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

Delivered: **01/04/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

TN

Before: Morgan LCJ, Treacy LJ and Huddleston J

MORGAN LCJ (delivering the judgment of the court)

[1] The appellant appeals against a jury's finding pursuant to Article 49A of the Mental Health (Northern Ireland) Order 1986 that he committed 23 historic offences of assault and sexual offences, including rape, common assault, indecent assault on a female and gross indecency with a child, against two of his daughters in the early 1980s. He was sentenced to a three year supervision and treatment order.

[2] The appellant was granted leave to appeal against these findings by the Single Judge on 12 September 2017 on the sole ground that the trial judge had arguably erred in admitting bad character evidence in respect of the appellant. Mr Lyttle QC and Mr Burns appeared for the appellant and Mr Weir QC appeared with Ms McCullough for the PPS.

Background

[3] The appellant was born on 29 January 1943 and is now 75 years of age. He was arraigned on 27 May 2014 and pleaded not guilty to all counts. He was re-arraigned on 3 February 2015 and pleaded guilty to all counts. Prior to sentence the appellant instructed that he wished to vacate his plea. He then obtained new legal representation. In light of fresh medical evidence that he was suffering from dementia, Her Honour Judge Smyth vacated his plea on 11 March 2016. He was further re-arraigned on 12 April 2016 and pleaded unfit to plead which plea was accepted. A fact-finding trial commenced on 16 June 2016 in respect of all counts. On 30 June 2016 the jury unanimously found that the appellant had committed the acts set out in Counts 1-23.

[4] The charges all relate to the actions of the appellant in respect of two of his daughters, VP who was born on 20 October 1969 and HB who was born on 29 April 1967, whilst they were minors, on various dates between 20 October 1980 and 20 October 1989. The offending was said to have taken place when the complainants

were individually assisting their father with tasks in the evening after school. VP described how, when she was 11 years old approximately, her father asked her to touch his penis – something that subsequently became a regular occurrence. On the occasions when she refused he threatened to "thump her". This progressed to the point where the applicant – with the on-going threat of violence – forced her to masturbate him. VP also complained that the applicant touched her breasts and digitally penetrated her vagina causing pain and bleeding. She reported a continued escalation in sexual abuse by the applicant over a period of approximately four years which culminated in two separate rapes. VP also alleged that the applicant had physically assaulted her on two separate occasions.

[5] HB reported various incidents from when she was aged 13 of her father forcing her to masturbate him to the point of ejaculation. She further alleged that he digitally penetrated her roughly leaving her scared. She alleged that he justified his actions on the basis that he was "preparing her for what other fellas would do to her". HB alleged that the abuse stopped when she was about 16 years of age.

Grounds of appeal against findings

[6] The sole ground upon which leave was granted by the Single Judge was that the trial judge arguably erred in admitting bad character evidence of physical assaults by the appellant against his wife, GR. This was the principal focus of the appeal before this court. However, Mr Lyttle on behalf of the appellant also sought to renew his application for leave in respect of his contention that the trial judge erred in holding that the appellant had a case to answer and that the findings of the jury were unsafe in light of irreconcilable inconsistencies in the prosecution case. In his oral submissions Mr Lyttle also developed his criticisms of the manner in which the jury was invited to use the bad character evidence once admitted.

The first bad character application

[7] On 15 June 2016 the trial judge heard an oral application by the prosecution to admit evidence of the appellant's bad character. This related to evidence of VP that she witnessed two instances of violence by the appellant against her mother GR namely that he threw a plate of food at her striking her chest and that he pushed her into a bath in the bathroom. The prosecution submitted that the evidence was admissible under Article 6(1)(d) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order") as relevant to important matters in issue on three distinct bases:

(i) it was relevant to the commission by the appellant of sexually violent offences;

(ii) it was relevant to the climate of violence that the appellant engendered in the family and

(iii) it was relevant in explaining the response and conduct of the complainants in failing to report the matters at the time of their occurrence.

