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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

NH

COGHLIN J

[1] The applicant was tried upon an indictment containing 65 counts alleging sexual offences against his sister and a female child fostered by his parents. He was acquitted, either by direction of McCollum LJ, the learned trial judge, or by the verdict of the jury, of 22 charges against the foster child and 3 charges against his sister but convicted of 40 charges alleging sexual offences against his sister. The offences of which the applicant was convicted occurred between February 1980, when the applicant was 13 years of age and his sister 9 years of age, and February 1989, when the applicant was 22 years old and his sister aged 17. All the offences were committed in the applicant's family home. The trial took place between 9 and 23 October 2002 and, on 17 January 2003, McCollum LJ sentenced the applicant as follows:

(*i*) Ten years imprisonment on each of five counts of rape;

(*ii*) Eight years imprisonment on two counts of incest;

(*iii*) Five years imprisonment on two further counts of rape and five counts of incest.;

(*iv*) Eighteen months imprisonment on two counts of gross indecency and five counts of indecent assault.

(*v*) Six months imprisonment upon a further nineteen counts of gross indecency and indecent assault.

In all, the effective sentence was one of ten years imprisonment.

[2] The applicant applied for leave to appeal against both conviction and sentence but leave was refused by the single judge and the applicant now renews his application for leave to this court. At the commencement of the hearing his counsel withdrew the application in respect of sentence.

[3] The application was based on a number of grounds but, in an able and well marshalled submission, Mr Lyttle QC, who appeared on behalf of the applicant, divided the application into two parts focusing upon;

(*i*) The alleged failure by the learned trial judge to give a proper and adequate good character direction;

(*ii*) The alleged lack of balance in the learned trial judge's overall charge to the jury which supported the case of the prosecution and denigrated that put forward by the defence to such an extent as to virtually render the learned trial judge an advocate.

[4] In the context of this appeal it is important to record that the learned trial judge commenced his charge to the jury on 22 October 2002 but did not complete it until the following day. After delivering a substantial portion of his closing remarks the learned trial judge released the jury on 22 October 2002 and then, in our view sensibly and quite properly, enquired from counsel whether there were any requisitions on the basis that it would be easier to put right any relevant matters at that stage.

The character direction

[5] On 22 October 2002 the learned trial judge gave a good character direction which included the following words:

> "As you have heard, he is a man of good character. He has never been convicted of any offence apart from this careless driving which very few of us, I suppose, no one, would regard as a serious matter, a momentary lapse on the roadway. That is the only time that the law and he have ever run across each other up until this case and he certainly hasn't at all either molested other young girls or given any problem or difficulty, as we heard in the Witness Box, to girls that he has been friendly with."

He then pointed out that while the alleged offences commenced when the defendant was at an age at which the acquisition of a criminal record might not have been expected, the jury would have to regard it as being in his favour that he had remained a person of good character without being involved in any problems with the police up until the date of trial. The

learned trial judge instructed the jury that good character supported the appellant's credibility and also meant that he was less likely to have committed the crimes alleged.

[6] The learned trial judge then continued his address in the following terms:

> "At the same time – and I am not trying to dilute my comments about his good character – obviously a person could be of good character in all other respects but might be drawn to some particular type of prohibited sexual behaviour and it is a very sad fact and you have heard Mrs Johnston and you know from your own experience of the world and what's going on the world, sexual abuse of children may be perpetrated by the most respected of persons and of course none of you, I am sure, is unaware of current scandals that are mentioned almost day and daily in the newspapers affecting clergies and church. To that extend it isn't quite like robbing a bank or something of that nature where you would expect the person to have a particular perhaps social standing or social position and you might expect them to be a particular type of character. It appears that people otherwise of apparently unblemished character have been found to be guilty of this type of offence, so you have to weigh that to some extent against him, but give him credit for his good character both in considering the likelihood that he might be involved in offences of this nature and also in assessing his evidence."

[7] The reference to Mrs Johnston was to a witness called by the defence who worked as a social worker in relation to the fostered child and who visited the appellant's premises upon a number of occasions. It appears that Mrs Johnston gave some evidence to confirm that some persons convicted of sexual offences were of good character without criminal convictions.

