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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

B

CARSWELL LCJ

Introduction

This is an application for leave to appeal against the conviction of the applicant on 23 May 2001 after a trial at Ballymena Crown Court before McLaughlin J and a jury and against the sentences imposed by the judge on 7 September 2001. The applicant was charged on 24 counts with a series of sexual offences against his step-daughters L and F. He was found guilty on five counts and not guilty on two counts of rape of L and guilty on three counts and not guilty on one other count of indecent assault on L. He was found guilty on three of the counts and not guilty on a fourth count alleging indecent assault on F and not guilty on four counts of rape of F. On five other counts no verdict was taken and the judge ordered that the counts should lie on the file. The judge sentenced the applicant on 7 September 2001 to five

years' imprisonment on each of the indecent assault charges and on each rape charge he made a custody probation order consisting of thirteen years' custody and three years' supervision by a probation officer. All sentences were concurrent. He declared that if the applicant had not consented to a custody probation order he would have imposed a sentence of fourteen years' imprisonment.

The Facts and the History of the Case

The applicant is now aged 47 years. In 1992 he married the complainants' mother and went to live with her and her three children. L is now aged 19 years and F 17 years. The Crown case is that the applicant engaged in sexual abuse of the two complainants over an extended period.

It was alleged that he commenced acts of indecent assault on L when she was about eight years old, when her mother and the applicant had commenced a relationship before their marriage. He committed such acts regularly over the next two or three years, then commenced full intercourse with her, which occurred frequently and regularly against her will. In 1998 she became pregnant with a child of which the applicant was later proved to be the father, and he continued with intercourse right up to the time of the birth and again from a few months after it. He ceased in September 1999.

F claimed that the applicant commenced improper behaviour towards her shortly after the family moved to Portrush in September 1998, when she was 14 years old. She alleged that he had intercourse with her against her will on a considerable number of occasions – as she put it, nearly every day –

between then and the end of 1999 and that he regularly touched and felt her breasts and genital area. He gave her money or cigarettes, and F alleged that these gifts were in return for her carrying out sexual acts with him.

The matter first came to light after an altercation between F and the applicant on 2 January 2000, following which F informed her sister L what the applicant had done. A complaint was made to the police and F made a statement on 4 January 2000. L also made a statement on 5 January dealing with the applicant's conduct with F, although she did not on that occasion refer to any conduct on his part towards herself. F made a further statement on 10 February 2000, containing further detailed allegations. She also wrote out a manuscript statement on 10 April 2000, in which she detailed two specific incidents of rape and one of attempted indecent assault. She made further allegations against the applicant to social workers on 27 February 2001. The existence and content of the statement of 10 April 2000 and the allegations made on 27 February 2001 formed part of the case made on behalf of the applicant. L did not make a complaint of the applicant's treatment of herself until 27 May 2000, when she made a detailed statement to the police.

The applicant denied all the charges when interviewed by the police. His case made in cross-examination of L was that consensual intercourse had taken place between them on two occasions in February 1998, which resulted in the birth of her child. An application was made to the judge to stay the trial on the ground of abuse of process and another application to direct the

jury to acquit the applicant on the ground that there was no case to answer. The judge rejected both applications. The applicant did not give evidence.

The jury brought in the following verdicts on the several counts in the indictment:

Counts 1 to 5, specimen counts of indecent assault on L – Guilty.

Counts 6 to 10, specimen counts of rape of L – Guilty.

Counts 11 and 12, specific counts of rape of L – Not guilty.

Counts 16 to 18, specimen counts of indecent assault on F – Guilty.

Counts 20 to 23, specimen counts of rape of F – Not guilty.

The jury were not asked to return verdicts on the remaining counts.

Grounds of Appeal

The grounds of appeal against conviction set out in the notice of application for leave, as amended by leave by the addition of a fifth ground, were the following:

> "The verdicts of Guilty returned in respect of the applicant (hereinafter 'the defendant') were, and each was, unsafe for the following reasons:
>
> 1. The learned trial erred in refusing the defence application to stay the proceedings for abuse of the trial process, in circumstances where the Crown had elected to have one of two sisters alleging sexual abuse, give evidence in respect of certain of the acts of abuse, but not to give evidence of certain other specific acts (including two rapes) by reason whereof:
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> (a) the Crown had signally departed from – and denied the Defendant his right to due process thereby irreparable [sic] prejudicing his position.

