Neutral Citation No. [2015] NICA 56 | *Ref:* **COG9739**

Judgment: approved by the Court for handing down | *Delivered:* **14/09/2015**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

M

Before: Morgan LCJ, Coghlin LJ and Gillen LJ

COGHLIN LJ (delivering the judgment of the court)

[1] This is an appeal by M ("the appellant") who was convicted by a jury of two counts alleging sexual assault upon a child under 13 contrary to Section 14 of the Sexual Offences (NI) Order 2008 ("the Sexual Offences Order") on 17 June 2014 following a trial commencing on 9 June 2014. The appellant was sentenced to a three year determinate custodial sentence comprising 18 months custody and 18 months on licence. Since this appeal involves allegations of sexual offences against a child the name of the appellant and those of the witnesses, including the injured party, have been anonymised. No person should publish any material which is intended or likely to identify the appellant or any child involved in these proceedings except insofar as may be permitted by direction of the court.

[2] For the purpose of conducting the appeal before this court Mr Berry QC and Mr Taggart appeared on behalf of the appellant while Ms McCullough was instructed on behalf of the PPS. The court is grateful to all counsel for their carefully constructed and attractively delivered written and oral submissions.

Factual background

[3] On 24 May 2013 the injured party, a boy then aged 10, was attending a family celebration at a local public house. The injured party left the celebration early and came home with his father. At later stages the injured party's mother, his sister and a number of others, including a man named A, who had attended the celebration, returned to the injured party's home. When they arrived the appellant was also present. In due course both the appellant and A were given a place to sleep in the living room of the injured party's home where his mother left out duvets and

pillows for the two men. The injured party's mother was friendly with the mothers of each of these two men.

[4] The injured party gave evidence that he was awoken in the early hours of the morning by the appellant sitting on his bed. He said that the appellant made his way up the inside of the bed against the wall, lay down beside him and put his arms around the injured party. According to the injured party the appellant then pulled down his pyjamas and pants, felt and squeezed his penis and then kissed his back and wrist. The injured party said that he arose, went to the bathroom, looked at the clock and saw that it was about 6.25 am. He then returned to his bedroom and got into bed. The appellant was still there and he repeated the same acts. The injured party appreciated that this was wrong, felt uncomfortable and got up. He then went to the living room where he watched television until his father arose in the morning.

[5] The injured party's mother arose at about 9.30 next morning and met the injured party in the living room. She asked him if the appellant and A had left and he replied that A was in his (the injured party's) bed. She decided to let him sleep.

[6] Around 11.00 am the injured party went into the kitchen of his house and informed his mother and sister that A had been acting weird last night. He gave an account of what had occurred in his bed, but his mother and sister expressed the view that A would not have committed such acts. His mother later went to the injured party's bedroom with a pair of his trainers and discovered that it was the appellant and not A who was in his bed. The injured party's mother returned to the living room and told the injured party that it was the appellant and not A who was in his bed. The injured party went out to play and his mother asked his sister to question the injured party further about what had happened. The injured party's sister went outside and showed the injured party pictures of the appellant and A on her mobile telephone that had been taken during the celebration on the previous evening. The injured party said that he could tell the difference between them and A was not the person by whom he had been assaulted. It was accepted that the injured party and A knew each other although it was unclear how well. In cross-examination the injured party maintained that he had never seen the appellant before.

[7] The injured party's mother did not know what to do and telephoned a friend of hers who was also friendly with the appellant's mother. She told her to telephone the police which she did. When the injured party's mother returned to the bedroom the appellant had left having exited through the bedroom window.

[8] During the course of interview by the police the injured party accepted that he had thought that he had been abused by A until his mother told him that it had been the appellant. He explained that when he was shown a picture of A he denied that he was the person by whom he had been assaulted. He said that the person by whom he had been abused had a scar or mark on his face and was wearing a blue hoodie. He said that person had dark hair but it was lighter than A's. The appellant

denied that he had a mark or scar on his face and the jury were given an opportunity to examine him.

[9] The injured party's sister gave evidence during the course of the trial. In direct evidence she was not asked about showing the injured party photographs on her telephone. She was asked about the photographs in cross-examination by counsel then appearing on behalf of the appellant. She explained that the particular mobile phone had been broken and that she no longer had the exact photographs. Counsel had earlier confirmed with the injured party that he had been shown photographs by his sister.