[8] Mr Lyttle QC requisitioned the learned trial judge on the basis that he had given a good character direction which he had effectively undermined by the suggestion that the fact that a person had a good character did not mean that he was not going to get involved in sexual abuse.

[9] On 23 October 2002 the learned trial judge revisited his character direction addressing the jury in the following terms:

> "He (Mr Lyttle QC) also suggested to me that in dealing with the good character of [the applicant] might have diluted my remarks by telling you that sex abuse is sometimes perpetrated by people of good character. It is very important ladies and gentlemen of the jury, not to minimise the value of a good character. Its relevance of course is a matter for you and it is for you to decide what weight you give his good character both in assessing his evidence and in deciding whether the Prosecution have satisfied you of his guilt.
>
> Mr Lyttle suggested that I might have said something that might have conveyed to you that persons of good character may be drawn to child abuse. Of course members of the jury, I did not mean to say and I hope I did not infer and that you did not take from what I said that good character might draw one to child abuse. That obviously would be a completely wrong thing to say and it must always be a positive advantage to a person charged with a criminal offence that he is of good character. However, as I have indicated the weight to be attached to it may vary from one case to another and it is entirely a matter for you to consider what weight to apply in this case."

[10] In his submissions before this court Mr Lyttle emphasised the importance of a proper and adequate good character direction in a case, such as that of the applicant, where, ultimately, guilt depended almost exclusively upon the view that the jury took of the respective credibility of the complainants and the applicant. In support of his submissions Mr Lyttle QC relied upon R v Vye and Others (1993) 97 Cr App R 134, a decision of the Court of Appeal subsequently approved by the House of Lords in R Aziz and Others [1996] 1 AC 41.

[11] We accept that credibility was a fundamental issue in the case against the applicant and that, in such circumstances, provided that he was entitled to it, it was of first importance to ensure that the appellant had the benefit of a full good character direction. In R v Vye and Others Lord Taylor LCJ confirmed this approach and went on to say, at page 139:

> "Having stated the general rule, however, we recognise it must be for the trial judge in each case to decide how he tailors his direction to the particular circumstances. He would probably wish to indicate, as is commonly done, that good character cannot

> amount to a defence. … Provided that the judge indicates to the jury the two respects in which good character may be relevant, ie credibility and propensity, this court will be slow to criticise any qualifying remarks he may make based on the facts of the individual case."

In R v Fulcher [1995] 2 Cr App R 251 in the course of his judgment in the Court of Appeal Kennedy LJ said, at page 260:

> "In the light of the authorities, we must accept that a proper direction as to character has some value, and therefore is capable of having some effect in every case in which it is appropriate for such a direction to be given. This was such a case. The case for the prosecution depended on the uncorroborated evidence of Wendy Fulcher, with a li ttle circumstantial evidence in support."

In delivering the leading judgment in the House of Lords in R v Aziz and Others [1996] 1 AC 41 Lord Steyn approved the directions suggested in R v Vye and Others as a basis for placing a "fair and balanced picture" before the jury and emphasised that, prima facie, good character directions must be given in appropriate cases.

[12] The applicant in this case was examined in chief in support of his good character and two female character witnesses were called upon his behalf. The learned trial judge directed the jury that they "must" have regard to the appellant's good character both in relation to credibility and to propensity. On 23 October he told the jury that it was "very important" not to minimise the value of good character and that such a character must "always be a positive advantage" to a person charged with a criminal offence, while pointing out at the same time that relevance and weight was a matter for them to consider. While we do not accept that he did make any such suggestion, subsequent to Mr Lyttle QC's requisition on 22 October, the learned trial judge specifically disassociated himself from any inference that "good character might draw one to child abuse". In our view the use of the phrase "… so you have to weigh that to some extent against him …" on the 22 October was perhaps unfortunate. However, provided that overall he gave a positive and adequate good character direction, as we conclude that he did, the learned trial judge was free to qualify his direction in such manner as he felt appropriate having regard to the circumstances of the case and, while another trial judge might not necessarily have chosen to do so in precisely the same manner, it is clear that the qualification was made in the context of the evidence which Mrs Johnston had undoubtedly given. It is clear that the jury gave very careful consideration to the issue of credibility in that they not only

rejected all of the allegations made by one of the complainants but also discriminated between those made by the other. In the circumstances, we do not consider that the character direction given by the learned trial judge was defective or that it in any way rendered the verdict unsafe.