(b) the Crown had abdicated (to a witness) its responsibility to lead all, or none, of the said witness's evidence.

(c) the Crown had procedurally facilitated and/or acquiesced in the said witness's truncation of her account of events, and her effective manipulation of her intended testimony.
and

(d) the Crown and/or the said witness had been permitted to indulge in an exercise in selectivity in respect of that, which, of its nature, can only be, properly and justly, indivisible.

2. The learned trial judge erred in not acceding to a defence application to stop the case at the conclusion of the Crown case on the ground that the prosecution evidence was so manifestly and inherently weak as to have precluded a properly directed jury from properly convicting in reliance on same.

3. The learned trial judge, in charging the jury, erred, in serially identifying specific alleged incidents as each representing a factual basis for respective specimen counts.

4. Further, in charging the jury, the learned trial judge gave disproportionately much greater attention and consideration to the detail of the complainant's accusations, than that devoted to the frailties, infirmities, contradictions and inconsistencies of their evidence – particularly so in a case in which he had previously declined to 'give a direction' based in [sic] the contended for inability of a properly directed jury to properly convict.

5. The learned trial judge failed to direct the jury that in considering each count against the defendant they should only take into account the facts relevant to that count, and should not take account of the facts relating to the other Counts."

The applicant's counsel did not rely on ground 3 at the hearing before us.

The grounds of appeal against sentence were as follows:

> "The plaintiff says that the sentences imposed were manifestly excessive in that:
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> (a) They failed to adequately reflect or take into account the accused's medical condition.
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> (b) They place [sic] disproportionate and unfair emphasis on the applicant's contesting the allegations against him.
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> (c) They failed to reflect a fair and appropriate analysis of the actual circumstances of the commission of the said offences as reflected in the circumstances of the commission of the said offences as reflected in the evidence, and thereafter contended for by the defence in relation to sentencing.
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> The applicant says that the sentences imposed were manifestly excessive in that:
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> The applicant further says that the sentences imposed were wrong in principle for the foregoing reasons."

Abuse of Process

In the manuscript statement dated 10 April 2000 F set out, amongst other material, three specific incidents. She alleged that on two of these occasions the applicant had had intercourse with her against her will and that on the third he had attempted an indecent assault. The Crown did not lead as part of F's evidence the allegations contained in the document. Mr JF McCrudden QC on behalf of the applicant submitted that the failure to do so constituted an abuse of process. He also was critical of the fact that the defence had had to obtain the document by way of discovery from a Social Services Trust, and it had not been furnished to them by the Crown as part of their unused material. Mr McCrudden's thesis, which he argued at length

before the judge, was summarised in the judge's reserved ruling on the application to stay or dismiss the prosecution:

> "He argues that if the evidence in the April document had been led in chief, it would in combination with the other allegations, add up to such an extreme series of allegations that the jury would see them all to be unworthy of belief, that in giving such evidence F would be exposed as so prone to exaggeration that it would be demonstrated in her demeanour, perhaps as showing her to be nervous or hesitant."

Counsel argued that he was put in the position of having to decide whether to use the material in cross-examination, which might have resulted in strengthening the effect of F's evidence rather than weakening it. The reason advanced on behalf of the Crown for not adducing the evidence of the matters described in the April 2000 document was that the charges in respect of F were specimen charges and it was adjudged unnecessary by the Director of Public Prosecutions, to whom the document had been sent, to add these to the evidence which F would give.

The judge robustly dismissed the defence argument as "fanciful", saying:

> "They were perfectly free to cross-examine upon it and I cannot see how any disadvantage of consequence could have resulted from the failure of the prosecution to produce more not less evidence against the accused … These were matters which fell to the defence to decide to cross-examine about or leave out of account and that is part of the ordinary process of decision making which falls upon counsel in a trial of this kind."

The judge declined to accept that the continuation of the trial would be unfair to the applicant and refused the application.