[10] A gave evidence during the course of the trial. He said that when he arrived at the injured party's house at about 3.00 am he met the appellant whom he had not met before but about whom he knew because their mothers were friends. He thought that he had stayed up for about an hour and then went to sleep in the living room under a quilt, still fully clothed and facing in towards the back of the sofa. He said that he awoke with the appellant lying behind him feeling the appellant's hand moving around his waist under his clothing. He said that he jumped up from the sofa and told the appellant to get away from him. Despite the appellant trying to stop him, A then left the house at about 5.30 am and walked to a location where he was able to get a taxi.

[11] When interviewed by the police the appellant initially denied that he had sexually touched the injured party although he agreed that he had sat on the injured party's bed and spoken to him in the early hours of the morning. During a second interview by the police the appellant confessed to sexually touching the injured party and confirmed that he had been wearing a blue hoodie at the time. He also volunteered that he had been lying on the bed between the injured party and the wall when he put his arms around him and carried out the assaults. During a third interview the appellant retracted that admission saying that it had only been made after he had been threatened by his father that if he did not confess he would be beaten and put out of the house. When giving evidence at the trial the appellant, during cross-examination, said that he had left the living room looking for a bathroom and a bed in which to sleep. He stated that he had found the injured party in his bedroom and that he had sat on the edge of the bed and spoken to him before going to the bathroom where he remained for 15-20 minutes because he felt sick. He accepted that the injured party had been assaulted but not by him. He explained that when he left the bathroom he found an empty bed in which he went to sleep. When he awoke he was confused and embarrassed about being in a strange house and left by way of the bedroom window. The appellant's father also gave evidence accepting that he had put the appellant under 'incredible pressure' to confess because he could not conceive that the injured party had been lying. He said that he had changed this view when he heard that the injured party had initially mentioned the name of A.

[12] The first interview of the appellant by the police occurred on 25 May 2013 at 6.46 pm. That was the day after the alleged offences had taken place. On the

following day he was interviewed again at 3.14 pm. His father had telephoned the police asking for him to be re-interviewed and his father had accompanied him to the police station. During that interview the appellant admitted committing the offences. The third interview took place on 4 July at 11.45 am. At that time the appellant was accompanied by his then solicitor. During this interview the appellant denied that he could recall entering the injured party's bedroom although he remembered that was where he had woken up. In the third interview the appellant told the police that he had admitted the offences in the second interview because his father had told him that it would make things much easier for everyone involved because a child was not going to turn around and tell lies.

The grounds of appeal

[13] There were originally two grounds of appeal which were:

(i) The trial judge erred in admitting inadmissible identification evidence.

(ii) The alleged identification was in breach of Code D of the Code of Practice of the Police and Criminal Evidence (Northern Ireland) Act 1989 ("PACE").

The provisions of the Code

[14] The relevant provisions of PACE Code D are as follows:

> "**3 Identification and Recognition of suspects**
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> **(a) Identification of a suspect by an eye-witness**.
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> 3.1 This part applies when an eye-witness has seen the offender committing the crime or in any other circumstances which tend to prove or disprove the involvement of the person they saw in the crime, for example, close to the scene of the crime, immediately before or immediately after it was committed. It sets out the procedures to be used to test the ability of that eye-witness to identify a person suspected of involvement in the offence as the person they saw on the previous occasion …."
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> **(b) Cases where the suspect is known and available:**
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> "3.4 If the suspect's identity is known to the police and they are available, the identification procedures set out in paragraphs 3.5 to 3.10 may be used. References in this section to a suspect being 'known'

mean there is sufficient information known to the police to justify the arrest of a particular person for suspected involvement in the offence. A suspect being 'available' means they are immediately available or will be within a reasonably short time and willing to take an effective part in at least one of the following which it is practicable to arrange:

- video identification;
- identification parade; or
- group identification."

(Paragraphs 3.5 to 3.9 contain the definitions of the various types of identification arrangements.)

Circumstances in which an eye-witness identification procedure must be held

3.12 Whenever:

(i) an eye- witness has identified a suspect or purported to have identified them prior to any identification procedure set out in paragraphs 3.5 to 3.10 having been held; or

(ii) there is a witness available, who expresses an ability to identify the suspect, or where there is a reasonable chance of the witness being able to do so, and they have not been given an opportunity to identify the suspect in any of the procedures set out in paragraphs 3.5 to 3.10, and the suspect disputes being the person the witness claims to have seen, an identification procedure shall be held unless it is not practicable or it would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence, for example:

- where the suspect admits being at the scene of the crime and gives an account of what took place and the eye-witness does not see anything which contradicts that;

- when it is not disputed that the suspect is already well known to the witness who claims to have seen them commit the crime."

