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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

SAMUEL BOYLES

Before: Carswell LCJ, Nicholson LJ and Campbell LJ

NICHOLSON LJ

Introduction

[1] The applicant was tried before His Honour Judge Rodgers and a jury on an indictment of seven counts of gross indecency with a child at Belfast Crown Court in December 2002. He had pleaded Guilty to the first count on 10 October 2002; and he was re-arraigned on the first count out of seven on the direction of the trial judge and pleaded Guilty to it again before the jury on 3 December 2002. His trial on the other six counts commenced on 3 December 2002 and he was convicted by a majority verdict of the jury (10-2) on 5 December 2002. He applies to this court for leave to appeal against these convictions. Leave to appeal was refused by the single judge in May 2003.

Offences alleged against the applicant

[2] On the first count the Statement of Offence was: Gross Indecency with a child contrary to section 22 of the Children and Young Persons Act (Northern Ireland) 1968. The Particulars of Offence were that the applicant on a date unknown between the 7th day of July 1991 and the 9th day of July 1994 in the County Court Division of Belfast committed an act of gross indecency with or towards a child [referred to hereafter as Miss H]. This count related to the first allegation of gross indecency made by Miss H. The next five counts were specimen counts. The second and third counts related to allegations of gross indecency between the 7th day of July 1991 and the 9th day of July 1992.

The fourth and fifth counts related to a period between the 7th day of July 1992 and the 9th day of July 1993. The sixth count related to a period between the 7th day of July 1993 and the 9th day of July 1994. The seventh count related to the final allegation of gross indecency made by Miss H.

Preliminary application before the trial

[3] Before the trial began Mr Larkin QC on behalf of the applicant submitted to the trial judge that as the applicant had pleaded Guilty to the first count he should not be required to plead Guilty before the jury on this count and the evidence on it should be excluded from the consideration of the jury in reaching their verdicts on the other six counts. The trial judge rejected this application.

Trial Judge's ruling

[4] Following submissions by counsel on 2 December the trial judge stated that there was an allegation by the injured party of a continuous pattern of abuse of a similar nature. The applicant had always admitted that there was a single, isolated incident. To remove count 1 from the jury would be to render the evidence in the case artificial, and in particular prevent the injured party from relating the whole of her evidence and prevent the defendant from fully attacking that evidence.

[5] The question of prejudice would have to be dealt with in the charge to the jury. He, therefore, would admit the plea of Guilty to count 1 in front of the jury and indicated that he thought that the applicant should be re-arraigned so as to plead Guilty to count 1 in front of the jury. On 3 December before the trial commenced he mentioned two passages from Blackstone's Criminal Practice 2002 to which he had been referred that morning. The first passage was at F12-16 under the heading `Previous Sexual Conduct and the Same Transaction rule.' The passage read:-

> "It is clear that the prosecution may adduce evidence regarding discreditable conduct by the accused where such evidence is part of the transaction under consideration (see F12.21 to F12.23). Under this rule evidence of sexual acts or advances other than those which are the subject of the charge is frequently adduced to show the true nature of the relationship between the parties, a practice which may be regarded as an acceptable and inevitable form of evidence of `guilty passion' (see, eg, *Ball* [1911] AC 47, and F12.15). In *DPP v Boardman* [1975] AC 421, for example, evidence of the accused's previous approaches to a boy with

> whom he was alleged to have committed buggery was admitted, including evidence of an indecent assault taking place several months before. Similar evidence was given by another complainant of indecent conduct leading over a period of time to incitement to buggery. As Lord Morris observed (at p 435), no question was raised at the trial as to the admissibility of such evidence. See also, eg, *Rearden* (1864) 4 F & F 76 (series of rapes on child regarded as one continuing offence); *Flack* [1969] 1 WLR 937 (evidence of previous indecency with alleged victim of incest).
>
> Where a complainant gives evidence of an earlier offence against him which is admissible under the `same transaction' rule, it has been held that evidence corroborating the earlier offence may go to support the complainant's testimony with regard to the offence charged (*Hartley* [1941] 1 KB 5)."