Mr McCrudden submitted at the hearing of the appeal in this court that the judge was wrong to refuse his application and had not exercised his discretion in a correct fashion. He cited a decision of the High Court of Australia in *Whitehorn v The Queen* (1983) 152 CLR 657, in which the seven-year-old complainant in an indecent assault case was not called by the Crown prosecutor, who gave as his reason that "she would not be any use as a witness" and "she would not have been capable of giving evidence." The conviction was set aside on differing grounds. That relied upon by Deane and Dawson JJ was that all available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events on which the prosecution is based. Counsel submitted that this was analogous to the present case, and repeated his contention that the Crown's failure to adduce evidence of the matters in the April 2000 document had made the trial unfair.

The Divisional Court in *Re DPP's Application* [1999] NI 106 at 116 stated, in our view correctly, that there are only two main strands or categories of cases of abuse of process in which a trial may be stayed:

> "(a) those where the court concludes that because of delay or some factor such as manipulation of the prosecution process the fairness of the trial will or may be adversely affected (we regard these words, which were used in *Re Molloy's Application*, as the appropriate formulation of the criterion);
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> (b) those, like the *Ex p Bennett* case, where by reason of some antecedent matters the court concludes that although the defendant could receive a fair trial it would be an abuse of process to put him on trial at all."

The jurisdiction, as the Divisional Court observed at page 113, is firmly rooted in the obligation of every court to give a fair trial to a defendant appearing before it. That part of it which is based on excessive delay in bringing the case to trial is too well known to need elaboration. That based on manipulation or misuse of the process of the court was described in the judgment of the Court of Appeal in *R v Derby Crown Court, ex parte Brooks* (1984) 80 Cr App R 164 at 168, where it said that it may be an abuse of process if –

> "the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality."

The court went on to say:

> "The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution …"

It is necessary to bear in mind that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons, and that it is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct: see *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42 at 74, per Lord Lowry.

We agree with the conclusion reached by the learned trial judge that no prejudice or unfairness resulted from the failure to adduce in F's examination in chief the contents of the document of April 2000. The material in it was justifiably regarded by the prosecution as constituting further examples of the allegations already made by F, which could be dealt with properly by the use

of specimen charges and disclosure to the defence. It was open to the applicant's counsel to cross-examine on it; if he was uncertain whether to risk the possibility that doing so would strengthen rather than weaken the effect of F's evidence, that is a choice of a type which has constantly to be made by the defence in criminal trials, and it was not unfair to the accused that his counsel had to make a decision on it. In our opinion the prosecution decision not to use the material was not unfair or manipulative and the fairness of the trial cannot be said to have been adversely affected. We regard the judge's decision to refuse a stay as correct and reject that ground of appeal.

The Refusal of a Direction

The contention of counsel for the applicant was that the evidence adduced by the prosecution, specifically that of the two complainants, contained so many inconsistencies and weaknesses that it could not be relied on and accordingly the judge should have ruled that there was no case to answer and directed the jury to acquit the applicant on all counts. He relied on the familiar principle in *R v Galbraith* [1981] 2 All ER 1060 and the gloss put on it in *R v Shippey* [1988] Crim LR 767, where Turner J said that the requirement to take the prosecution evidence at its height did not mean "picking out all the plums and leaving the duff behind". It is necessary to look at the evidence as a whole, not merely parts of it, and assess whether a reasonable jury *could* come to the conclusion on that evidence that the defendant is guilty. One should also bear in mind the application of this

principle exemplified by *R v Hasson* [1981] 9 NIJB, where Lowry LCJ stated, after referring to *R v Galbraith*:

> "I entirely accept the principles as stated by Lord Lane, always remembering that 'no evidence' does not mean literally no evidence but rather no evidence on which a reasonable jury properly directed could (I emphasise that word) return a verdict of guilty. This test does not depend on the unacceptable practice of assessing the credibility of a witness, the key words in Lord Widgery's statement are,
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> > 'It is not the judge's job …. To stop the case merely because he thinks that the witness is lying.'
>
> But it is still open to the trial judge to say that the evidence reveals inconsistencies and absurdities so gross that, as a rational person, he could not allow a jury to say that it satisfied them of the prisoner's guilt beyond reasonable doubt. If that is his clear view, he should direct a verdict of not guilty."

