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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

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Before Morgan LCJ, Weatherup LJ and Weir LJ

WEIR LJ (delivering the judgment of the court)

Introduction

[1] This is an application for leave to appeal out of time against convictions on 24 April 2015 on four counts of indecent assault, five counts of sexual assault, one count of gross indecency, one count of sexual assault on a child under 13 years, one count of sexual assault by penetration, thirteen counts of indecent assault on a female and four counts of sexual activity by an adult with a child under 14 years.

[2] The applicant was represented by Mr McKay QC and Mr Bernard and the prosecution by Mrs Dinsmore QC and Mr Steer.

The Background

[3] This case involved allegations of the historical sexual abuse of two females whose evidence was that they had as children been repeatedly abused by the applicant, a much older male relative. This judgment has been anonymised to protect the identities of the women concerned.

[4] The applicant was tried on a number of occasions but the first three trials had to be aborted. However, the fourth trial ("the December trial") resulted in verdicts, some of which were acquittals by direction of the trial judge while the remaining counts, apart from acquittals by the jury on two counts of alleged rape against the complainant D ("D"), resulted in disagreements by the jury.

[5] There then followed a fifth trial ("the April trial") before a different judge on those counts upon which the jury had disagreed at the December trial. On this occasion the jury convicted the applicant on all the counts detailed at [1] above. During the course of the April trial Mr McKay had applied to the judge for leave to reveal to the jury in the course of cross-examining D that the applicant had been acquitted of her rape at the December trial. He acknowledged that leave to do so was required and submitted that the fact of the acquittals was a relevant matter going to the credit of D in a trial in which there was no independent evidence so that this was a case of "her word against his" and therefore the acquittals were a matter which in fairness to the applicant should be brought to the notice of the April jury. The application was resisted by Mrs Dinsmore. After rising for a short adjournment the learned judge gave the following *ex tempore* ruling:

> "I had an opportunity of considering the decision in R v Preko. In relation to this matter I have a jury at hearing and I am going to give my ruling at this stage which if necessary I can put into writing if required or it is necessary to do so later.
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> In relation to this matter I refuse the defence application to introduce the evidence of the previous acquittal. I do that on the basis that an acquittal is not conclusive evidence of innocence and does not establish that all the issues were resolved in favour of the accused. I rely particularly on paragraph 32 of R v Preko where it indicates that:
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> > "Evidence of an earlier acquittal is generally irrelevant and therefore inadmissible, and in most cases it is impossible to be certain why a jury acquitted."
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> I do note that there is an expectation to that and that expectation being that where a witness' credibility is directly an issue and there is a clear inference that the jury rejected his or her evidence because it did not believe him or her would be an exception. In circumstances of this case I cannot be satisfied that this acquittal was such an acquittal and was based upon a clear inference that the jury rejected the evidence of the complainant and did not believe her at that time. So accordingly I view that the acquittals in relation to the rapes as a matter of law are irrelevant to the circumstances of this case."

The April trial accordingly proceeded thereafter without any reference to the December rape acquittals.

[6] Following the convictions on 25 April 2015 a Form 2 Notice of Application for leave to appeal those convictions ought to have been lodged within 28 days. The printed notes attached to the form make that time requirement clear. However, the notice was not then lodged. On 28 July 2015 the applicant was sentenced to 12 years imprisonment and only on that date did defence counsel ask the judge to provide, as he had offered to do when giving his *ex tempore* ruling, his written reasons for refusing to permit the April jury to learn of the December acquittals for rape. The judge agreed to do so.

[7] Even then no application for leave to appeal was lodged, the applicant's advisors apparently waiting before doing anything for the judge's written reasons which did not become available until 14 December 2015. Even then no attempt to give notice of intention to seek to appeal was made until 5 May 2016 but no Form 2 was lodged and the correct Notice of Intention to seek leave to appeal was not perfected until 5 July 2016, fourteen months after the convictions. Gillen LJ refused the application for the requisite extension of time. Accordingly, the applicant now applies to this Court for the extension of time and for leave to appeal.

The relevant legal principles

[8] It was agreed between the parties that the principles to be applied to admit evidence such as this continue to be those set out in R v Deboussi [2007] EWCA 684 in which, having reviewed the earlier authorities, the court said:

> "[29] It seems to us that the following principles have been established by these cases.
>
> (1) The general rule is that evidence of previous acquittals is not admissible. The reason for this given in Hue Chi-Ming was that an acquittal is no more than evidence of the opinion of the previous jury, but, as we said, taken alone, that would be a reason for never admitting evidence of a previous acquittal. It seems to us that the true rationale for the general rule is that in most cases it is not possible to be certain why a jury acquits a defendant. It follows that in most cases a jury will not be assisted by knowing of a previous acquittal. On the contrary, there is a real danger that if they are told of a previous acquittal the jury will be deflected from their task of determining the case before them on the evidence that they have heard by considerations of what actuated the earlier jury to acquit.