[6] He then referred to F12.24 and in particular the case of R v Bond [1906] 2 KB 389. He read out the passage at p400:-

> "The general rule [of exclusion of evidence of bad character] cannot be applied where the facts which constitute distinct offences are at the same time part of the transaction which is the subject of the indictment. Evidence is necessarily admissible as to acts which are so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances, and so could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible."

[7] He confirmed that the plea of Guilty and of the evidence on count 1 were admissible and he then directed that the applicant be re-arraigned on count 1.

[8] In the course of his summing-up he said:-

> "You have to decide enough to allow you to come to a decision on counts 2 to 7 of the charges laid against the defendant … The evidence is not in compartments … You also have to treat each of

> these charges separately … You do not consider count 1. That has already been dealt with … The first matter of law is an important one. You have heard the defendant admitted count 1 and admitted in front of you in court yesterday. Normally you will not have heard that but in this case the evidence would have been unintelligible without that information going to you. You must not assume that the defendant is guilty of the other offences because of his guilt of the first offence. Not only would that be bad in law but grossly unfair to the defendant and … inaudible … to decide that case purely on the facts and evidence. Each charge stands on its own feet and [evidence relevant] to one is not relevant to the guilt of the other."

[9] It seems apparent, therefore, that he admitted the evidence on the basis that it was part of the background to counts 2 to 7. He did not decide the issue of prejudice nor did he take into account his discretion under Article 76 of the Police and Criminal Evidence (NI) Order 1989 before he admitted it.

Allegations made by Miss H and the evidence at the trial

[10] Miss H, who was born in 1983, was 19 years of age when she gave evidence at the trial. She stated that from the time when she was 3 years old she would stay with the applicant and his wife at their ground floor flat in the Newtownards Road area of Belfast on Friday, Saturday and Sunday nights. There were two bedrooms, a front and back bedroom, a kitchen, bathroom and living-room. The applicant and his wife slept in the front bedroom and she slept in the back bedroom. At some stage the applicant moved into the back bedroom and slept there and she moved to the front bedroom where she slept with the applicant's wife. When she went to primary school nearby she stayed on Wednesday nights during the week. The applicant's wife went to church on Sunday morning and Sunday evening. She went with her on Sunday mornings. The applicant did not go to church. On Sunday evenings she would be alone with the applicant. She was scared of him because he shouted a lot and used bad language On a Sunday evening when she was eight years of age she was watching television in the front bedroom when he called her into the back bedroom. He had no trousers on. He was wearing pink underclothing akin to underpants. He told her to go into the front bedroom and asked her whether she thought he looked nice in them. She felt sick and disgusted. On the next Sunday night she had been out of the flat playing with a friend. The applicant called her into the flat and told her to go to the front bedroom; then he came in, took her wrist with his hand, pulled out his belt, pulled his trousers down, took his penis out, made her rub his

penis with her hand for about 10 minutes and said: "This is our secret, don't tell anyone. If you tell anyone I'll shout at you." She felt scared and disgusted. She was too scared of him to tell anyone.

[11] The only times she was on her own with him were on Sunday evenings. What had happened on the second Sunday evening, happened every other Sunday evening after that for 3 years. He did it on about 20 occasions when she was eight, and on every Sunday evening when she was nine and ten years of age except the times that she ran away so that he could not call her in from playing with a friend. On those subsequent occasions he did the same thing. He went into the front bedroom, tilted the blinds so that people could not see in but he could see out, made her rub his penis. It never happened on any other occasion than on a Sunday evening when his wife was at church. It did not occur every Sunday evening because there were occasions when she went to a caravan belonging to her grandmother at Easter and from the start of July until the end of August. The last time that it happened was when she was almost 11 years old. He called her into the room, tilted the blinds so that no one could see in but he could see out. He took her wrist and pulled his trousers down, pulled his penis out, made her rub his penis, let go of her wrist and tried to pull her trousers down. She struggled successfully to get out of the room. During that summer when she was 11 years of age she had her first period.

