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

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

ML

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

COGHLIN LJ (delivering the judgment of the court)

[1] This is an application for leave to appeal from a trial by jury which terminated on 19 March 2014 when the applicant was convicted of 25 counts of sexual activity with a child contrary to Article 16 of the Sexual Offences (Northern Ireland) Order 2008 (the "2008 Order"). These were alternative counts that had been added to an original indictment containing 29 counts comprising 7 counts of sexual assault contrary to Article 7(1) of the 2008 Order, one count of sexual assault by penetration contrary to Article 6(1) of the 2008 Order and 21 counts of rape contrary to Article 5(1) of the 2008 Order. One of the convictions was reached by a majority of 11-1 and the rest were reached by a majority of 10-2. Mr Brian G McCartney QC and Mr Desmond Fahy appeared on behalf of the applicant while the prosecution was represented by Mr Philip Mateer QC and Mr Michael McAleer. This court wishes to acknowledge the assistance that it derived from the carefully prepared and succinctly delivered written and oral submissions from all counsel.

Background facts

[2] While in his early 20s the applicant started to go out with B, who was the sister of the injured party, A. The applicant and B were married in January 2011. The sisters came from a close and loving family, there was frequent contact with the applicant and he was made to feel welcome in the family home.

[3] The prosecution case was that over the period from 28 February 2011 to 1 March 2012 the applicant engaged in a series of sexual acts with A. During that

period the applicant was aged 28/29 and A was aged 14/15. The allegations involved a mixture of specimen and specific counts commencing with kissing and fondling in a shed, progressing to intimate touching and, eventually, amounting to full oral and vaginal penetration. The events were alleged to have occurred at various locations in Northern Ireland, the Republic of Ireland and in England in sheds, vehicles and at the applicant's marital home.

[4] Another sister in the family, C, told the court that, upon an occasion in January 2012, after Sunday dinner at the family home, she thought that the applicant was holding A behind the sofa. At the time she did not think it was sexual but she thought it was some form of 'sneaky contact'. As a result of her mother expressing concerns about A in March 2012, C asked A if the applicant had done anything to her but A replied in the negative. A's mother gave evidence that A had suffered from two vaginal infections, the first of which had occurred in November 2011 and the second in January 2012. When the second infection occurred A's mother asked her if the applicant had been touching her and A replied "why would you ask that?" A's mother said she had raised the matter because, prior to the first infection, A had been away overnight with the applicant in Cork and she had also been out with him prior to the second infection.

[5] C overheard a telephone conversation between A and the applicant on 8 May 2012 as a result of which she asked A directly whether anything had been going on with the applicant. A admitted that 'it had been going on' from the end of March. C's mother was telephoned and, when she arrived home, A confirmed what she had told C. B was informed and contacted the applicant in England. On 11 May 2012 B telephoned the police and did not identify herself but left a number. She told the police that her sister was in a non-consensual relationship with her husband. On 12 May 2012 A said that she was ready to talk to C and they went into A's bedroom for about two hours where C wrote down everything that A said. Arrangements were then made for A to participate in an ABE interview and she was also examined by a doctor who confirmed that a transection of her hymen was consistent with multiple occasions of sexual intercourse.

[6] The prosecution case was that all of the sexual activity had taken place without A's consent and that A had acted out of fear of the applicant. When asked why she had not complained at the time A gave a number of answers including that the applicant made her feel it was her fault, that she was afraid of him, that he was at her house every day and threatened to take her away if she told anyone, that he said he would know if she told anyone and would kill her and her family. She said that he told her that no one would believe her and that her family were saying bad things behind her back. She was asked why, if she was afraid of the applicant, she had kicked him on the shoulder on one occasion and she said that he had become very angry when she kicked him. She was asked why she had not gone to the police, a hospital or a church when she was with the applicant for two days in Donegal in his

lorry and he was forcing her to have sex with him. She said that she thought about walking away but felt that the applicant would come after her.

[7] The defence case was that none of the alleged acts had ever taken place and that the applicant and her family members were telling lies. The applicant said that he believed that the motive for the allegations was his refusal to provide financial support to the injured party's family in relation to two matters. The first was finishing a house that B had asked the applicant to buy as a matrimonial home. And the second concerned repayment of a debt that A's father owed his solicitor. A's father said that he had believed that the applicant, who needed a tractor, was going to borrow £16,000 to buy a tractor from him which would have been adequate to pay any debt that he owed to his solicitors. However, her father insisted that he had never asked the applicant for any money and that he had paid his legal costs by mortgaging the family home.