The allegation that the learned trial judge erred in admitting inadmissible identification evidence

[15] As noted above the appellant maintains that the learned trial judge wrongfully admitted hearsay evidence of identification based upon photographs contained in a mobile phone belonging to the complainant's sister. Neither the photographs nor the mobile phone were available for consideration by the appellant's advisors and neither could be produced during the course of the trial.

[16] It is important to focus upon the context in which the evidence of the identification of the appellant from the photographs contained in the mobile phone came to be admitted in the course of the evidence. No objection was taken to the admissibility of that evidence by counsel acting on behalf of the appellant at trial. The prosecution made an application for the material to be admitted as hearsay evidence which was considered by the learned trial judge who ruled:

> "Having considered that, absent any objection to that, I will grant the hearsay application formally."

In response to which the following exchange took place with then defence counsel:

> "Counsel: Your Honour will be aware that the boy initially named someone else and it's his mother says to him it's the defendant.
>
> Judge: Yes.
>
> Counsel: So I don't object to this, your Honour, it is relevant to the defence that has been mounted."

The evidence was not mentioned in the prosecution opening speech nor was it led in direct examination of the complainant's sister. The introduction of the evidence occurred during the course of cross-examination of the sister by counsel then acting for the appellant and it seems clear that the introduction came as a result of a deliberate tactical decision in the course of conducting the appellant's case. At the conclusion of the evidence both counsel agreed with the learned trial judge that a direction in accordance with the decision in R v Turnbull [1997] QB 224 would not be appropriate. The learned trial judge noted that the injured party had provided a description of the alleged assailant and his clothing but had not actually purported to have identified the appellant and, in the circumstances, he took the view that it really was a matter of circumstantial evidence. He accepted that counsel might wish to emphasise the absence of a scar or mark as being a factor inconsistent with the guilt of the appellant.

[17] The tactical approach adopted by counsel then acting on behalf of the appellant was clearly appreciated by the learned trial judge who addressed the following remarks to the jury during his final charge:

> "I must warn you to exercise caution when considering the description given by (the injured party) to police of his assailant on the basis that he had earlier been shown a photograph of the defendant by his sister, and whom his mother told him had been the assailant, the danger being that (the injured party) would describe the person shown in the photograph, and indeed his clothing since the photograph had been taken earlier that evening at the birthday party, so the clothing would have been the same, the same hoodie. Arguably (the injured party) would have been describing the photograph as opposed to the person in the room and that's what, the point the defence are making in relation to the photograph being shown to him by his sister. That is particularly so in relation to the clothes and possibly the hair colour described by (the injured party). What the defence in essence are saying to you is that (the injured party's) evidence in that regard has been contaminated by being shown the photograph before he gave any description to the police. The defendant, simply put, tells you that (the injured party) didn't name him, he named A whom he knew. He had got him a bike, he was in the house before, he knew A and the defence say that (the injured party's mother and sister) have jumped to the wrong conclusion about M, and that he has been wrongly accused. The defence say that they have contaminated the evidence of (the injured party) by showing him the photograph, not believing him that it was A, telling him that he was wrong and that the mother and (the injured party's) sister have contaminated the evidence in that way."

[18] During the course of the hearing the court drew to the attention of Mr Berry the fact that no ground of appeal had been advanced based upon any allegation of incompetence by counsel originally representing the appellant at trial. Mr Berry applied to this court to amend the grounds of appeal to include a ground alleging that counsel should have applied to exclude the hearsay evidence relating to the photographs on the mobile phone and that he should have cross-examined PSNI witnesses with regard to the omission to hold an identification parade. However, Mr Berry also candidly accepted that the particular approach adopted by the

original counsel came within the range of tactical approaches legitimately available to counsel although it was not perhaps one that he himself would have adopted.

[19] In R v Boyd [2011] NICA 22 and again in R v Bradley [2013] NICA 12 this court approved the approach to be applied where an appeal is brought on the grounds of the failure by counsel to properly conduct an appellant's case at trial contained in the remarks of Lord Carswell in the Privy Council case of Teeluck v State of Trinidad and Tobago [2005] 1 WLR 2421 when he said at page 2433:

> "In Sealey v The State 61 WLR 491 paragraph 30 their Lordships stated, citing R v Clinton [1993] 1WLR 1181 and R v Kamar [The Times 14 May 1999]:
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> > 'Whilst it is only in exceptional cases that the conduct of defence counsel can afford a basis for a successful appeal against conviction, there are some circumstances in which the failure of defence counsel to discharge a duty, such as the duty to raise the issue of good character which lies on counsel … can lead to the conclusion that a conviction is unsafe and that there has been a miscarriage of justice …'
>
> There may possibly be cases in which counsel's misbehaviour or ineptitude is so extreme that it constitutes a denial of due process to the client. Apart from such cases, which it is to be hoped are extremely rare, the focus of the appellate court ought to be on the impact which the errors of counsel have had on the trial and the verdict rather than attempting to rate counsel's conduct of the case according to some scale of ineptitude …"