[12] She went to secondary school that year and when she was 13 years of age told a girlfriend who was 12 years of age what the applicant made her do to him. She spoke to her mother in September 2001 when she was 18 years of age, saw a doctor and reported the allegations to the police in October 2001.

[13] In cross-examination a version of facts on the first count was put to Miss H which was much more favourable to the applicant than were her allegations. She denied it. It was put to her that the allegations [of gross indecency] were very specific, always at a particular time and at a particular place. She agreed.

[14] The girlfriend of Miss H to whom she confided when she was thirteen years of age, according to her own testimony, told the court without objection from the defence that in first form at secondary school Miss H, then 13 years old, told her that the applicant had been abusing her when she stayed at his house, that it occurred when the applicant's wife was at church on Sunday evenings, that he would get her to touch his penis and had tried to get her trousers down on one occasion.

[15] The mother of Miss H told the court that on 19 September 2001 Miss H told her that she did not feel safe with boys of her own age because of what the applicant had made her do to him. The mother knew it was of a sexual

nature. She brought her daughter to see a doctor and her daughter was interviewed by the police on the following day.

[16] The applicant's wife gave evidence that on a day in September 2001 she came home and spoke to the applicant, saying: "Why did you do it? Why did you do it?" She was referring to Miss H. He said that he could not remember. The next morning she spoke to her husband and said: "All I want you to say is the truth. I need to know the truth." He said that he did do it, expose himself to Miss H. In cross-examination she said that he told her that it happened once and once only.

[17] Detective Constable Carroll gave evidence that he interviewed the applicant under caution on 10 December 2001. The applicant admitted that the first incident of gross indecency occurred but not the way Miss H said it happened. He said that she came in from playing. He was standing at the door of the working kitchen. He exposed himself. He put her hand on his penis. He said "put your hand on my penis". She said: I'll have to go now. My chum's coming." The incident lasted a couple of seconds or less than half a second. He said that it shouldn't have happened. He denied that any other such incident occurred. He said that the incident which she described as involving a pair of pink underpants occurred in the back bedroom; he was wearing pink swimming trunks and said nothing to her.

[18] The applicant gave evidence, admitting that he behaved improperly or indecently with Miss H on one occasion as he had described it to Detective Constable Carroll. He said that it was a spur of the moment thing and was not planned. He did not give evidence in chief of the incident about the pink underclothing which according to him and his wife were pink bathing shorts. He was cross-examined by Mr Hunter QC on behalf of the prosecution about the first incident and was asked why he put her hand on his penis. He said that he did not know why he did so and did not do so because he wanted to give himself a degree of sexual pleasure or because it excited him. He repeated that he had no answer as to why he did it. His version of what happened did not involve many of the "similar facts" which Miss H described in respect of the incidents alleged to have occurred.

Challenge to the ruling

[19] It is contended before this court that the trial judge erred in law and irredeemably prejudiced the fairness of the proceedings. It is unnecessary to set out the grounds of appeal as they are contained in and expanded by the written and oral submissions of counsel.

Application to stay the proceedings

[20] Before setting out the skeleton and oral argument it may be worthwhile to recall that an application was made before the trial judge to stay the proceedings as an abuse of process. Amongst the submissions presented in a written skeleton argument for the applicant was one which was headed:

Presentation of case in light of plea

It was contended as follows:-

> "A separate but related issue is how the Defendant can receive a fair trial in light of his plea of guilty to one count. The trial process is then presented with a quandary. On the one hand, the jury should not be informed of the first incident to which the Defendant has pleaded guilty as this would be highly prejudicial. No reference should be made to the incident, to Mr Boyles' admission in interview or to his guilty plea. On the other hand, the prosecution (and the alleged injured party) is presented with a difficulty in presenting its/her evidence of the alleged conduct, having to start with an incident other than that which is alleged to be the first in the series.
>
> Moreover, Mr Boyles is severely curtailed in the way in which he presents his case. He would not be able to effectively present his version of events which has consistently and persuasively been that it only happened once, that it shouldn't have happened and that he is sorry. He would be driven to denying everything which is put to him and the whole evidential process would become exceptionally artificial."