[30] (2) But exceptionally a jury may be told of a previous acquittal. As the editors of the current edition of Archbold neatly put it at para 4-332:

> "The principle to be derived from Cooke, *ante*, seems to be that where there is a clear inference from a verdict that the jury has rejected a witness's testimony, on the basis that they do not believe him (as opposed to thinking he might have been mistaken) and that witness's credibility is directly in issue in a subsequent trial, evidence of the outcome of a first trial is relevant. For further refinement of this principle, see R v Edwards."

[31] (3) In applying the criteria referred to in (2) the court should stand back and consider whether fairness to both sides requires the jury to know of a previous acquittal. The court should always be astute to the danger that we have referred to in (1) above."

[9] Deboussi and the preceding authorities together with a more recent authority of R v Preko [2015] EWCA Crim 42 were considered by this court in R v L (COG9669) on 10 June2015 and the Deboussi principles together with the observations of Rafferty LJ in Preko were adopted. The following passages from the latter were referred to in R v L:

> "[32] During submissions the judge was taken to authorities to the effect that an acquittal is not conclusive evidence of innocence and does not establish that all relevant issues were resolved in favour of the accused: Terry [2005] QB 996. Evidence of an earlier acquittal is generally irrelevant and therefore inadmissible: Hui Chi Ming v R. In most cases it is impossible to be certain why a jury acquitted. An exception may exist where a witness's credibility is directly in issue and there is a clear inference that the jury rejected his evidence because it did not believe him – see for example Edwards [1991] 2 All ER 226.
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> [72] Once again, in our view it would achieve nothing to speculate ad infinitum on the range of potential explanations for these acquittals. That one jury in one trial did not find the Crown's case proved to the criminal standard is of no relevance to the decision of the jury in the retrial."

[10] One of the prior authorities cited with approval in Deboussi is close on its facts to the instant case. R v H (JR) (1990) 90 Cr App R 440 concerned charges of alleged sexual misconduct involving two children, S and C, who were at the time aged 9 and 8, on the part of a man who was co-habiting with their mother. At the first trial the appellant was acquitted by the jury on two counts of indecent assault upon child S but on four counts of buggery and two others of indecent assault the jury failed to agree. A retrial was ordered on those counts at which counsel for the appellant sought leave to adduce evidence of the acquittals at the first trial. The trial judge refused leave on the ground that it would deflect the jury's attention from the issues and evidence before them and cause them to speculate on what motivated the previous jury. Lord Lane CJ, having observed that the jury in the first trial did not reject S as a liar otherwise they would not have disagreed on the other counts concerning her, said at page 445:

> "It seems to us that in a case such as this the judge has a very difficult exercise to perform. He has to balance the interests of the defendant against the interests of the prosecution, and he has to determine in the light of those considerations what in his judgment would be fair, because like so many problems in the criminal trial, it is fairness rather than any remote, abstruse legal principle which must guide the judge. Coupled with that fairness, if indeed it is not part of it, is the necessity for the judge to ensure that a jury who he is assisting do not have their minds clouded by issues which are not the true issues which they have to determine.
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> We now turn to apply those principles to the questions which the judge in this case had to determine. If the evidence as to the acquittals on counts 1 and 3 went in, then the learned judge was quite right, and neither counsel seem to have dissented from his view, that the evidence as to the disagreements on all those other counts would have to have gone before the jury. As the judge rightly indicated, if that had been the case, the danger would be that the jury to whom he was addressing his remarks would have likely been spending their time not in determining what they believed to be the truth in the evidence which they had heard, but they would be deflected from that course by consideration as to what had actually actuated the earlier jury to come to the various conclusions that they did."

[11] An example of an exceptional case whose facts pointed in the other direction was Cooke (1987) 84 Cr App R 286 where four defendants were claimed to have made confessions to the same police officer. Two had been acquitted at a trial in circumstances where it was clear that the jury must have rejected the evidence of the police officer whose credibility had been directly in issue, there being a clear inference that the jury had rejected his evidence because it did not believe him. In the subsequent trial of the other two defendants the trial judge had refused a defence application to cross-examine the officer about his evidence of the claimed admissions at the earlier trial. The Court of Appeal allowed the appeal, Parker LJ saying at p 293:

> "In the present case although the acquittal and its circumstances which were sought to be relied on related to different accused and a different offence, the circumstances were that the credibility of DC Spreckley was a vital matter and the offences and interviews were so closely connected that the defence ought in our judgment to have been allowed to bring the matter out."

Submissions on behalf of the Applicant

[12] Mr McKay presented his arguments with characteristic economy and realism. He conceded that the Notice of Intention to seek leave to appeal could have been drafted and lodged within time and without awaiting the written reasons of the April trial judge and further that there was no explanation for the continuing omission to perfect the notice for a further six months after the judge's written reasons became available. He therefore further conceded that, on the authority of this court in R v Brownlee [2015] NICA 39, this was a case falling within the category identified at para [8](vi) thereof:

> "Even where there has been considerable delay or a defendant had initially taken the decision not to appeal, an extension of time could well be granted where the merits of the appeal were such that it would probably succeed."