It is instructive to remind ourselves of the wording of the judgment given by Lord Lane CJ in *R v Galbraith.* After reviewing the authorities he summarised the rules to be applied as follows:

> "(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken to a witness's reliability, or other matters which generally speaking within the province of the jury and where on one possible view of the facts there is

> evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

Mr McCrudden specified a number of points in the complainants' evidence which he claimed showed inconsistencies of a nature and amount sufficient to destroy their credit and make it unsafe to rely on their testimony. We shall summarise these in the order in which he put them forward and entitle them as in his skeleton argument.

F's Evidence

The First Assault

F stated in her evidence in chief that the first incident of abuse had occurred in or about September 1998 in the garage of their home. She confirmed this a couple of times in her cross-examination. It was then put to her that in her second statement to the police, made on 10 February 2000, she described an incident which occurred in the bathroom, when she said that in or about October 1998 the applicant rubbed her breasts over her housecoat as she was about to have a bath. The statement then read "This is the first thing I remember B… doing to me". F's reply was that she had meant that that was the first thing that he did to her in the bathroom. She had not referred in her evidence in chief to any incident in the bathroom.

The Asthma Incident

In her evidence in chief F, when asked if any incidents had occurred in the living room, said that it had occurred only once there. Around Christmas 1999 she had gone into the bathroom, suffering an asthma attack, and was

sitting on the floor with her back to the bath when the applicant came in. He took her into the living room and tried to have sexual intercourse with her, but she pushed him away and he desisted. She did not refer to this incident in her statements to the police.

In cross-examination F said that she had in fact written down an account of this incident and given it one of the social workers, whom she authorised to pass it on to the police. No such document was forthcoming.

The Airport Incident

In her evidence in chief F recounted an incident in the latter half of 1999 when she was in the applicant's car, on a journey to meet a friend and his girlfriend at Aldergrove Airport. He pulled into a place by the river and assaulted her indecently in the back of the car. He was interrupted by a call on his mobile telephone from the friend, who informed him that the flight had arrived early and he was at the airport. She had not mentioned this incident in her statements to the police.

When cross-examined about the reason why she had not reported this incident, F said:

> "I don't know why. Maybe I didn't want to tell them then. Maybe I didn't feel ready, but they were told."

The "Quilt" Attacks

F said in her evidence in chief that the applicant came to her bedroom at night regularly over a period of about four months, put his hands under the quilt and touched her and tried to kiss her. She did not mention that in her police statements.

The Price List

It was put to F in cross-examination and accepted by her that there had earlier been in existence a document in her handwriting which was described in the proceedings as a price list. It contained a number of sets of initials and sums of money opposite them. F claimed that she had written these down at the insistence of the applicant, who had written it roughly on a piece of cardboard with a black pen, and that the sets of initials each had an obscene meaning, some of which she specified in evidence, representing sexual acts for which the applicant would pay her the sums set out beside them. She agreed that she had given this list to L when she first told her about the applicant's behaviour to her and that L had given it to their mother. The list had gone missing and was not produced in evidence. It was put to F that it was in fact a shopping list for carry-outs from a local café, to which she responded that the applicant never wrote out a list but telephoned for items which he ordered, and that the list would be in his writing and not hers if it represented a shopping list of that type. When first asked about the initials, F professed not to recognise them. Her evidence was somewhat equivocal about whether she had carried out the sexual acts which she specified as

forming items in the list. She had not disclosed this to the police. When asked why not, she said variously that it had slipped her mind and that it made her look like a prostitute. She eventually refused to answer any more questions on the topic.

L's Lift

It was put to F in cross-examination that on Sunday 2 January 2000, the day on which the complaints were made, she had insisted on going with the applicant in his car to pick up L at her place of work and that she told L in the car that the applicant had done nothing to her. F denied strenuously that she had been in the car that day, because the business was not open on Sunday 2 January, and said that no such conversation had taken place. L said in her evidence, however, that on the following day Monday 3 January the applicant had picked her up from work in his car, in which F was a passenger, and that in the car F had said that she had made it up. L stated that she did not believe her, for she knew for a fact that she was telling the truth.