[21] Understandably the skeleton argument for the applicant on this appeal was focused on the ruling by the trial judge that the plea of guilty and the evidence on count 1 were admissible as evidence of misconduct forming part of the background to the other counts on the indictment.

[22] The first submission was that evidence of previous convictions is not admissible as not being relevant to a fact in issue in the proceedings. Even where an exception to this rule may be invoked, there is considerable caution about the admission. Reference was made to the Law Commission's Report

on Evidence of Bad Character in Criminal Proceedings (Cm 5257). In the present case the trial judge had directed that the applicant be re-arraigned.

[23] Secondly, if such evidence were admissible, it ought not to have been admitted because its prejudicial effect outweighed its probative value.

[24] Thirdly, if the injured party might have been able to give evidence about the first incident to assist in the presentation of her narrative – thus coming within the "background" exception discussed in paragraphs 2.9 and 4.11-12 of the Law Commission's Report, that is no reason for the admission of the obviously prejudicial plea of guilty to it. This would have led the jury to reason that "he has done it once, he must have done it again" or at least he is more likely to have done it again. The trial judge was wrong to comment to the jury that the evidence would have been unintelligible without that information [about count 1] going to them.

[25] Fourthly, the forbidden inference referred to in the third submission could not have been prevented or deterred by the clearest of warnings to the jury. As it was the trial judge's warning on the issue is not satisfactory. He does not make it clear that the jury should not use the evidence as evidence of propensity. Prosecuting counsel spent some time cross-examining the applicant on the incident giving rise to the first count.

In all the circumstances the admission into evidence of the applicant's plea of guilty was grossly prejudicial and, compounded by the judge's lack of clear direction to the jury, renders the convictions on counts 2 to 7 unsafe. These submissions cover Ground 2; Ground 1 was abandoned before this court.

[26] Fifthly, the alleged offences being tried in the course of these proceedings were committed between 1991 to 1994. The law of evidence at that time required that the jury be warned of the danger of convicting an accused of offences of this type on the uncorroborated evidence of the alleged injury party. See *Phipson on Evidence* (14th edition, 1990, Sweet & Maxwell) at paragraph 14-12.

[27] In this case, the injured party's evidence was uncorroborated. No such warning as was required by the law of evidence at the time of commission of the alleged offences was, in fact, given by the trial judge. This was presumably by reason of article 45 of the Criminal Justice (Northern Ireland) Order 1996 which abrogated the corroboration rules. However, the applicant has thereby suffered prejudice in the manner in which the jury was directed by reason of the retrospective application of the 1996 Order. This is contrary to the requirement in Article 7 of the Convention that criminal laws should not be given retrospective application. See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (1995, Butterworths) at page 275 where it is contended that a change in the rules of evidence to the detriment

of the accused may be so closely related to the finding of guilt of a criminal offence that it is within the prohibition of Article 7. See further *X v UK* No 6683/74, 3 DR 95 (1975) and the helpful exposition of the analogous provision in the United States Constitution in *US v Williams* 475 F2d 355 (1973) and *US v Henson* 486 F2d 1292 (1973).