[8] The application was objected to on the basis that it was neither necessary nor desirable and would introduce a multiplicity of incidents that would unreasonably divert the trial. The judge reserved her ruling until the following day, 16 June 2017. She noted that the appellant would have been able to instruct his lawyers about this bad character evidence since it was referred to in the committal papers. At the stage at which she gave this ruling the case had already been opened and VP was scheduled to be the first witness. The judge noted that the matters which were the subject of this bad character application were also referred to in the second statement of GR made in September 2013. She continued:

> "The central issue is whether evidence of violence inflicted by the defendant on the complainant's mother is relevant to an important matter in dispute between the prosecution and defence. The matter in issue in this case is whether the defendant committed violent acts including violent sexual acts. I am satisfied that the evidence of the defendant's alleged violence towards the complainant's mother is relevant because the jury may conclude if it believes that evidence that the defendant is more likely to have committed the acts charged. It is therefore relevant to credibility. I am also satisfied that the evidence is relevant to the complainant's response to these alleged acts and to the climate of fear which allegedly existed within the home. These are important matters in historic sexual cases where reasons for delay in reporting are usually relevant to the issue of credibility and in particular whether or not the allegations are fabricated. I do not accept that the evidence was unnecessary in light of the allegations the complainant herself makes about violence perpetrated upon her by the defendant nor am I satisfied that the jury will be unreasonably diverted or confused by hearing the evidence."

The second bad character application

[9] A second bad character application was advanced by the prosecution on 22 June 2016 in respect of the evidence of GR. By this stage the evidence from both complainants and their respective cross-examinations had been completed. We have not been provided with nor has our attention been directed to any aspect of the transcript of their evidence. It is not in dispute, however, that the cross-examination

took issue with the contention that the appellant was given to threats of violent behaviour and we proceed on the basis that this also put in issue the contention that the complainants were not in a position to report the incidents at the time because of the fear of violence.

[10] The application related to a number of incidents beginning in 1970, when the complainants were very young children, until 2007, 18 years after the last incident on the bill of indictment, by which time the complainants had left the family home for about the same period. Although the application referred to some observations on the nature of the sexual relationship between the appellant and his wife the judge excluded those matters and there is no suggestion that she was wrong to do so. GR's statement dated 8 July 2013 related to incidents that were alleged to be violent in nature in the following terms:

> "I remember one day when VP was six months old [1970] and had measles … I left VP with her Aunt X because she was quite sick. When I got home [the appellant] was angry that I did not have VP with me and he told me in front of his Aunt Y to go and get her otherwise he would break my legs. I remember another occasion when me and [the appellant] had been to church. When we got home L [another of their children] was crying so I cradled her to pacify her but [the appellant] pulled L by her arm and leg and pulled her clean out of my arms. He then hit me with an open palm to the left side of my face causing me to fall against a sideboard which resulted in a bruise over my right eye. I was a cleaner at the ……. School and the headmaster [named] even saw the injuries . This would have been between 1970-1972. I always felt I was controlled and lived in fear. [The appellant] used violence against me and the children just to keep us all under control. The appellant would slap the kids for little or no reason or if they had not done what he wanted … Because we lived in fear whenever I could I would take the kids to work with me. I was a care assistant then and I drove so I would just stick the kids in the car and take them with me. As the girls got older they had to help their father with jobs such as filling the diesel drums up for the digger and also helping him on the digger after school. Because of my work I would not always know what they were up to. I remember one occasion when VP was helping him change the wheel on the digger and the pin fell causing an injury to her finger that I took her to the doctor's for. I remember one

