to the jury is likely to depend simply on whether or not he committed the offence charged. The jury should focus on the latter question rather than on whether or not he has a propensity for telling lies.
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> 31 For these reasons, the only circumstance in which there is likely to be an *important* issue as to whether a defendant has a propensity to tell lies is where telling lies is an element of the offence charged. Even then, the propensity to tell lies is only likely to be significant if the lying is in the context of committing criminal offences, in which case the evidence is likely to be admissible under section 103(1)(a)."

At paragraph [41] the court indicated that they did not consider it helpful to tell the jury that the evidence of bad character may be taken into account when deciding whether or not the defendant's evidence was truthful.

[16] Those observations have been the subject of substantial criticism. They leave very little room indeed for the introduction of evidence of propensity for untruthfulness or, in effect, the use of bad character evidence in assessing the credibility of the defendant. There is a substantial body of case law suggesting that the Court of Appeal has now moved away from such a narrow interpretation.

[17] In R v Singh [2007] EWCA Crim 2140 the appellant was charged with robbery. In the course of the trial he challenged the character of the complainant. The judge admitted his convictions for disorder, assaults on policemen, harassment, criminal damage and driving with excess alcohol. The court accepted that once the convictions were admissible it was open to the jury to use them for any relevant purpose. Although it was accepted that the convictions would not have been admitted to show either a propensity to commit offences of the type charged or untruthfulness the court considered that they were relevant to his credibility and the jury were entitled to take them into account on that basis.

[18] R v Jarvis [2008] EWCA Crim 488 was a case in which the appellant was convicted of stealing jewellery which had been placed in his care by the owner. Bad character evidence was introduced by the co-defendant suggesting that he had lied to customers to keep their business and falsely told customers that property placed with him for sale had not been sold when it had. On appeal the decision to admit the evidence was challenged. The court dismissed the challenge stating that if a witness or defendant in the case has a proven history of untruthful dealing with other people that was plainly relevant and ought to be admitted as long as it has substantial probative value on an issue arising between the relevant parties. The issue in that case was the credibility of the applicant.

[19] More recently in R v N [2014] EWCA Crim 419 the appellant was convicted on two counts of rape and three counts of indecency with a child. The prosecution arose as a result of a complaint which was consequent upon the complainant becoming aware that the appellant had been convicted in 2010 of sexual assault. In that trial he had contested the charge giving a false account and further put forward mitigation which was also entirely false as to his service in the Army. The learned trial judge declined to admit the conviction as evidence of a propensity to commit offences of the type charged but did admit it as important explanatory evidence and as evidence of a propensity to untruthfulness. The court noted the approach taken in Campbell but suggested that such an approach was more restrictive than the language of the statute itself required. The case at issue was one in which the credibility and reliability both of the complainant and the appellant were of central importance and the evidence sought to be admitted was indicative of previous sustained lying in court context of the kind involved in that case.

[20] From this review of the authorities we consider that the following observations can be made:

(i) Despite the observations in Campbell whether or not the defendant is being truthful is likely to be an important matter in issue between the defendant and the prosecution in many criminal trials.

(ii) The prosecution can seek to introduce evidence under Article 6(1)(d) of the 2004 Order on the basis that the defendant has a propensity to be untruthful.

(iii) In order to succeed in such an application the prosecution must establish the propensity. A single instance of lying may be sufficient, particularly if there is some unusual characteristic associated with it, but the court should look at all of the relevant evidence in the round when determining the issue of propensity.

(iv) Any conviction for a criminal offence is likely to reflect on the credibility of the defendant (see R v Singh).

(v) Where evidence of convictions is introduced through another gateway the evidence may be used for any other relevant purpose (see R v Highton [2005] 1 WLR 3472).

(vi) It is the responsibility of the court to explain to the jury the purposes for which such evidence can be used.

(vii) Where evidence of bad character has been admitted to show a propensity to commit offences of the type charged the court should consider whether a direction on untruthfulness or credibility would distract the jury from the issues in the case or appear to give an unfair enhanced importance to the bad character evidence.

(viii) Old or isolated instances of untruthfulness are generally not likely to be of significant probative value on credibility.

(ix) In all cases it is important to impress upon the jury that any such bad character evidence does not mean that the defendant is guilty but is only one of the factors that they should take into account in coming to their decision. The focus should be on the evidence connecting the accused to the offence rather than his credibility.

The rulings of the learned trial judge on bad character

[21] We already indicated at paragraph [12] above the basis upon which the learned trial judge correctly admitted four previous convictions as evidence of a propensity to commit offences of the type charged. She then turned to the prosecution submission that the evidence in relation to one of those convictions was admissible as evidence of a propensity for untruthfulness on the basis that the charge was contested and the evidence of the applicant was not believed. The learned trial judge sought clarification in relation to the latter matter and the

prosecution understood that confirmation was duly received. The applicant did not seek to adduce any contradictory evidence.

[22] Having satisfied herself that the appellant had pleaded not guilty and given an account which the tribunal must have disbelieved the learned trial judge concluded that the evidence was sufficient to demonstrate a propensity for untruthfulness. She then considered whether it was unfair to admit it and was satisfied that its admission would not deprive the applicant of a fair trial. We do not accept that a single incident where a defendant pleaded not guilty to an offence in respect of which he was subsequently convicted and gave an account which must have been rejected necessarily establishes a propensity for untruthfulness. In this case there were three other convictions in which the applicant had pleaded guilty. It was necessary to stand back and take those into account in determining whether the propensity was established.