[28] In any event, it is now clear that the common law has developed to protect the interest of accused persons facing allegations of sexual abuse of some vintage. In the present case nothing approaching a corroboration warning was given to the jury and the trial judge noted that the delay of seven to ten years before the allegations were made `puts the defendant at a disadvantage' [see page 119 of the book of appeal]. It is submitted that what may be distilled from the approach of the English Court of Appeal in *Dutton* [1994] Crim LR 910 and *Bell* [2003] EWCA Crim 319 is that in the absence of an effective warning to the jury about the dangers inherent in this type of case a conviction may not be regarded as safe: see Cooper, `Corroboration of Sexual Offences and Abuse of Process' [2003] 6 *Archbold News*. Although reference is made in the fifth ground of appeal to Article 6 of the Convention, it is suggested that this adds little, if anything, to the common law as it currently stands." These submissions cover Grounds 4 and 5.

[29] Sixthly, one of the matters which may assist the court in weighing the sixth ground of appeal (as amended) is the evidence of the applicant's wife, to the effect that there had been a discussion between her and the injured party about criminal injuries compensation. Such a conversation is denied by the injured party. It is submitted that the trial Judge erred when dealing with this issue at page 11 of his charge by indicating that there was no need for the jury to `decide it'. Plainly, if the jury took the view that Miss H was lying about this issue, then that is a matter that would have told against her credibility generally in supplying a motive for an exaggerated depiction of the applicant's conduct. The effect of the trial Judge's instructions was to preclude consideration of this issue by the jury.

[30] Seventhly, it is striking that in this case no concrete facts or details were supplied by Miss H about the sexual activities of the applicant upon her. It is not a question of a child being unable to use technical terms, rather of an absence of any meaningful description. Further, it is submitted that the conduct of the injured party in remaining alone with her uncle and, on her case, submitting to abuse is utterly implausible when considered alongside the readily accessible escape route afforded by church on Sunday evening. These submissions cover Grounds 3 and 6.

Conclusions

[31] In our view the evidence on the first count from Miss H was relevant and admissible as part of the background to the second to seventh counts because it tended to show, if accepted by the jury, a guilty desire on the part of the applicant to be masturbated by her in the knowledge that she would keep their "secret" because of his threat to her that if she ever revealed that "secret" he would shout at her and he knew that she was sufficiently frightened by the threat that she would keep silent. It also tended to show why she did not disclose the secret but kept silent. If it was omitted from her account of what took place between them on following Sundays the totality of her account would be incomplete and unintelligible. The fact that the whole account involved including evidence establishing the commission of an offence which was the first count on the indictment to which the applicant had pleaded guilty was not of itself a ground for excluding the evidence, provided that it was relevant and admissible.

[32] However, it was the duty of the trial judge to weigh its probative value against the prejudice to the accused in so far as it also tended to show a disposition or propensity to commit acts of gross indecency with this young girl and to have regard to Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1976. Article 76(1) provides:-

> "In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstance in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

He does not appear to have exercised his discretion before admitting the evidence and we will return to this at a later stage of our judgment.

[33] The principle under which background evidence may be admitted has already been referred to in the citations from Blackstone on which the trial judge relied. In Archbold, Criminal Pleading, Evidence and Practice 2003, it is stated at 13-34:-

> "A distinction should be drawn between evidence of similar fact, usually relating to offences against persons other than the alleged victim of the

> offence charged, and evidence of other acts or declarations of the accused indicating a desire to commit, or reason for committing, the offence charged, ie motive. This distinction is sometimes blurred in reported decisions."

The passage from Archbold continues:-

> "Although the prosecution does not have to prove motive, evidence of motive is always admissible in order to show that it is more probable that the accused committed the offence charged. The position is well stated in a dictum of Lord Atkinson during the argument in R v Ball [1911] AC 47:-
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> > `Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to show that he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove that the fact of the homicide by the accused as well as his `malice aforethought' in as much as it is more probable that men are killed by those that have some motive for killing them than by those who have not" (p68).'
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> As Ball was a case of incest, it is clear that Lord Atkinson's remarks were of general application …"

[34] We would add that Lord Loreburn LC also referred in argument at p68 to the words of Kennedy LJ in R v Bond [1906] 2 KB 389 at 401:-

> "The relations of the murdered or injured man to his assailant as far as they may reasonably be

> treated as explanatory of the conduct of the accused as charged in the indictment, are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial."