The remaining complaints about the charge to the jury

[13] Mr Lyttle QC criticised the charge of the learned trial judge as being "unbalanced" insofar as his remarks generally supported the case made by the prosecution and diminished that of the defence. In particular, Mr Lyttle QC referred to the following:

(*i*) During his charge on the 22 October 2002 the learned trial judge referred the jury to "… one theme running through the case …" as being the reason/reasons why the applicant's sister had not complained about his alleged conduct at an earlier stage. He reminded the jury of her evidence that she thought that she "might not be believed", she was afraid of her brother and she thought that it might further damage her mother's health. The learned trial judge also suggested that a factor might have been the apparent reluctance of her mother to believe her when, as an adult, she did draw the matter to her attention. He reminded the jury that when this occurred her mother's theme seemed to be "tell me. Tell me the details. Tell me about it. How can I help you unless you tell me", and the learned trial judge then commented in the following terms:

> "I don't know what impression that makes on you, whether you think 'yes that is the way I think I would respond if my child came and told me the story' or not."

He also reminded the jury how the mother had walked out of the meeting between herself, her daughter and the counsellor. Mr Lyttle QC criticised the learned trial judge for failing to put the mother's version of this interview fairly to the jury insofar as she had maintained that she had tried to talk to her daughter but the counsellor kept intervening saying that if she loved her daughter she would believe her and for generally being unsympathetic to her mother's evidence. On 23 October the learned trial judge reminded the jury of the period when the applicant's sister had been very ill and how her mother had been a "devoted carer" at that time. He made it clear to the jury upon that occasion that he was not in any sense suggesting that the mother had been anything but a "good and caring mother" and that in many respects the sister had stated in evidence that she believed her mother loved her although they may have had their differences as happens in every family. He also reminded the jury that the applicant's mother had said that she would have noticed if her daughter had been tearful.

(*ii*) Mr Lyttle QC criticised the learned trial judge for devaluing the evidence of the applicant's brother. The applicant's sister had alleged that the first incident of abuse had occurred when she was about eight years of age and the applicant had pulled up her nightdress and tied it above her waist which caused her great embarrassment because she was not wearing underwear. The applicant's sister maintained that this incident was witnessed by the foster child and by the applicant's brother. In the course of his charge on 22 October 2002 the learned trial judge had referred to the brother as giving "a lot of monosyllabic answers" in examination in chief and recalled that when questioned about this first incident, which took place at a time when he would have been about nine years old, the brother had said that he did not remember it. In dealing with this answer the learned trial judge said:

> "He didn't actually say that it hadn't taken place. That probably doesn't mean very much. It is a sensible answer really because I am sure all kinds of incidents of horseplay occur in every family and sometimes it mightn't be as seemly as it should be, but that is a very far cry of course from the sort of abuse that has been talked about here and something could well happen that in his innocence he wouldn't attribute any significance to and it wouldn't be that long before it would be out of his mind and he would forget about it."

Mr Lyttle QC pointed out that the brother had not simply said that he did not remember the incident but that he had also confirmed that if such an incident had happened he thought he would have remembered it. On 23 October the learned trial judge reminded the jury of the significance of the relationship between the applicant's sister and this brother in the following terms:

> "Apart from complaining to her mother she was very friendly with C, great pals, some people thought they were twins they were such good friends and so much in each other's company, but she never made a complaint to him. The defence say that, of course, is very significant."

He went on to emphasis that C was a man against whom there was no allegation of any kind of misconduct and, therefore, he had entered the witness box as a person whom the jury were entitled to believe although it was a matter for them as to what importance and significance they attributed to his evidence.

(*iii*) Mr Lyttle QC complained that the learned trial judge had been critical of the defence questioning of the complainants about the details of individual incidents and that, in particular, he devalued defence cross-examination about the incident when the applicant's father was alleged to have returned home at a time when the applicant was showing his sister a pornographic video. The learned trial judge returned to the issue of detail on 23 October referring to Mr Lyttle QC's submission that the witnesses were unable to give specific details, expressing the view that some of the accounts appeared to be "pretty detailed" but leaving the matter entirely to the jury.

