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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

RH

_____

Before: Morgan LCJ, Deeny LJ and Maguire J

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DEENY LJ (delivering the judgment of the Court)

[1] This is an appeal by way of reference from the Criminal Cases Review Commission ("CCRC") pursuant to the powers contained in Part II of the Criminal Appeal Act 1995 in respect of the appellant's convictions following a trial on indictment concluding in December 2006. The original appeal was dismissed in April 2008. Mr Brendan Kelly QC and Mr Barlow appeared for the appellant and Mr Richard Weir QC with Mr Magee for the PPS. We are grateful to all counsel for their helpful oral and written submissions.

[2] The appellant was convicted of both the rape and the indecent assault of a female, then a child, to whom we shall refer as C in the course of this judgment.

Paragraphs [3] to [5] redacted

[6] The CCRC summarised four grounds on which it was referring this matter to this Court:

(i) That the requirements of Article 24 of the Criminal Justice (Evidence) (NI) Order 2004 appear not to have been followed in relation to the evidence of I.

(ii) That the trial judge failed to properly direct the jury on the approach to be taken on this evidence.

(iii) That the trial judge failed to adequately direct the jury in relation to RH's good character.

(iv) That these failures – particularly in relation to the evidence of I, but also when added to the failure in relation to good character – gives rise to a real possibility that the NICA would find RH's conviction unsafe.

Paragraphs [7] to [28] redacted.

Grounds of Reference by CCRC

Admission of the complaint evidence

[29] Article 24 of the Criminal Justice (Evidence) (NI) Order 2004 ("the 2004 Order") provides for the admission of previous statements of witnesses:

> "24. - (1) This Article applies where a person ("the witness") is called to give evidence in criminal proceedings.
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> (2) If a previous statement by the witness is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.
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> (4) A previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if-
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> (a) any of the following three conditions is satisfied, and
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> (b) while giving evidence the witness indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth.
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> (5) The first condition is that the statement identifies or describes a person, object or place.
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> (6) The second condition is that the statement was made by the witness when the matters stated were fresh in his memory but he does not remember them, and cannot reasonably be expected to remember them, well enough to give oral evidence of them in the proceedings.
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> (7) The third condition is that-

(a) the witness claims to be a person against whom an offence has been committed,

(b) the offence is one to which the proceedings relate,

(c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence,

(d) the complaint was made as soon as could reasonably be expected after the alleged conduct,

(e) the complaint was not made as a result of a threat or a promise, and

(f) before the statement is adduced the witness gives oral evidence in connection with its subject matter."

[30] Mr Weir had a recollection that a notice had been served under Article 24. If that were so in the intervening decade the notice had been lost. In so far as the evidence of complaint by C was introduced by virtue of Article 24(4) of the 2004 Order the objection is made that the grounding conditions required by that subsection were not satisfied. It is accepted, however, that the defence did not object in any way to the leading of the evidence and that senior counsel for the defence relied upon variations in the reporting of the complaint to test the reliability of C's evidence.

[31] Mr Kelly realistically accepts that in light of the apparent consent to the admission of the evidence this is a ground which would be difficult for him to make out. We agree but in any event the evidence of complaint was admissible by virtue of Article 24(2) to rebut the suggestion that C's oral evidence had been fabricated. The essential case made on behalf of the appellant was that C and her two siblings had made up these cases in order to exact revenge for the appellant's treatment of their mother. The prosecution was perfectly entitled to introduce the complaint evidence of C in order to rebut that suggestion. Once introduced by virtue of Article 24(2) the evidence was admissible as evidence of the matter stated. This ground is not sustainable.

The Good Character Direction

[32] The appellant relies on defects contended for in the trial judge's good character direction. In its statement of reasons for this reference the CCRC at paragraph 63 submits that the trial judge failed to give a "third limb" of the good character direction in historic sexual abuse cases. They submit it should have been along these lines:

> "Having regard to what you know about this defendant and in particular the many years since the date of the alleged offence [and (if it be the case) that no similar allegation has been made against him] you may think he is entitled to ask you to give considerable or more than usual weight to his good character when deciding whether the prosecution has satisfied you of his guilt."