In the course of his speech with which the rest of their Lordships concurred Lord Loreburn LC said:-

> "Further evidence was then tendered to show that these persons had previously carnally known each other and had a child … The object was to establish that they had a guilty passion toward each other, and that, therefore, the proper inference from their occupying the same bedroom and the same bed was an inference of guilt."

[35] At 13-35 the learned editors of Archbold refer to R v Berry (DR) 83 Cr App R 7 and the reference by the Court of Appeal to the "dubious authority of Ball". They then refer to R v Williams (CI), 84 Cr App R 299 in which Hodgson J giving the judgment of the Court of Appeal, stated that their Lordships considered that the dictum of Lord Atkinson in Ball and of Kennedy LJ in Bond correctly represented the law.

The head note in Williams reads in part:-

> "… evidence of motive was admissible to show that it was more than probable that an accused person had committed the offence charged, and in the present case [on a charge of making threats to kill] the evidence of the appellant's previous history was admissible in the trial judge's discretion, as tending to show that the appellant intended his threats to his intended victim to be taken seriously."

[36] The court in Williams, as is pointed out in Archbold, approved the passage in R v Pettman (Unreported: 2 May 1985) in which Purchas LJ, giving the judgment of the Court of Appeal said:-

> "… where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that

> the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence."

In R v Fulcher [1995] 2 Cr App R 251 at 257 Kennedy LJ said:-

> "The earlier injuries were also relevant as tending to show that right up to the time of the fatal injury the child would have been in some pain, and so more liable to be fractious than a normal healthy baby. The prosecution was then, in our judgment, entitled to lead evidence to show how on other occasions the appellant reacted to the crying baby, so that they could invite the jury to infer that on the critical occasion the appellant was so irritated that he resorted to gross violence. In other words the evidence now challenged was evidence of motive. It went to the actus reus and the mens rea. It was not intended as evidence of similar facts …"

He went on to approve the dictum of Lord Atkinson in Ball and of the passage cited from the judgment of Purchas LJ in Pettman.

[37] In her commentary on R v Stevens (1995) Crim LR 649 at 651 Professor D L Birch said:-

> "Background evidence is admitted in order to put the jury in the general picture about the characters involved in the action and the run-up to the alleged offence. It may or may not involve prior offences. If it does so, it is because the account would be as Purchas LJ says [in Pettman] "incomplete or incoherent". Professor Birch substituted "incoherent" for "incomprehensible" but the sense remains the same. She went on:-
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> "It is not so much that it would be an affront to common sense to exclude the evidence, rather that it is helpful to have it and difficult for the jury to do their job if events are viewed in total isolation from their history".

See also R v Sidhu, 98 Cr App R 59, R v M and Others [2000] 1 WLR 421 and R v Sawoniuk [2000] 2 Cr App R 220.

[38] In the present case the first count related to the first allegation by Miss H of gross indecency when she was eight years of age to which the applicant pleaded Guilty. The second and third counts related to similar allegations of gross indecency when she was eight years of age and were specimen counts. So were counts 4, 5, and 6 which related to specimen counts of similar allegations of gross indecency when she was nine and ten years of age. Count 7 related to her final allegation when she said that he went a step further after the act of masturbation by trying to pull her pants down and she managed to run away.