(*iv*) During the course of his charge on 22 October the learned trial judge referred to the applicant's household as being "busy" with the applicant's mother having her own children as well as minding and fostering other children over a period of time. He continued:

> "Now if you have a mother in the kitchen or in the living room and she has got a baby to look after and her children are thumping about upstairs but nobody is screaming or shouting or there is not much happening would that be something that would make an immense impression on her? If she is feeding a colicky baby and trying to get the bottle into it she is going to be out of commission for a while as far as patrolling the house is concerned and as I say, if there are noises and so on upstairs would that be something that she would regard as so extraordinary that she would have to investigate it. There doesn't seem to be any occasion when that arose, but you have to look at all those circumstances and of course you may feel if [the applicant] was the sort of dreadful person he is said to be you may think he would have found his opportunities. It is always possible for one child to find another alone at some time of the day and indeed the evidence of course of V is that there were sort of established times when he was best able to do it – after Sunday lunch, everybody I suppose sitting about relaxing after lunch – when she was getting ready for the Girls Brigade or the pipe band – that these were times that these offences took place and could it be that for a fairly short time nobody … the house apparently according to [the applicant] was pretty fraught say on a Monday night when everyone was heading out for their activities so in that sort of atmosphere if someone was upstairs for a short time would it be noticed? Everybody busy and trying to get out and so on? That is all a matter

> for you to assess, member of the jury, and to decide whether it is really the position that these things could not have happened without being discovered."

Mr Lyttle QC was critical of this passage insofar as he said that it lacked balance in failing to reflect the defence case which was that this degree of activity in the household would have been a prime reason as to why the incidents alleged by the complainants were unlikely to have happened at all. In addition, he complained that there had been no evidence whatsoever about a "colicky baby". During his address to the jury on 23 October the learned trial judge fully accepted the latter criticism conceding that he had used a rather "colourful phrase" to describe a situation in which the applicant's mother's attention might have been taken up making it difficult for her to be aware of what was going on upstairs. He also emphasised to the jury that his reference to the applicant finding "opportunities" did not involve any assumption upon his part that the applicant was carrying out any alleged abuse of the complainants.

(*v*) Mr Lyttle QC also submitted that the learned trial judge had not dealt with the evidence of Mrs Johnston in a balanced way insofar as on 22 October he simply referred to Mrs Johnston consulting other people's notes and expressing the view that there was no record of the fostered complainant having objected to being legally adopted. However, on 23 October the learned trial judge reminded the jury that Mrs Johnston had visited the household once a month and that she had taken the fostered complainant away by herself, away from her foster parents, so as to give her a specific opportunity to tell her about any problems or complaints. He also reminded the jury that Mrs Johnston had been specially trained to deal with children. Ultimately it appears that the jury rejected the evidence of this complainant.

(*vi*) Mr Lyttle QC submitted that the learned trial judge had not given the jury a balanced comment upon the decision by the applicant's sister to stay the night at the applicant's house when he was doing her typing. The defence had emphasised to the jury that this visit took place after the termination of the incidents alleged by the applicant's sister suggesting that it would be very unlikely that such a visit would have taken place if there had been any truth in those allegations. When dealing with this point the learned trial judge referred the jury to the explanation for staying overnight put forward by the applicant's sister which was that she had been told to do so by her mother and that she felt "that was it". The learned trial judge specifically told the jury that it was a matter for them to assess the truth of this explanation and that they might wish to consider whether there were some people in their experience for whom parental compliance and obedience was a big factor which might last into adult life. He concluded his remarks on this topic by saying "And it is something that you could consider and decide, members of the jury, having seen all these witnesses; having seen [the applicant's mother],

having seen V. Could it be that she is a pretty compliant person and when told she does what she is told?"