> night when VP came to me in the bathroom crying and very upset. I struggled to talk to her but eventually she told me that her daddy had made her do things and had done things to her. She was crying so it was hard to make sense of her but I knew she meant something sexual. I went out to the shed to [the appellant] and asked him what he had done and he told he was just letting her know what all men would do to her. He said he was showing her what all men would do to her. I can't remember when but I also found out that the appellant had also interfered with HB. I think she said she had been touched by him. I remember bathing L one day and I told [TN] if he ever touched L or any of the girls I would pick up the phone to the police and I would kill him. I know he never touched L or physically assaulted her. I think it was something just came back in my head that made me say it. As far as I was aware none of my daughters were sexually assaulted by their father after this. The physical assaults occurred on a daily basis. I was last physically assaulted by [TN] approximately six years ago [2007] … The physical assaults on me have been continuous through our marriage and my injuries normally would be slaps and bruising. On one occasion he threw boiling hot tea into my face. On other occasion he threw his dinner at me hitting me in the chest with it. On another occasion he pushed me into the bath and I thought he had broke my neck. I did go to the doctors and I had to wear a neck collar for about a week. … I know my daughter VP has made a complaint to the police about my husband [TN]. I am making this statement so that police are aware of what married life and life bringing up my children has been with [TN]. I have and still do live in fear. As such I do not wish to make a formal complaint against [TN] for the physical assaults … I have suffered from him."

[11] The basis for the admission of this evidence can be derived from an exchange between prosecution counsel and the judge:

> "COUNSEL: It is relevant to an important matter initially between the defendant and that is his past conduct is relevant, namely that he was sexually violent and violent towards his daughters, and the

> evidence of that, your honour, the evidence of the mother is the background evidence, as it were of the…
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> JUDGE: Just so that we are clear what the important issue is.
>
> COUNSEL: The important issue…
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> JUDGE: Is it that it is more likely that it is the truth, is it credibility, I just want to be clear about that for the record.
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> COUNSEL: Yes, your Honour. There is a subsidiary part of it, your Honour, I am not sure relating, it is entirely sort of on point with this but it is the suggestion by [TN] that these matters have been fabricated as an attack on character and opens gates in other directions but the thrust is in relation to the background. It explains, as your Honour is aware, she says there is a background of fear and both of the witnesses have described a very strict is perhaps not the correct word to use but a domineering violent presence where children should be seen and not heard, where their lives are controlled, where they are told exactly what to do and if they don't do it there are immediate physical consequences. And of course the allegations they make of the sexual abuse and the mother's life and her description of how he treats her is exactly the same. So in respect of submission these matters should be admitted if your Honour pleases."

[12] Mr Lyttle objected that the bad character evidence which it was sought to introduce was disputed. These were historic allegations in respect of which there had been no complaints to the police and no court hearing. There was no corroborative evidence in relation to it. Counsel for the appellant were not in a position to consult with him to give evidence on his own account by reason of his unfitness and he was not in a position to give evidence on his own account.

[13] The appellant relied on the observations in R v Hanson and others [2005] EWCA Crim 824 at paragraph [12] that where past events were disputed the judge must take care not to permit the trial unreasonably to be diverted into an investigation of matters not charged in the indictment. It was submitted that the admission of this evidence would lead to a trial of the marital relationship of the appellant and his wife in circumstances where he could not challenge those allegations. That was fundamentally unfair. The jury would focus upon that

relationship rather than the relationship that existed between the two complainants and their father. There was no need to go beyond the evidence that had already been given in this case dealing with that issue.

[14] The appellant also referred to the written basis upon which the application was made under Article 6(1)(d) of the 2004 Order where the contention was that the defendant's past conduct was relevant to an important matter in issue between the defendant and the prosecution, namely whether the defendant had committed sexually violent offences against his daughters. It was submitted that the basis of admission was propensity. The trial judge intervened to say that she had clarified that with the prosecution. They were not relying upon propensity, they were relying on credibility. Although she did not deliver a written ruling the trial judge indicated that she would give in due course reasons for her decision if requested or required but no such request was made. It is clear, however, that credibility of the complainants was the basis upon which the learned trial judge admitted the evidence.