[39] We have set out the evidence of Miss H at paragraph [5] of this judgment. In our opinion this evidence about the first offence could have been admitted in support of counts 2 to 7 in accordance with the principles in DPP v P [1991] 2 AC 447 relating to evidence of similar facts. It allegedly occurred on a Sunday evening when the applicant's wife was at church. It allegedly occurred in the front bedroom of the house where he and his wife had previously slept together until he moved to the back bedroom. He allegedly arranged the blinds so that he could see out but others could not see in and he allegedly took her wrist with his hand and placed her hand on his penis and required her to rub it for some minutes. But the trial judge did not admit the evidence on count 1 on this basis, nor were the jury given directions appropriate to consideration of similar facts. Its admissibility must, therefore, stand or fall on the grounds that it is covered by the principles relating to background evidence which we have set out. We consider that it is as relevant to count 7 as to count 2 although further away in time. We recognise that it is background evidence to more than one offence; we hold that it is background evidence to a series of offences, of which counts 2 to 6 were specimen counts. We say this having regard to the passage in Cross & Tapper (9th edition) at p343:-

> "It is possible to categorise these various cases as being those in which the evidence from which the inference of the accused's disposition is drawn is so closely entwined and involved with the evidence directly relating to the fact in issue that it would amount to distortion to edit it out. Such an approach is potentially dangerous because the notion of involvement is rather vague and could easily be used to smuggle in otherwise inadmissible similar fact evidence by an extended view of what is to count as a single event."

[40] We do not regard this evidence as "smuggled in because it would otherwise have been inadmissible similar fact evidence." The evidence about the first count was close in time, place and circumstances to the facts and circumstances of the offences charged in respect of the following Sunday and

Sundays. It completed Miss H's account of the circumstances of the offence alleged to be committed on the following Sunday and the following Sundays and this made it comprehensible to the jury. It tended to establish a relationship with the victim of the offence committed on the following Sunday and the following Sundays and the previous misconduct related to her. It assists in establishing the motive behind the offences charged. These are the four "indicators" referred to by the Law Commission in their consultation paper and report (Cm 5257) at paragraph 10.1. See also 10.2 to 10.10. We have read and gained assistance from a number of Commonwealth case. But they were not discussed in argument. However, we have taken them into account.

[41] In our opinion the trial judge had a duty to consider whether the evidence was more prejudicial than probative and to have regard to Article 76(1) of the Police and Criminal Evidence (NI) Order 1989. Where the trial judge has not exercised a discretion, it falls to the Court of Appeal to perform that task in relation to the material before the trial judge: see R v Cook (1959) 43 Cr App R 138 and R v Miller [1997] 2 Cr App R 178 at 188 (per Rose LJ). We exercise that discretion in favour of the Crown. It was undoubtedly prejudicial to the applicant, although not seriously prejudiced if the jury accepted his account of it, rather than Miss H's account. In fact, if they accepted his account to the police, it was helpful. But it was relevant and, as we have said, was inextricably linked with the events which came after it, if believed. If edited out, it would have made the rest of the evidence unintelligible and evidence of motive and of her reaction to his threat would have been excluded. Avoiding cross-examination of the girl, defence counsel could have commented to the jury in his closing speech: why did she not tell what happened?

G. The exercise of discretion

[42] It was said in Lowery v The Queen [1974] AC 85 at 99:-

> "In some circumstances evidence that may have some relevance is not admissible because its prejudicial effect [heavily] overbalances its probative value and as a matter of fairness or of public policy a court will not allow the prosecution to call such evidence."

Other authorities suggest that the test is that the probative value must outweigh or significantly outweigh the prejudicial effect. We have adopted the most stringent of the tests. Evidence which does no more than tend to show that the appellant has a disposition or propensity or is the sort of person likely to commit crimes of the nature charged is inadmissible. We have also taken into account Article 76(1) of the PACE Order. We regard the evidence as significantly more probative than prejudicial and do not consider that its

admission would have such an adverse effect on the fairness of the trial that the trial judge ought not to have admitted it, having regard to the reasons we have given for admitting all the evidence of Miss H.

[43] The trial judge directed the jury not to rely on the evidence in count 1 to support the evidence on counts 2 to 7 and also directed them to treat the evidence on each of counts 2 to 7 separately. He did not tell the jury, as we consider that he was entitled to do, that the evidence on count 1 was relevant and admissible on counts 2 to 7 for the reasons which we have given.