Aunt Sonya

F agreed in cross-examination that she had told her social worker that the allegations against the applicant were fabrications, made up with the help of her Aunt Sonya. She said in evidence that that statement to the social worker had been a lie, instigated by the applicant.

Grandfather's Flat

It was put to F in cross-examination that the applicant had caught her having intercourse with a friend of her sister in a flat in Portrush in August

1998. F denied this, but the applicant's counsel suggested that her manner of dealing with the matter was evasive and contradictory.

Condom Incident

At one point in her cross-examination it was put to F and agreed by her that she had recounted all that the applicant had done to her. She had omitted, however, to mention the first incident described in the April 2000 document, which was graphically described there. Counsel suggested that if she was being truthful she could hardly forget such an incident. He also pointed out that whereas the throwing away of a condom figured largely in this account F had told Dr Siberry that the applicant had never used a condom.

The "February Document"

F had also omitted to mention the three or more further rapes which she related to her social worker in February 2001. She had stated to her that after she absconded from the children's home to which she had been sent the applicant had raped her and that he had sexually abused her after her discharge. When this was put to her in cross-examination she said that these incidents had happened in a house in Coleraine which she specified. She was asked why she had not reported these to anyone at the time and why she had not mentioned them when she was asked if the applicant had done anything else to her. A confused series of questions and answers followed, in the course of which it became clear that F was very disturbed at the time in question and blamed at least some of it on her solvent abuse. She said that

she resorted to glue sniffing to block out her unpleasant experiences and worries and that it tended to affect her memory. She had feelings of guilt about her regular absconding from her care accommodation and did not inform the social workers about what had happened.

The Last Assault

F was asked on several occasions during her evidence which had been the last time that the applicant had abused her. In examination in chief she was uncertain, but thought that it might have been sexual intercourse in the living room about three weeks before she informed her sister and mother on 1 January 2000. In cross-examination she said that that occasion, the "asthma incident", was the last time he had intercourse with her, but was not sure when the last instance of sexual misconduct occurred. In her police statement of 4 January 2000 F had said that the last intercourse incident had been about three weeks previously in the car and that the previous Thursday the applicant had indecently assaulted her in the back room at home. When cross-examined she said that she had been mixed up about dates and may have meant three months instead of three weeks.

L's Evidence

The Poundstretcher Incident

L stated consistently in her evidence that the first rape had occurred in the hallway of the applicant's flat in Portrush above premises known as Poundstretchers, when she was aged about eleven years. At various points in her cross-examination her evidence varied about other visits to that flat and to

what had occurred there. It was not clear on her account whether the applicant had indecently assaulted her on a previous visit to the flat or whether his first act of sexual abuse there was a full act of rape. She finally combined the two and averred that on the same occasion in the flat he had started by fondling her and then went on to rape her. The applicant's counsel laid some stress on these contradictions and inconsistencies in L's account.

The Ice Cream Van Incident

L stated that when she was helping the applicant in his ice cream van he would touch her and place his fingers inside her vagina. She had stated in her police statement that she could not remember if he was able to put his fingers inside her. In cross-examination she claimed that she had never forgotten this but that she was "all upside down and flustered" when making her statement.

The Mr Chips Shop Incident

L said in her evidence that the applicant had fondled her breasts on about three occasions while they were working together in the chip shop. She said that he confined himself to this because he was afraid that someone might catch him. In her police statement, however, she had said that he "would have fondled my breasts and vagina".

The Mr Chips Van

She said in evidence that he had had intercourse with her in the chip van on only one occasion, whereas she referred in her police statement to it

happening a second time. In cross-examination she said that she could not remember a second time.

The Disability Show Incident

L said that on an occasion when her mother was away at a Disability Show the applicant had sexual intercourse with her in the house, he having prevailed on her mother to keep her off school in order to do the housework. In cross-examination she agreed at one point that no force was involved. At a later point she said that she tried to push him off on every occasion when he had intercourse with her, but he was too heavy.

Intercourse in the Car

L said in evidence that the applicant regularly had intercourse with her in his car, almost every time she was with him, over a period of four or five years. Despite this she continued to travel with him in the car, and never told anyone about it.