[33] The origin of this direction was the judgment of Campbell LJ in R v Paul Hughes [2008] NICA 17. That judgment, of course, was published long after the hearing of this case and it is unsurprising, therefore, that the learned trial judge did not refer to any authority on this issue. The full text of the relevant passage this find at paragraph [11]:

> "This direction deals with the first and second limb of a good character direction, as they are sometimes described. In a case such as this where a considerable length of time has passed since the date of the alleged offences and there was no suggestion that any similar allegations had been made against the appellant the jury should have been told that he was entitled to ask them to give more than usual weight to his good character when deciding whether the prosecution had satisfied them of his guilt. In the passage of the summing up which preceded the reference to good character the judge gave the normal direction on the burden and standard of proof. In a case of delay such as this we consider that more was required along the lines that we have indicated."

[34] This was a case in which the judge was directing the jury not only on the two counts on which the appellant was found guilty but the other counts relating to his son and daughter. The total period of complaint on the indictment was 11 years from December 1973 until December 1984. In a case in which there are allegations by multiple complainants over a prolonged period of time there must be a greater degree of discretion available to the trial judge to craft how he should deal with the question of good character. The law on good character directions was reviewed by the Court of Appeal in England and Wales in R v Hunter [2015] 1 WLR 5367. That court provided no support for the notion of a third limb but none of the cases reviewed were of historic sexual abuse. We consider that the direction should generally be given in such cases.

[35] The direction given by the learned trial judge was as follows:

"The defendant has what is termed a good character. As you know, he has no criminal convictions. I think he asserted at one stage he had no run-ins with the police in the past. How do you factor that into your considerations? In deciding whether the prosecution has satisfied you beyond reasonable doubt of the defendant's guilt, you should have regard to the fact that he is a man of good character. Good character in itself cannot be a defence to a criminal charge or establish innocence in itself, but you should take it into account in two separate ways. The defendant has given evidence, so therefore by virtue of the fact he is a man of good character, it supports his credibility – credibility simply relates to the confidence which you have in the truthfulness of his evidence; that is whether you can believe him or not. In the second place, the fact he has not previously committed any offences, having reached the age that he has, may mean it is less likely than otherwise that he is guilty of the offences, that he would have committed the crimes alleged against him at this point of time. Good character in itself is not a defence but it should be a factor you take into account when assessing the evidence that he has given and assessing the guilt in the way that I have suggested. But it is not itself, obviously, an answer to the charges. On that point, you also heard evidence from L, his present partner. You may form the view she is a decent lady, as she is standing by the accused. She herself has asserted that she is of the belief that he is not guilty of these offences and that is why she is standing by him. She asserts that he has a good relationship with her children, who are in their 30s at this present point in time. Of course, you have to take into account that what she is dealing is the defendant as he is now and has been over the last 8 years. What you are dealing with is the defendant as he was 20/30 years ago. Therefore, her assessment of his character at this present point in time, may or may not be a great indicator of the defendant as he was 20/30 years ago. It was suggested to her that she is a decent lady but in a very difficult position, she wants to believe the defendant is innocent. At the end of the day that is part of his character, as a witness, a decent lady has come forward to speak as to his character and you will take that into account when assessing what credibility you attach to the defendant's evidence and

> your assessment of his guilt or innocence of their present charges."

[36] The appellant criticises this on the basis that the direction is heavily qualified in respect of the evidence of L and that the learned trial judge repeats the fact that good character is not an answer to the charges. These are matters which the court concludes on balance are within the band of reasonableness for the trial judge.