[44] It follows from what we have said about the probative effect of Miss H's evidence that Crown Counsel was entitled to refer to the plea of Guilty on Count 1 in his opening speech to the jury. The applicant's wife was called to give evidence that in September 2001 she asked him about the allegations recently made against him by Miss H. [She told her mother on 19 September 2001.]

> "Q. What did you ask him about?
> A. I just said to him: 'Why did you do it? ….
> Q. Did he say anything to you?
> A. He said he couldn't remember."

The next morning she spoke to him again and he said he did do it, expose himself to Miss H. In cross-examination she stated that he said it happened once only. In our view this evidence was relevant and admissible as evidence of his reaction to the series of allegations being made against him by Miss H.

[45] It also follows that the Crown was entitled and had a duty to call evidence about the police interview with the applicant. All the allegations of Miss H were put to him including the allegation about the first act of gross indecency. He answered "It happened but not the way she said it … She was out playing … She came in … I was actually standing at the door of the working kitchen. H came in to go to the toilet … I did do what she says. I did expose myself …" He admitted that he put her hand on his penis. The incident only lasted "a couple of seconds … And that was it. That was the only time". If, on the other hand, she was believed, all the acts occurred in the front room in the way described by her. If there was a reasonable possibility that his account was true it cast doubt on her whole story.

[46] We do not consider that it was appropriate to re-arraign him so as to plead Guilty to the first count in front of the jury as he had already done so when he was first arraigned. But as it was permissible for Crown counsel to refer to the plea, the re-arraignment was not a material irregularity.

[47] The requirement for corroboration of Miss H's evidence was abrogated by Article 45 of the Criminal Justice (Northern Ireland) Order 1996.

Accordingly the trial judge was not obliged to give a warning of the danger of convicting the applicant on the uncorroborated evidence of Miss H. Mr Larkin QC on behalf of the applicant sought to call in aid Article 7 of the Convention, citing a passage from Harris, O'Boyle and Warwick's Law of the European Convention and Human Rights (1995) at p. 275. In Quinn v United Kingdom (Application No. 23496/94) the European Commission of Human Rights held that Article 7 was concerned with the creation of criminal offences and not with the retrospective application of rules of evidence: and see X v UK (1976) 3 DR 95. This change in the rule of evidence is not "inextricably linked to the accused person's guilt or innocence" (Harris, O'Boyle & Warwick, Law of the European Convention on Human Rights (1995) p. 275). See also Emmerson and Ashworth, 15-146: Lester and Pannick, Human Rights Law and Practice p. 161. The fact that there was a majority verdict rather than an unanimous one does not make the convictions unsafe. The circumstances of the case do not require a warning or a direction as to what might amount to corroboration, having regard to the Order of 1996.

[48] The judge was entitled to comment that the evidence would have been unintelligible without the evidence about count 1, and, as we have indicated, could have gone further. Prosecuting counsel was entitled to cross-examine the applicant on the incident giving rise to the first count, because it was relevant and admissible as to the motive for his subsequent behaviour. We do not consider that the convictions on counts 2 to 7 are unsafe merely because the applicant was re-arraigned on count 1, although we do not consider that it was appropriate. We have dealt sufficiently with the arguments set out in the fifth submission; we reject the contention that the absence of an effective warning to the jury about the dangers inherent in this type of case renders a conviction unsafe. We do not consider that the judge gave a `model' summing-up but are of the opinion that none of the criticisms which can be made of it render any of the convictions unsafe.

[49] It was not suggested to Miss H that she had made up the allegations of gross indecency in order to obtain more compensation than she would have been entitled to as a result of the first act of gross indecency. Accordingly the trial judge was entitled to tell the jury that there was no need to decide whether there was a conversation between Miss H and the applicant's wife about compensation. The final submissions about the conduct of Miss H were for the jury to decide.

[50] Accordingly the application is dismissed.