Intercourse while Pregnant

L said that the applicant continued to have intercourse with her in the car during her pregnancy, and agreed in cross-examination that this was face to face. She had stated in her police statement that he changed position and entered her from behind during the late stages of her pregnancy, but when this was put to her in cross-examination she said that she did not remember saying that.

The Boyfriend Incident

It was put to L in cross-examination that the applicant had caught her having intercourse with a boy against a freezer in the shed at the rear of their

house. She denied that and said that she had been trying to retrieve items from the bottom of the chest freezer, had overbalanced and nearly fallen in, when the boy had caught her jumper and pulled her back. She claimed to remember the evening particularly because she had boxed the boy's ears later over a tasteless remark and she had fallen in the garden and cut her leg.

Mr McCrudden submitted with some vigour that the accumulated effect of the inconsistencies and omissions in the complainants' evidence was such that the judge should have withdrawn the case from the jury. We are unable to agree. The matters of which he complained in L's evidence were relatively minor when set against the long and detailed catalogue of abuse which she related. We do not regard it as remotely possible to say that her evidence was so discredited in the sense described in the cases to which we have referred that a jury could not properly be asked to convict on it. F's evidence contained more inconsistencies and contradictions and it may fairly be described as unsatisfactory in a number of respects. A jury would have to approach it with a degree of caution, but it is right to remember that there was again a long catalogue of complaints and that there was ample possibility for confusion of recollection. Moreover, there were factors to be considered of the passage of time since some of the incidents, embarrassment, stress and possible fear. When one takes the evidence of both complainants together, there were issues of reliability which the jury would have had to consider, but it was a clearly tenable view that the strength or weakness of the prosecution case was a matter for them to decide.

The judge received detailed submissions on the issue and reserved his decision overnight. He properly recognised that there had been inconsistencies and contradictions in the complainants' evidence, but regarded the acceptance of that evidence to be a matter for the jury. He applied the proper test and we find no fault in his exercise of his discretion. We consider that he was amply entitled to hold that there was a case on which the jury could justifiably convict.

The Judge's Charge to the Jury

Counsel for the applicant submitted that the balance of the judge's charge to the jury had been unfair, because he devoted more attention to the details of the complaints than to the frailties which had been exposed in them in cross-examination. Bearing this in mind, we have read the charge through again critically, in order to assess the balance and determine whether we are satisfied that it was fair to the applicant and properly put his defence to the jury. We are so satisfied. The charge was in our judgment fair and impartial and left decisions to the jury which fell within their province. The judge covered the matters relied upon by the defence as frailties in the complainants' evidence, in summary form but in our view fairly and without omissions. We do not consider that he was obliged to go into minute detail on each, so long as he gave a fair reminder to the jury about their existence and the nature of each. The judge concluded his review of the complainants' evidence by giving the jury some fair and balanced comments about the

nature of that evidence, while leaving decisions on its reliability properly in their hands.

Taking Evidence into Account

The fifth ground of appeal was based on the issue which we decided in favour of the appellant in our recent decision in *R v D* (2002, unreported). In that case, as in this, the prosecution had elected not to apply for a similar facts ruling in respect of the evidence of the complainants. In *R v D* there had been some degree of reference to the complaints by both complainants (who had alleged distinct acts by the appellant) in support of the case against him and the judge had not spelt out to the jury a warning that they should leave out of consideration the evidence given by one complainant when considering the case made against the appellant by the other. For that reason we set aside the conviction and ordered a new trial.

In the present case, as Mr Kerr QC submitted on behalf of the Crown, the case against the applicant consisted of two self-contained complaints, each made up of a distinct set of allegations. In several places in his charge to the jury the judge reminded the jury that they must consider the evidence on each individual count separately. He did not create any evidentiary overlap by referring to the evidence of one complainant as supporting that of the other, and the jury were at no point invited to look at the prosecution case as being in any way a composite of their evidence. The jury appear to have exercised their critical faculties in reaching their findings, in which they decided for themselves which counts they found proved and which they did not.

Although it would be preferable in such cases for judges to spell out a specific warning on the lines which we indicated in *R v D,* we do not consider that in the circumstances of this charge the jury were misled into taking evidence wrongly into account.