The Judge's Direction on the 1997 Complaint Evidence

[37] This was unquestionably the real issue in this case. The legal principles governing the use of complaint evidence whether admitted under Article 24(2) or (4) are now well established. Mr Kelly relied on *R v Pritchard* [2011] EWCA Crim 2749. Gross LJ reviewed the current law on complaint evidence and in the light of that put forward the following propositions (paras 29-34):

> "(1). Whereas, prior to the enactment of Section 120 of the Criminal Justice Act 2003 evidence of recent complaint was admitted for the sole purpose of demonstrating the consistency of the complaint, such evidence is now admissible in certain circumstances as going to the truth of the matter stated.
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> 2. However, both under the old law and under the law subsequent to the enactment of Section 120, evidence of recent complaint does not emanate from a source independent of the complainant. In that regard, we turn to one of those recent authorities, the decision of *R v AC* [2011] EWCA Crim 1430, where, at [10], Laws LJ, giving the judgment of the court, said the following:
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> > `Before the material provisions of the Criminal Justice Act came into force recent complaint evidence, though admissible in sex cases, could only be admitted as evidence of consistency on the part of the complainant and not as evidence of the truth of the complaint as such. That was altered by Section 120 of the Criminal Justice Act 2003. Subject to certain conditions such evidence may now be admitted as truth of the matter stated. However, it of course remains the case that recent complainant evidence does not emanate from a source independent of the complainant. [See too Archbold at paragraph 20-12].'

> 3. As the evidence of recent complaint is not evidence from a source independent of the complainant a direction in that regard should routinely be given. The authorities to which we were referred speak as to principle with one voice. Such a direction should routinely be given. The authorities differ in their outcomes not because of any uncertainty as to principle, but because of the differences in the individual cases between either the facts or the other directions given by the judges in those cases. For completeness, the authorities in question are as follows:
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> *AA* [2007] EWCA Crim 1779 at paragraph 7-17; *Ashraf A* [2011] EWCA Crim 1517 at paragraphs 10-24; *AD* [2011] EWCA Crim 1943, especially at paragraphs 21-26; *AC Supra* at paragraphs 10-13; and *H* [2011] EWCA Crim 2344 at paragraphs 10-15.
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> The same point as to the need for such a direction as underlined in the Crown Court Bench Book March 2010 at page 229, where the following was said:
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> 'The jury must be reminded that a complaint cannot provide independent support because the source remains the witness.'
>
> 4. If such a direction is not given, it may render the conviction unsafe.
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> 5. Whether it does will depend on all the circumstances including consideration of the summing up and the evidence as a whole."
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> (Emphasis added)

[38] The appellant also relied on the following passage from the judgment of Morgan LCJ delivering the judgment of the court in *R v Alan Greene* [2010] NICA 47:

> "Evidence of recent complaint has always been admissible at common law on the issue of the credibility of the complainant. Similarly evidence of complaint admitted under the provisions of article 24(4) of the 2004 Order is admissible on the issue of credibility. In assessing the weight to be given to the evidence on that issue it is important that the jury are directed to pay particular regard to the circumstances of any disclosure

> and the period of time that may have elapsed between the alleged offence and the complaint. Of course as appears from the preceding paragraph the evidence is also admissible for the purpose of proving the truth of what has been said. In any case it is important for the judge to direct the jury that they should be cautious about the weight that they should give to such evidence since it is coming from the same source as the complainant. It is not independent evidence supporting the complainant's case. In a case such as this where there is a conflict between the complainant and the alleged offender and little or no independent evidence it is particularly important that the jury should be directed about the manner in which such evidence should be considered by them."

[39] In addition Morgan LCJ, again giving the judgment of the court, returned to this issue in *R v Chakwane* [2013] NICA 24. He cited the passage at paragraph 7 of *R v Greene* and said the following at [17]:

> "The trial judge did not draw to the jury's attention that the recent complaint evidence was not independent evidence of the truth of the allegations made by the claimant, did not direct the jury on the circumstances, including any passage of time, relating to the disclosures nor was the jury directed on the caution they should exercise in giving weight to those disclosures."

This was one of several reasons the court relied on at [17] in that case, which was also a reference from the CCRC, to consider the conviction unsafe and allow the appeal.

[40] The importance of such a direction was also emphasised by Morgan LCJ in *R v AG* [2010] NICA 20 at [13]. In the absence of such a direction here the court must therefore consider very carefully whether this conviction is unsafe. We turn to this below.

[41] The prosecution did not quarrel with the authorities referred to but in turn helpfully referred the court to *R v H* [2012] 1 Cr App R 30 and *R v AA* [2007] EWCA Crim 1779. They pointed that in the latter case it was a relevant consideration that counsel at the time had not expressly sought an independence direction.