The judge's charge

[15] The judge in her charge to the jury said as follows:

> "Members of the jury if you believe that VP and HB have told the truth, then you won't have difficulty finding that each of those elements of the offences have been proved. The issue for you in this case is whether or not the evidence VP and HB have given to you is the truth and whether you are sure that it is truth … As I said you cannot find that the defendant did any of the acts charged unless you accept that the evidence of HB and VP is the truth. Now [they] told you that they feared their father and if they didn't do what they were told he would hit or slap them and VP also told you that she witnessed the defendant assault her mother … and you have heard two very different pictures painted about what life was like within the family home. [The trial judge then goes on to summarise the evidence of two witnesses called on behalf of the defence who painted a different picture of life within the family home]. … The acts that [the mother] describes do not form part of the indictment. So it is important that you should understand why you have heard that evidence and how you may use it.
>
> *If you believe the mother's evidence, it may assist you to consider the accuracy and reliability of VP and HB's*

evidence and to understand why these matters may not have come to light earlier. That is the only relevance of that evidence and you must not use it for any other purpose. If you do not believe [the mother's] evidence, then you should ask yourselves whether that causes you to doubt the prosecution case overall. Even if you do believe her evidence, it is for you to decide to what extent if at all, it assists you in deciding whether you are sure that VP and HB told you the truth about these alleged acts.

The evidence the mother has given of the defendant's behaviour towards her cannot and does not prove that the defendant did any of the alleged acts in the indictment. What matters in this case is the evidence that you have heard from VP and HB and whether you are sure that their evidence is the truth and you can only find that the defendant did any of the acts if you are sure that their evidence is the truth. So you may think … that the evidence that you have heard from the mother about violence inflicted upon her even if you do believe it, does not assist you at all and in those circumstances you can disregard it entirely. It is a matter for you.

So, be very careful not to jump to any conclusions because you have heard that evidence from the mother or to be unfairly prejudiced against the defendant by what you have heard."

Consideration of bad character issues

[16] Bad character evidence is evidence of or a disposition towards misconduct other than evidence which has to do with the alleged facts of the offence with which the defendant is charged. Article 6(1)(d) of the 2004 Order provides that bad character evidence is admissible if, but only if, it is relevant to an important matter in issue between the defendant and the prosecution. Section 17(1) provides that "important matter" means a matter of substantial importance in the context of the case as a whole. If the statutory test is met the evidence is admissible unless, by virtue of Article 6(3), on an application by the defendant to exclude it, it appears to the court that 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.

[17] The first bad character application concerned the proposed evidence of VP that her mother was assaulted by the appellant on two occasions. On one occasion he was alleged to have thrown a dinner plate at her and on another occasion he was said to have pushed her into a bath. Both of these were said to have occurred while

VP was a child living in the family home. There was some element of corroboration in relation to these two matters by her mother. The background against which these allegations were made was one in which VP alleged that she herself had been the subject of two beatings which were the basis for the two counts of common assault and that she had been threatened with a thump if she did not engage in sexual activity.

[18] The first question is whether this evidence was to do with the alleged facts of the offence. There was nothing in the evidence to indicate the relationship between these acts and the allegations as to the offending. We agree, therefore, that the judge was correct to treat this as bad character. The next step was to identify any important matters in issue to which the evidence was relevant. The particular matters raised by Mr Weir were the relevance of the evidence to the prosecution contention that first, the appellant was violent leading to an atmosphere of fear in the household and secondly, that this explained why the offences were not reported earlier. We consider that both matters were important matters in issue in this case.

[19] On the assumption that the statutory test was satisfied the next step was to consider whether to exclude this material on the basis of the submission that it would have an adverse effect on the fairness of the proceedings. These were unadjudicated complaints where there were neither convictions nor medical evidence of injury. The learned trial judge noted that the appellant would have been able to provide instructions in relation to them in 2013. He was, however, quite unable to provide any further instructions or to give any evidence to rebut these allegations. On the other hand the explanation for the delay in reporting was a live issue in the case and there was broad support for this evidence from VP's mother. It is not clear whether at the time of admitting the evidence the learned trial judge was aware that there were two members of the appellant's family who took issue with the description of this being a household ruled by fear. On balance we consider that the learned trial judge would have been entitled to admit this evidence for the purposes set out in the preceding paragraph.

[20] The second bad character application was different. The mother's statement suggested that she had been assaulted on a daily basis throughout her marriage. When in her oral evidence she did not allege daily assaults she explained that was because she did not count slaps and punches as assaults. There was no corroborating direct evidence and no medical evidence introduced to support these allegations which were clearly in dispute. In particular there was no evidence from either of the complainants that they were aware of these assaults despite the frequency with which they were alleged to have occurred.