The trial

[8] On 18 September 2013 the applicant was committed for trial at Omagh Crown Court and on 21 October 2013 he was arraigned and pleaded not guilty to the original 29 counts on the indictment. The trial of the applicant commenced before Her Honour Judge Loughran and a jury at Dungannon on 3 March 2014. At the close of the hearing on 13 March 2014, at a time when the applicant was still subject to cross-examination, the learned trial judge circulated counsel by e-mail with a number of draft documents. These included a document relating to the counts, a document setting out the ingredients of the offences, a proposed direction on alternative counts and a proposed direction on delay. In her e-mail she indicated that it was her intention to provide the first two documents to the jury. She asked for any assistance that counsel felt that they could provide. Later on the same evening junior counsel for the Crown responded indicating that the only point he wished to raise was with regard to the document dealing with alternative counts. Counsel proposed that "there may well exist a scenario whereby if the jury determined that rape and/or sexual assaults were not committed by virtue of a consent issue, the defendant might well be guilty of an alternative offence of Sexual Activity with a Child contrary to Article 16 of the Sexual Offences (Northern Ireland) Order 2008".

[9] On 14 March 2014, in the absence of the jury, the learned trial judge asked counsel if sexual activity with a child was acceptable as an alternative count stating that, if so, she proposed to direct the jury that they could consider that offence as an alternative to all of the counts. Junior counsel for the applicant submitted that such alternative counts were not borne out by the Crown case. The learned trial judge replied that she had a duty to ensure that the applicant was not convicted of more serious offences than should be the case relying upon the decision in R v Croome [2011] NICA 3. When senior counsel for the applicant was asked to comment upon the proposal to direct the jury that sexual activity with a child was an alternative on

all counts he said "that's not the prosecution case". The learned trial judge repeated the response that she had made to junior counsel for the applicant.

[10] The learned trial judge then said that she intended to give the jury a 'route towards verdict' document in which the choices were to be:

- The defendant is not guilty of any offence on the indictment.

- The defendant is guilty of some of the offences on the indictment and not guilty of other offences.

- The defendant is not guilty of any of the offences on the indictment but guilty of lesser offences on some or all of the counts.

Senior defence counsel responded "yes Your Honour". The learned trial judge then indicated that she would be directing the jury with regard to the proposed alternative offence and that she would amend the alternative offences document accordingly. She proposed that the amended alternative counts would specify that the prosecution must prove the defendant was aged 18 or over, that he intentionally touched A, that the touching was sexual, that she was a child and that the defendant did not reasonably believe that she was 16 or over. Senior defence counsel replied that he was happy with the proposal. The case then proceeded in front of the jury and the cross-examination of the applicant continued.

Grounds of appeal

[11] At the hearing before this court Mr McCartney helpfully indicated that the applicant no longer sought to rely on the original ground relating to use by prosecuting counsel of the ABE material. He focused the attention of the court upon his submission that the learned trial judge had erred in:

(*i*) Suggesting counts of sexual activity with a child as an alternative to counts of rape in circumstances where such counts were inconsistent with the account advanced by the prosecution.

(*ii*) Failing to identify the evidential basis upon which the alternative counts were to be considered by the jury.

(*iii*) Failing to warn the jury that the applicant could only be convicted if the evidence properly established that the applicant had committed the specified alternative offences.

[12] Mr McCartney emphasised the stark contrast between the cases made by the prosecution and the defence with the former alleging that the sexual acts had taken place without the injured party's consent and the defence maintaining that none of

the alleged activity had taken place at all. He noted that no question as to whether the jury should consider anything other than these opposing cases had arisen until the virtual end of the defence case. Mr McCartney relied upon the authorities of R v Coutts [2006] UKHL 39, R v Croome [2011] NICA 3 and R v Greatbanks [2013] NICA 70 submitting that in the instant case there simply was not "any alternative offence which there is evidence to support" and that the proposed alternative verdicts had not been "obviously raised by the evidence".