[42] Of course all of those authorities giving guidance on appropriate directions were delivered long after this case was heard in November and December 2006. Where a judge has failed to take them into account when charging the jury the court is likely to anxiously scrutinise the charge on the basis that the judge may have

overlooked this important matter and thereby not given the jury the assistance to which it is entitled. Where, as here, the case predates the emergence of these authorities the task of the court is to examine the charge to see whether it addresses any risk that the jury may have treated the complaint evidence as independent supporting evidence and, if so, whether that rendered the verdict unsafe.

[43] This is an issue which was not expressly raised when the case was considered by the Court of Appeal in April 2008. The substance of that appeal can be ascertained from paragraphs 5 and 6 of the judgment:

> "[5] The second and related ground which might be described as the principle ground was that the complainant's firm espousal of the case that she had been assaulted before she had gone to secondary school clearly raised a doubt as to the safety of the conviction. When I use the expression 'doubt' I do so in the connotation that this court adopted in the case of R v Pollock. In paragraph 32 of the judgment delivered in that case we said that the Court of Appeal in deciding whether or not a verdict was safe should concentrate on the single and simple question does it think that the verdict is unsafe. As we there observed this does not involve the court trying the case again rather it requires the court to examine the evidence given at the trial and as in this case any fresh evidence that is given to gauge the safety of the verdict. It should avoid speculation as to what may have influenced the jury to its verdict and for an application or an appeal to succeed the court must be persuaded that the verdict is unsafe but if having considered the evidence the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence it should allow the appeal. We entertain no such sense of unease about the correctness of the verdict in this case. It appears to us that it was entirely open to the jury to conclude that notwithstanding her firm view that this assault had occurred before she went to secondary school that indeed it had occurred subsequent to that time and that merely because the complainant firmly espoused that case as I have said does not cause to entertain any significant sense of unease as I have described.

> [6] The worth of detail in the complainant's account and the fact that she was susceptible of challenge and indeed was properly and vigorously challenged in cross-examination over a considerable period on significant elements of the account and as is clear from the verdict of the jury her evidence emerged without any substantial inroad being made in its veracity or reliability persuade us that this is a case in which the jury properly approached its task. We are fortified in that conclusion by two considerations, firstly no criticism has been made of the learned trial judge's charge to the jury, nor indeed when one reviews the charge could any plausible criticism of his charge be made. He put this issue properly and firmly to the jury in a way that must have rendered the issue prominent among those which the jury had to consider and secondly as has been pointed out in the course of submissions it is clear that the conscientious way in which the jury approached its deliberations in this case is reflected in the circumstances that they did not convict the applicant of a number of other charges that were preferred against him."

[44] The endorsement of the learned trial judge's charge to the jury needs to be seen, however, in the context of the issues raised in the appeal. Despite the availability of some of the authorities to which reference has been made in this appeal on the treatment of complaint evidence it does not appear that the issue was the subject of consideration by the court. Indeed the court was told by counsel that there was no criticism of the charge.

[45] The complaint evidence was introduced in stages.
The rest of this paragraph has been redacted.

[46] There was some limited discussion about the delay in making the original complaint in February 1997 in the course of this hearing. The Crown Court Compendium warns against stereotypical assumptions in this area:

> "In R v D [2008] EWCA Crim 2557 the Court of Appeal accepted that a judge may give appropriate directions to counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct. In short, these were that (i) experience shows that people react differently to the trauma of a serious sexual assault, that there is no one classic response; (ii) some may complain immediately whilst others feel shame and shock and not complain for some time; and

> (iii) a late complaint does not necessarily mean it is a false complaint."

The application of this principle to children was addressed in R v Miller [2010] EWCA Crim 1578:

> "When children are abused they are often confused about what is happening to them and why it is happening. They are children and if a family member is abusing them in his own home or their own home, to whom can they complain? A sexual assault, if it occurs, will usually occur secretly. A child may have some idea that what is going on is wrong but very often children feel that they are to blame in some way, notwithstanding circumstances which an outsider would not consider for one moment them to be at blame or at fault. A child can be inhibited for a variety of reasons from speaking out. They may be fearful that they may not be believed, a child's word against a mature adult, or they may be scared of the consequences or fearful of the effect upon relationships which they have come to know, or their only relationship."