(*vii*) The learned trial judge did spend some time on the evidence of Dr Toland, the complainant's GP whom she had attended on 8 July 1994. During the course of this consultation the applicant's sister complained of finding it "difficult to cope" and "feeling down" expressing the wish to be referred to a psychiatrist. She alleged that she had been sexually abused by her brother, whom she did not name, from the age of 8 until the age of 15. In referring to this evidence in the course of his charge on 22 October the trial judge drew attention to the apparent inconsistency between the account given by the applicant's sister to the doctor and to her evidence in the course of which she had stated that the abuse took place between the ages of 8 and 17. Mr Lyttle QC submitted that, when dealing with this point, the learned trial judge had not given enough weight to this apparent inconsistency. He also suggested that the learned trial judge's approach was unbalanced in so far he referred the jury to the complaint to Dr Toland but did not tell them that no detail of the alleged abuse appears to have been provided.

(*viii*) Mr Lyttle QC also referred to the learned trial judge remarking, when dealing with the allegation of rape made by the fostered complainant that they should consider "…. whether its likely that a girl would take such a thing on lightly or not." However, on 23 October the learned trial judge reminded the jury of these words and went on to say:

> "Well now, I have to say do you, members of the jury, the courts have ever been on the alert to the possibility, which is regarded as a real possibility that a sexual complaint can be false. Such is proven to be the case in the past. Of course, you will remember that T in particular made a rape allegation, which we don't know whether it was justified or not in relation to this lad C. But if I gave you the impression that all claims of sexual offences must be well-founded and true, that would certainly not be the correct impression. You must approach it with a critical mind and consider whether it is in fact true or not, the allegation that is being made."

[14] This court has frequently observed that, in relation to a ground of appeal such as this the cardinal principle is that the accused person should receive a fair trial. Mr Lyttle QC has submitted that, in this case, the learned trial judge's charge to the jury was so fundamentally unbalanced as to render the conviction of the applicant unsafe. Mears v R (1993) 97 Cr App R 239 is authority for the proposition that if a judge makes comments in his summing-up which are so weighted against the defendant as to leave the jury little real

choice other than to comply with the judge's views or wishes, this may make the verdict unsafe – see Lord Lane at page 243. We have carefully considered the various criticisms put forward by Mr Lyttle QC, in his able submissions both individually and cumulatively in the context of this principle bearing in mind that the learned trial judge is entitled to express an opinion and to comment upon the evidence and to do so, where appropriate, in strong terms. The charge must be considered as a whole, including both days, and it is clear that, on 23 October the learned trial judge not only told the jury that Mr Lyttle QC felt that his charge on the previous day had "done less than justice to his client" but also told them that it was only fair for those matters to be put to the jury. He then proceeded to deal with virtually all of the points raised by Mr Lyttle QC in his requisitions in a way which was favourable to the defence. In particular, he referred to the applicant's evidence in the following terms:

> "Just a few more words about the defence I should say to you, members of the jury. First of all, the most important witness for the defence in any case is the defendant. You must bear in mind that in this case he was questioned over the course of a day by police officers and consistently maintained his innocence. So although he is questioned, as Mr Lyttle QC would say in a more hostile and unfriendly way (although there was no suggestion that it was particularly hostile), but he was being questioned no doubt by people who no doubt would be ready to seize on any admission or any half-admission that he made, but nonetheless he underwent that questioning without ever giving any indication that would show that he was indeed guilty of these offences. So he consistently maintained his innocence.
>
> He gave evidence before you and never deviated from his position that the allegations are completely without foundation. You have to look at that. You may have thought him composed and self-assured in the process of his evidence, and that he maintained his denials of wrongdoing in a calm and measured way, and if there is any conclusion to be drawn from that, members of the jury, you are in a good position to do it. He certainly was not exposed in cross-examination as telling lies about any collateral matter, and you will remember that he is a man of good character. So the defence therefore has shown no weakness in terms of its principle and its most important witness, the defendant."

It is important to remember that this was the last portion of the charge which would have been received by the jury before their retirement. As we have indicated earlier in this judgment it is clear that the jury appreciated that the fundamental issue was that of credibility and that they carried out their duty in a careful, considered and conscientious fashion.

[15] In the circumstances we do not consider that Mr Lyttle QC has succeeded in showing the conviction to be unsafe and, accordingly the application will be dismissed.