The relevant authorities

[13] In Croome this court set out to provide guidance on the duty of a trial judge to consider leaving alternative verdicts to a jury for consideration. That appeal was allowed on the basis that the learned trial judge had failed to leave to the jury the verdict of causing death by careless driving as an alternative to causing death by dangerous driving. In the course of delivering the judgment of the court Morgan LCJ reviewed the law in the following terms:

> "[19] The leading authority on the duty of the court to leave alternative verdicts is R v Coutts [2006] 1 WLR 2154. That was the case in which the appellant was charged with murder. His defence was that the death was a tragic accident. The trial judge did not leave the alternative of manslaughter and the appellant was convicted. The House of Lords allowed the appeal. Lord Bingham, with whom the other Law Lords agreed, set out the relevant principles.
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> > '23. The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support. I would not extend the rule to summary proceedings since, for all their potential importance to individuals, they do not engage the public interest to the same degree. I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest

themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency.

> 24. It is of course fundamental that the duty to leave lesser verdicts to the jury should not be exercised so as to infringe a defendant's right to a fair trial. This might be so if it were shown that decisions were made at trial which would not have been made had the possibility of such a verdict been envisaged.'

[20] Although senior counsel for the appellant at the trial indicated to the learned trial judge that there were matters pertinent to the careless driving issue which he had not explored neither counsel in this appeal were able to identify any such matter. It does not appear that there was any exploration with senior counsel as to the nature of any unfairness to the appellant. In his concurring opinion in Coutts Lord Hutton referred with approval to the passage in Lord Clyde's speech in Von Stark v R [2000] 1 WLR 1270 which set out the nature of the obligation on the court.

> 'The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may

> choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them'."

[14] In Greatbanks the indictment contained one count of causing grievous bodily harm but the learned trial judge left to the jury the alternative verdict of assault occasioning actual bodily harm. The appellant had been convicted of the latter and appealed his conviction. The first ground of appeal was that the learned trial judge had erred in leaving alternative offences to the jury after the close of the defence evidence. This court confirmed the principles elucidated by Morgan LCJ in Croome and dismissed the appeal stating at paragraph [13]:

> "[13] It is clear from the authorities referred to above that the responsibility for deciding whether or not to leave the additional alternative offences to the jury remains at all times with the trial judge. In discharging that responsibility the learned trial judge must have regard to the overall interests of justice insofar as they relate both to the public interest and to the defendant's right to a fair trial. It is clear that counsel for the appellant was given a full opportunity to deal with the proposal to leave additional offences to the jury prior to the closing speeches and the judge's final directions. At no stage was counsel able

> to particularise his general references to 'recklessness' in such a way as to establish any degree of significant prejudice on the part of the appellant. In such circumstances, we are not persuaded that the decision of the learned trial judge has rendered this conviction unsafe."

See also Archbold 2014 at 4-532 to 4-533.

[15] In R v Williams (1994) 99 Cr. App. R. 163 the appellant was charged with murder, the allegation being that he had caused the woman with whom he had a relationship to fall from a twelfth floor flat by throwing, lifting or pushing her over the balcony. His defence was that the deceased had committed suicide by jumping over the balcony. In summing up the judge left to the jury the question whether the appellant had held the deceased over the balcony to frighten her and that she had slipped from his grasp, making him guilty of manslaughter. When interviewed at the police station the appellant maintained that they had been talking about their future together and that the deceased was upset. He said that he had gone to the bathroom and that when he came back the deceased was holding on to the balcony. He said that he tried to grab her but that she jumped. At other times he said that he had seen her on the balcony and tried to hold onto her but that he could not do so. A forensic examination revealed fine scratches on the rail consistent with the deceased hanging by her fingers. Flakes of nail varnish were recovered from the balcony rail which appeared to match the nail varnish on the deceased's fingers. The prosecution accepted that they were not in a position to suggest precisely what had happened on the balcony and that it was a matter of necessary inference that the appellant had in some way put the deceased over the balcony rail with the intention of killing her. The appellant maintained that the deceased committed suicide for which he suggested two reasons. First, that she was worried about her health and secondly the deceased's suggestion that their child should live with him which had caused her upset. Thus, it was apparent that the issue between the prosecution and the defence was clear and straightforward.