[21] This was evidence that clearly supported the case of the complainants that the appellant was a violent man. It is difficult to see, however, that these allegations about which the complainants gave no evidence could explain why they delayed in reporting. The evidence supporting that delay was in the case of VP the threats of thumps and the incidents she said that she had witnessed of assault on her mother.

In the case of HB the supporting evidence was the threat of thumps. That evidence was admissible as evidence relating to the offence and we can understand in light of its relevance to the delay issue why it would not have been excluded.

[22] What the second bad character application sought to introduce was an allegation that the appellant had engaged in daily beatings of his wife in circumstances where these had not been witnessed by either complainant during the time they lived at home. The period of the allegations was 37 years, for approximately half of which the complainants did not live in the family home. The appellant had no means of taking issue with these allegations. This was not even a case of word on word as the appellant was not in a position to utter a word.

[23] Although the issue of violence was an important matter in issue it was not central to the case. As Crown counsel properly accepted it did not directly support the inference that the appellant was more likely to have committed a sexually violent assault. We appreciate that a trial judge necessarily has a better feel for the case than an appeal court but our concern about this evidence has been heightened by the acceptance by Crown counsel that there was no discussion about the duration and timings of any allegations in respect of which admission was sought and that this should have been addressed. Allegations of violence when the children were babies or long after they had left the home would have been prejudicial but could only have been of tangential relevance at best to the issues in this case. In our view the introduction of the entirety of these allegations when the appellant was not in a position to answer them was unfair to him and prejudicial. In terms of fairness to the prosecution there was already evidence on this issue from the complainants and they gave no evidence supporting the extent of the case made by the mother. In those circumstances the unfairness to the prosecution in excluding the evidence was minimal. We conclude, therefore, that the introduction of the entirety of the mother's evidence over this 37 year period had such an adverse effect on the fairness of the proceedings that it ought not to have been admitted. For that reason we consider the finding of fact unsafe and the appeal should be allowed.

[24] Although that is sufficient to deal with the appeal we consider that the admission of any of this evidence on the basis that it was relevant to credibility was likely to give rise to difficulty. We accept that in the vast majority of sexual abuse cases credibility is in issue, in fact credibility tends to be an issue in most criminal cases. It is often said that credibility is not a seamless robe and that it has to be considered in the context of each of the matters in issue in the case. In this case credibility would have applied in relation to the evidence about the violence of the appellant, the evidence about the reason for the delay in reporting and the evidence about whether or not there was sexual activity. The bad character evidence in this case was directly relevant to the complainants' case that the father was violent and was also directly relevant to their evidence that the violence was sufficient to prevent them from reporting the matter earlier. It was not, however, directly relevant to whether or not there was sexual activity.

[25] At the end of the italicised portion of her charge to the jury set out at paragraph [15] above the judge invited the jury to consider to what extent the mother's evidence of violent behaviour assisted in concluding that the appellant had done "these acts". That must have included the sexual activity. Prosecution counsel accepted and we agree that the evidence of the assaults on the mother did not assist on that particular issue. Of course, we also agree that in order to prove sexual activity beyond reasonable doubt the jury had to rely upon the evidence of the complainants and it would have been material for them to consider to what extent they accepted their evidence in relation to violence. To that extent there was an indirect link to the credibility of the complainants on other issues but the danger is that the jury may have taken the impermissible step of concluding that because credibility was established in relation to some of the matters in issue it was necessarily established in relation to all matters in issue. For that reason we consider that there are very few cases where bad character evidence might be admissible purely on the grounds of credibility. We recognise in this case that the learned trial judge warned the jury that they had to rely on the evidence of the complainants but we consider that there remains a risk of confusion that the jury will give the bad character evidence a wider effect than is appropriate.

Conclusion

[26] For the reasons given we allow the appeal. We are required by section 13A of the Criminal Appeal (Northern Ireland) Act 1980 to quash the finding and direct that a verdict of acquittal be recorded.