That line of authority makes it clear that a late complaint can be a complaint made at the first reasonable opportunity.

[47] The appellant's case at trial was that the complainant and her siblings had pursued these allegations against him because divorce proceedings had become acrimonious in or about 2002 and the appellant's wife had died in February 2004. In order to rebut the suggestion that C's allegation was a fabrication the prosecution relied upon the making of the complaint in February 1997 long before any such bad feeling had arisen. In closing to the jury junior counsel for the prosecution relied on that complaint as rebutting any suggestion of invention but also maintained that the making of the complaint at that time was evidence of the truth of the allegations on the indictment.

[48] The other pillar of the defence submission to the jury concerned the timing of the allegations and the fact that the appellant was not living in the premises identified by C until she was 12 years old, contrary to her police statement and evidence in chief. That was the matter dealt with by the Court of Appeal in 2008. We see no reason to revisit that issue but it does make up part of the factual matrix of this appeal.

[49] In his charge to the jury the learned trial judge rehearsed the graphic account of the complainant's evidence and the points made in cross-examination as he did

with the other witnesses. He recorded the fact of the complaint in February 1997 but the consideration of its relevance came towards the end of the charge when he said:

> "But at no stage did he intend to challenge [the complainant] about this absolutely appalling allegation which must have come out of the blue to him. The prosecution say, "Well, why not? If he really was innocent, the first thing you're going to do is say, 'Look why on earth are you making this allegation against me?'" because it was a serious allegation, he accepts, and was an allegation which ultimately led to the breakup of the marriage, a marriage that he was himself trying to save. The prosecution say, "Well, why on earth not?" Mr Weir made the point that maybe he should have gone to the police about this. Well, maybe that is taking it a little too far in reality, members of the jury, but the prosecution say, "Well, the reality, the explanation, the simple explanation for that is that he did not challenge the complainant because it was true." In fact, the allegation she was making was less serious than what actually happened. That is a matter for you, members of the jury."

[50] There are at least three proper criticisms which can be made of leaving the case in that way to the jury. The first is that the complaint made in February 1997 was of putting a hand up her nightie whereas the complaint made in 2005 was of rape. The jury needed to consider whether the omission of the rape allegation in the complaint of February 1997 called into question the truth or reliability of that allegation. The importance from the defence point of view of that difference does not seem to have been brought to the attention of the jury.

[51] Secondly and relatedly, the prosecution relied heavily upon the February 1997 complaint as evidence that C had not fabricated her evidence. It is apparent, however, that the first allegation of rape occurred when she went to police in 2005 at a time when she and the other co-complainants had agreed to pursue their father in very emotional circumstances. The complaint in February 1997 was not inconsistent with her having manufactured a more serious complaint in 2005. If the jury thought it reasonably possible that she enhanced the 1997 complaint in order to fabricate a more serious charge that would have raised concerns about the reliability of the entirety of her evidence. That does not appear to have been left to the jury.

[52] Of perhaps lesser significance in this case is the absence of any direction that the complaint evidence is not independent. We consider, however, that a direction making it clear that the complaint evidence was not independent ought to have been

given in light of the prosecution submission in the closing speech that the complaint was evidence of the truth of the charges.

Conclusion

[53] The test to be applied by the court has previously been set out by Kerr LCJ in *R v Pollock* [2004] NICA 34 and endorsed in *R v BZ* [2017] NICA 2:

> "1. The Court of Appeal should concentrate on the single and simple question `does it think that the verdict is unsafe'.
>
> 2. This exercise does not involve trying the case again. Rather it requires the court where a conviction has followed trial and no fresh evidence has been introduced on the appeal to examine the evidence given at trial and to gauge the safety of the verdict against that background.
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> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
>
> 4. The Court of Appeal must be persuaded that the verdict is unsafe but, if having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[54] In light of the matters set out above the court concludes that it has a significant sense of unease about the safety of these verdicts. Accordingly, we quash both convictions.