[16] In Williams counsel for the appellant submitted that it was not permissible to leave a case to the jury on a factual basis quite different from that upon which the case had been conducted. In giving the judgment of the Court of Appeal Neill LJ noted that in the majority of cases the task of the judge in his summing up could be divided conveniently into two stages:

(*a*) To direct the jury on the relevant law;

(*b*) To remind the jury of the evidence.

In carrying out such tasks the judge would usually be guided by the way in which the case had been put before the court by the prosecution and the defence. However, he then continued:

> "But there are other cases where the judge's role is more complex. As has been pointed out by Mr Sean Doran of the University of Manchester in his article 'Alternative Defences: The Invisible Burden of the Trial Judge' [1991] Crim. L. R. 878, in certain cases, 'the respective courses adopted by prosecution and defence present the jury with an incomplete picture of the range of options open to them in arriving at their final determination.' In these cases, the judge may be under a duty to direct the jury on the version of the facts which neither the prosecution nor the defence has advanced."

Neill LJ went on to emphasise that the extent of the judge's duty in such circumstances will depend upon the facts of the particular case and on the possible issues which the evidence, including the inferences properly drawn from the evidence, disclosed.

Discussion

[17] It is clear that the learned trial judge in this case was at pains to ensure that both the prosecution and defence received notice of the proposed alternative offences and were given an adequate opportunity to make submissions thereon. Indeed, when notice was given to the defence the applicant was still in the course of being cross-examined. The applicant's case at all material times was simply that none of the activity alleged by the injured party had ever occurred and that, in such circumstances, the issue of consent or non-consent was quite irrelevant. In such circumstances it is difficult to see how introduction of the alternative offences could have in any way have prejudiced the applicant or the way in which his advisors conducted the trial. The introduction of the alternative offences did not affect the *actus reus* of the behaviour alleged by A and that constituted the relevant sexual activity.

[18] In her direct evidence recorded by way of ABE statement A confirmed that she had kept photographs of the applicant on her mobile telephone. She also agreed that, after she had told her family and police about the relationship, she had attempted to conceal a mobile under her jumper and later texted the applicant in affectionate terms. On the 9th May 2012, after C had overheard her telephone call with the applicant but before she made a full confession to her sister, A had texted the applicant asking him if he had deleted everything from his mobile. Her reasoning for sending the applicant texts about paying for B's car and saying that he

loved B was that she was "trying to act jealous." Under cross-examination, as noted at paragraph [6] above, A provided a number of reasons as to why she had not made a contemporary complaint. During the course of the relationship the victim had suffered from two vaginal infections. When asked by her mother about the condition in November 2011 and asked whether anyone had touched her A's response was that a gypsy boy at football had "tried to put it in" but had not succeeded. A agreed in cross-examination the she had lied to her mother about that. When her mother discovered the second infection in January 2011 she asked her if she had been involved with the applicant. The basis for doing so was that the victim had been away overnight with the applicant in Cork prior to getting the first infection and that she had been out with him prior to the second infection. The victim's response was "why would you ask that?" The victim also denied any involvement when she was first asked about a possible relationship with the applicant by her sister C. She was unable to remember telling her sister C that the applicant loved her and not B and that he said sex with her was better than with B as C had recorded in the document on the 12th May 2012 in the bedroom.

[19] In R v RB [2013] EWCA Crim 2301 the learned trial judge added alternative counts of sexual activity with a child, in accordance with the equivalent legislation in England and Wales, to an indictment containing a charge of rape. In that case the Court of Appeal accepted that, on the evidence, including the evidence of the injured party's mother about the injured party's reluctance to reveal the sexual activity, it was open to the jury to convict of the alternative offence if they were not persuaded beyond reasonable doubt as to the absence of consent.

[20] In our view the history given by the victim in the course of the ABE interview and under cross-examination and her apparent willingness to make repeated journeys with the applicant coupled with the evidence of her sister and mother as to her reluctance to admit the sexual activity clearly had the potential to create doubts as to her credibility with regard to lack of consent in relation to the counts charging rape and sexual assault. It is also important to bear in mind that the learned trial judge had the benefit of seeing and hearing the witnesses examined and cross-examined at first hand. It is clear that she gave careful consideration to the specific facts and the proper inferences to be drawn from the evidence when deciding whether to place alternative counts before the jury. In our view she was entitled to exercise her discretion to do so in the overall interests of justice and, consequently, this application must be refused.