[13] Turning to the merits of the appeal, Mr McKay's submission was that, while accepting in agreement with the prosecution that the legal principles are correctly identified in Deboussi and Preko, the proper application of those principles by the trial judge to the circumstances of the present case ought to have caused him to rule in favour of the admission of the rape acquittals at the December trial. He challenged the judge's conclusion that "the December jury may not have been satisfied regarding penetration with the defendant's penis" asserting in his skeleton argument that "the question of penetration was never an issue in the December trial. D gave a very clear description of having been penetrated by the applicant. If D's version had been accepted by the jury then penetration could never have been

doubted …" Unfortunately this submission proved to be factually incorrect. A transcript of Mr McKay's cross-examination at the December trial was provided to this court by the prosecution and it is abundantly clear from it that Mr McKay had made a considerable issue of the possibility of penetration when he then cross-examined D. Some examples of his questions on the topic will suffice:

> "Q. How did he manage to get his penis inside you with you on the floor?
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> A. I don't know. He was lying on top of me.
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> Q. How did he get his penis inside your vagina at the age of 7?
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> A. I don't know.
>
> Q. How could that physical act have occurred with you, a wee girl of 7? How could he have perpetrated that on you?
>
> A. I don't know."

From a consideration of these questions and answers and others on the same theme contained in the transcript it is plain that the submission that "the question of penetration was never an issue" was erroneous as plainly that question was very much in issue at the December trial and the judge at the April trial was not wrong to surmise that the December jury may not have been satisfied regarding penetration.

[14] Mr McKay further submitted that while the fact of the disagreement by the December jury on the remaining counts involving D must mean that while some jurors must have accepted D's evidence on those counts as truthful the fact of the acquittal on the rape counts must mean even those jurors did not accept her evidence in respect of the rape allegations as truthful.

[15] Thirdly, he submitted that the April trial judge had failed "to sufficiently elicit or to properly examine" the circumstances of the December rape acquittals and had thereby failed to follow the Deboussi guidance so as to properly determine whether a clear inference could be drawn from the previous acquittals. In his submission the judge had thereby necessarily failed to balance the competing interests of the applicant and the complainant in deciding whether fairness to both sides required the jury to know of the previous acquittal.

[16] Finally however, Mr McKay candidly if unexpectedly acknowledged in response to a question from the court that the convictions to which this application relates are not unsafe.

[17] The court did not find it necessary to call upon the prosecution.

Conclusion

[18] This court affirms its view as expressed in R v L that the principles governing an application that a jury be told of a previous acquittal are those set out in Deboussi as more recently affirmed in Preko. The general rule is that evidence of previous acquittals is not admissible. Only in an exceptional case, of which Cooke is one example, may a jury be told of a previous acquittal.

[19] In every case where such an application is made the task of the trial judge is to stand back and consider whether fairness to both sides in the particular case requires the jury to know of a previous conviction.

[20] This court is quite satisfied that this was not such an exceptional case. In his brief *ex tempore* ruling the April trial judge referred to the then recent case of Preko, he recognised that there are exceptional cases where a clear inference exists that the jury rejected a witness' evidence because he or she was not believed but he held that this was not such a case. This court agrees. The recently obtained transcript of the December cross-examination of D confirms that there may have been any one or more of a number of reasons for the December jury verdicts of not guilty on the rape counts. Moreover, the fact that the jury disagreed on the remaining counts concerning D may indeed indicate that the December jury did not find D untruthful.

[21] It follows from that and from Mr McKay's frank concession that the April convictions were not unsafe that this late application for leave to appeal cannot succeed. Accordingly, we do not extend time for the bringing of the application.

[22] For completeness we conclude by saying something about Mr McKay's third submission, that the April trial judge failed to elicit or examine the circumstances of the December rape acquittals and had thereby failed to properly determine whether a clear inference could be drawn from the previous acquittals. This is a surprising submission which seeks to cast upon the April trial judge the obligation to carry out his own investigation into the circumstances surrounding the December acquittals. Our response to that is firstly, that in an adversarial trial system such as ours it is the responsibility of the parties and their advocates to bring to the attention of the court any matter of fact or of law that may assist their case and not the judge's responsibility to embark unasked and unaided upon his own enquiries. Secondly, Mr McKay was counsel in the December trial and his junior counsel or solicitor ought to have had a proper note of his cross examination of D. Thirdly, as we have said, the April trial judge was not the judge who had conducted the December trial. Fourthly, there was ample opportunity between December and April for the applicant's advisors to obtain a transcript of any relevant part of the December hearing. Fifthly and in any event, when the transcript of the cross examination of D was ultimately obtained for this court on the initiative of prosecuting counsel, it demonstrated that it was by no means to be inferred from it that the December jury

must have disbelieved D as a witness. We are satisfied that there is no substance in this submission.