[20] In R v Wood [2008] EWCA Crim. 587 Moses LJ delivering the judgment of the Court of Appeal in England and Wales, Criminal Division, said at paragraph [25]:

> "As we have already said, incompetence of counsel will only amount to a ground of appeal, if it can be shown that not only was that incompetence outwith the range of reasonable decisions that defence counsel might take in the circumstances, but that they also led to a lack of safety in the verdict."

Earlier, at paragraph [4] of the same judgment the learned Lord Justice had said:

> "It is too often forgotten how difficult and strenuous a task it is for independent counsel successfully to present a defence on behalf of a defendant faced with very serious charges and how grave and onerous that responsibility is."

We respectfully endorse those remarks and, in doing so, we would again emphasise the obligation on the part of the court to ensure the protection of the independence of counsel consistent with the interests of justice. We would simply repeat the observations contained in paragraph [17] (ii) of the judgment of this court in Bradley:

> "This court must bear in mind the give and take of a criminal trial and the obligation upon counsel to make both tactical and strategic decisions 'in the heat of battle.' Such decisions will be taken in the context of an assessment of the developing facts of the case, the impact of written and oral evidence already given and the predicted impact of evidence still to come. This court does not have the advantages of trial counsel and must have regard to professional decisions made in good faith as to how the interests of their client would best be served even if another course might have been validly adopted or the chosen course of action, upon mature reflection, subsequently turns out to have been erroneous – see R v MH [2008] EWCA Crim 2644."

[21] In the context of this case we are satisfied that the approach adopted by counsel originally instructed was a legitimate and tenable tactic and we are not persuaded that it had the effect of rendering the conviction unsafe in any respect. Accordingly, we refuse leave to amend the grounds and we reject this ground of appeal.

The allegation that the PSNI acted in breach of paragraph 3.12 of Code D in omitting to hold an identification procedure

[22] Counsel representing the appellant in the trial at first instance did not raise the failure to hold an identification parade with any police witness nor did he make any such omission the subject of any submission to the learned trial judge. Counsel was clearly aware of the circumstances in which the photographs had been shown to the complainant and the circumstances in which his assumption that he had been assaulted by A had been altered as a consequence of what he had been told by his mother. As indicated earlier in this judgment it seems clear that counsel decided, as a matter of tactics, to rely upon such circumstances as constituting irretrievable

contamination of any purported description/identification of the appellant by the injured party to the PSNI.

[23] Sub-paragraph (*ii*) of paragraph 3.12 places a mandatory duty upon the PSNI to hold an identification procedure where a witness has identified or purported to have identified a suspect "... unless it is not practicable or it would serve no useful purpose in providing or disproving whether the suspect was involved in committing the offence." While he initially denied the offences at his first police interview on 25 May 2013, the appellant requested to be re-interviewed on the following day when he made admissions. If that had remained the situation there would have been no need for consideration of an identification procedure. However, those admissions were withdrawn on 4 July 2013 when the appellant made the case that they had been made as a consequence of pressure to which he had been subjected by his father. It is our view that, at that stage, it would probably have accorded with best practice, in compliance with Code D, for the appropriate PSNI officer to have reconsidered the possibility of holding an identification procedure. It would then have been necessary to carefully assess whether any such procedure would serve any useful purpose in the context of the potential contaminating circumstances and the fact that it was common case that there were only two possible suspects. It would have been necessary to furnish details of the conversations between the injured party and his mother and sister, together with his viewing of the photographs, to the appellant's solicitors who, for the reasons set out earlier in this judgment, might well have objected to such a procedure. We consider that the overwhelming probability is that any such reasonable re-consideration would have resulted in a decision not to hold a formal identification procedure. Consequently, we are not persuaded that any such breach of the provisions of Code D had the effect of rendering these convictions unfair and we also reject this ground of appeal.

Generally

[24] In accordance with the principles set out in the judgment of this court in R v Pollock [2004] NICA 34 we have carefully reviewed all the circumstances of this appeal in the context of the evidence and the helpful submissions of counsel. This was a case in which there was both direct and circumstantial evidence implicating the appellant as the learned trial judge explained in his careful address to the jury which incorporated the specific warnings referred to above. Having done so, for the reasons given, we are not persuaded that these convictions were unsafe in any respect.