[23] In her charge to the jury the learned trial judge dealt with the issue of propensity in the following way:

> "When considering the counts of common assault …. you may consider it relevant that the defendant has committed four offences of violence against a female with whom he was in a relationship. The prosecution say that the defendant has a tendency to engage in violent offences against female partners and that that tendency supported the prosecution case. The prosecution also say that the defendant lied about the offence against the complainant in January 2010, do you remember the christening party offence, because he pleaded not guilty to that offence and he was found to have committed the offence. And the prosecution say that lie shows a propensity to lie about his behaviour towards the complainant. It is for you to decide the extent to which, if at all, the defendant's previous offending assists you in deciding whether the defendant committed the offences you are considering. I must warn you, however, not to place undue reliance on previous offences. You should not conclude that the defendant is guilty of the present offences against the complainant merely because he has committed other violent offences against female partners, including one against the complainant. Although these other offences may show propensity, this does not mean that the defendant has committed the present offences of violence that you are considering. You must decide, first of all, whether the previous offences in

> fact show propensity. If you find there is a propensity, you are entitled to take that propensity into account when determining whether the defendant is guilty, but propensity is only one relevant factor and you must assess its significance in the light of all the other evidence in the case."

[24] It is clear from this passage that the learned trial judge directed the jury that the propensity for violence was the feature that they should take into account in determining whether the applicant was guilty. The reference to the lie reflected only on his credibility which in any event was apparent from the mere fact of the convictions. We do not consider that the reference to the lie in this particular case was material to the jury's consideration of propensity having regard to the focus of the charge as a whole on propensity for violence and the entirely appropriate caution urged upon the jury in how they should take any such propensity into account.

[25] The final bad character issue arose in respect of an application by the defence pursuant to Article 5(1) of the 2004 Order to admit evidence of assaults by the complainant upon her daughter. The first of those related to an incident in October 2006 when the child was 10 and she complained to a teacher that her mother had hit her on the face and back in the course of an argument. The complainant was cautioned in respect of that matter. The second matter related to an incident on 16 May 2013 when the complainant accepted that she had gone up to her daughter's bedroom and pulled her from the bed by the hair. She claimed that she did not remember kicking her daughter but accepted that since this is what was reported by her daughter it must be correct.

[26] The learned trial judge admitted evidence of the second incident on the basis that it was important explanatory evidence and had substantial probative value in relation to the credibility of the complainant. She concluded, however, that the incident in 2006 was of a different character. The victim in that incident was the complainant's 10-year-old daughter rather than a 29-year-old male partner. The incident had occurred seven years before the events with which the jury was concerned and the relationship within which the incident occurred was quite different. We are satisfied that these distinctions were entirely appropriate considerations and we see no reason to interfere with the discretionary judgement of the learned trial judge on this issue.

Other matters

[27] The case made on behalf of the applicant was that the complainant had lied in evidence and bore the applicant a grudge as a result of his ending their relationship. There was evidence before the jury from which the jury was entitled to take the view that she had not been truthful about the extent of the assault upon her daughter in 2013. It was contended that in those circumstances the jury should have been advised to seek corroboration before relying on the complaints evidence.

[28] In R v Makanjoula (1995) 1 WLR 1348 Lord Taylor CJ stated that it was a matter for the judge's discretion what, if any warning, he considered appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and on what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence. Where the judge does decide to give some warning in respect of the witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set piece legal direction.

[29] The learned trial judge dealt with this in the following way: –

> "I have already reminded you that there is no independent evidence, such as medical evidence or forensic evidence, about any of these allegations. I have already reminded you about challenges to the credibility of the complainant and I have emphasised to you that credibility is the key issue in this trial. There is, therefore, a need to approach the evidence of the complainant with caution. If, having taken into account the need for caution, you may nevertheless rely on her evidence if you are sure, you are satisfied beyond reasonable doubt, that she is telling the truth."

[30] We accept that having regard to the evidence in relation to the incident concerning her daughter in May 2013 a warning was appropriate but the strength and terms of that warning were matters for the judge. Lord Taylor indicated that the court would be disinclined to interfere with the trial judge's exercise of discretion save in a case where the exercise is unreasonable in the Wednesbury sense. In our view the nature of the warning provided in this case was woven into a charge that fell clearly within the judge's discretion.

[31] The final issue pursued on this appeal was concerned with the questioning of the complainant about the making by her of a false criminal injury compensation claim. The learned trial judge intervened to indicate to that she did not have to answer the question on the basis that it might expose her to a criminal charge. She elected not to answer the question. It is common case that by virtue of Wentworth v Lloyd (1864) 10 HL Cas 589 no adverse inference could be drawn from the failure to answer the question. The applicant maintained that the rule in Wentworth v Lloyd was not compatible with Article 6 ECHR.

[32] We do not accept that submission. The entitlement of the witness not to answer the question did not in any way prevent the applicant using the bad character provisions under Article 5 of the 2004 Order to introduce any available and admissible evidence of misconduct on the part of the witness. That is the method by which the applicant is protected in the exercise of his fair trial rights. As it happens

no such evidence was introduced in this case and there is no explanation advanced as to why that was the case. We do not consider that this gives rise to any concern about the safety of the conviction.

[33] There were a number of other matters raised in the written submission such as the balance of the charge and the giving of a document indicating the nature of the allegation on each count to the jury which were correctly not pursued in the oral submissions as none of those matters gave rise to any concern about the safety of the conviction.

Conclusion

[34] In light of the conclusion we have reached about the admissibility of the evidence in relation to the applicant's propensity to untruthfulness we grant leave to appeal but we are satisfied that the conviction is safe and accordingly dismiss the appeal.