Sentence

The victim impact reports reveal a sad state. The impact on L's life has been severe. The traumatic sexualisation has resulted in substantial emotional trauma and has had an adverse effect on her sex life. She has had and is likely always to have difficulty in forming satisfactory relationships. She feels that if she had not been made pregnant by the applicant she could have entered upon a fulfilling career. She may be prone to self-destructive behaviour such as drug or alcohol abuse. She will remain at increased risk of recurrent episodes of psychiatric illness, such as depression.

F has been severely emotionally traumatised by her experiences. She has had a very disturbed time since the offences came to light, spending periods in a hospital psychiatric unit, foster care, a children's home and secure units. She has behaved in a very disruptive fashion and when examined in June 2001 by Dr Elizabeth McGavock, a specialist in sexual abuse cases, appeared to be in denial. Dr McGavock expressed her conclusions in her report of 28 June 2001:

> "In my opinion therefore, [F] is likely to have a greatly increased risk of recurrent episodes of depressed mood and of repeated attempts at self-harm in the future. She is likely to continue to have low self-esteem and to have great difficulty in trusting others. She will have difficulty forming

> satisfactory trusting heterosexual relationships and her experiences of being sexually abused may already have deprived her of any chance of experiencing normal healthy long-term intimate relationships in the future. In my judgement the outlook for this girl is poor especially as good evidence (I) is now available that a high proportion of such victims never recover satisfactorily from the psychological trauma caused by sexual abuse such as has occurred in this case."

The pre-sentence report on the applicant relates that he was subjected to severe physical punishment as a child. He claims that he also was sexually abused when he was aged seven years. He had abused alcohol for much of his adult life. He had a stroke in 1998 and suffers now from a number of medical complaints according to his general practitioner, a duodenal ulcer, epilepsy, osteoarthritis of the spine/cervical spondylosis, bullous emphysema and Bell's palsy. He has a substantial criminal record, but none of it relates to sexual offences.

The probation officer said of the applicant's attitude to the offences of which he had been convicted:

> "[The applicant] has been convicted of Rape x 5 and Indecent Assault x 8. He denies culpability on all counts except one: that of having unlawful carnal sexual intercourse with [L] around February 1998. I was therefore unable to discuss his offending behaviour in relation to these charges. The defendant expressed strong feelings towards the victims during interview describing them as 'so-called victims', claiming that he was 'set up' by them and that they were lying. His strong opinion was that the victims were attempting to obtain claim money.
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> In discussion the charge of having unlawful sexual intercourse, [the applicant] displayed distorted thinking and minimisation of the offence which is

> typical of sex offenders at this stage. He said that although the age of consent was 16, he was clearly of the opinion that the victim initiated the offence and that he was the real victim for having acquiesced to her advances. He blamed the fact that both he and the victim both had taken alcohol for precipitating the offence. It was clear throughout the interview that he was apportioning blame onto the victim and not accepting responsibility for his behaviour."

She went on to state that the applicant was unable to appreciate any adverse effects upon the victims and did not evidence any empathy or understanding of victim issues. The conclusion expressed in the report was as follows:

> "[The applicant] (with the exception of one offence of rape) denies his offending. He did, however inform me that he would be willing to attend a Sex Offender's Programme, either in prison or upon release in the community. A prerequisite for embarking upon such a programme however is a basic acknowledgment of responsibility for the offending. It is difficult to reconcile a wish to embark on a programme for change while maintaining such a high level of denial. Motivation to address his offending behaviour would be assessed on a regular basis with the prison.
>
> The court may wish to consider a period of supervised licence upon release from custody. Such an option would ensure that [the applicant] is held accountable for his behaviour in the community. He would be monitored as a high risk offender by a Supervising Probation Officer working closely with other relevant agencies and this would afford a measure of public protection."

A psychiatric report was obtained by the applicant's solicitors from Dr IT Bownes in June 2001. Dr Bownes' conclusion at page 8 of his report is as follows:

> "A pervasive tendency to present himself as the victim of circumstances and influences outside his

> own control has repeatedly been evident during [the applicant] current committal to prison consistent with a style of thinking that could continue to allow [the applicant] to avoid confronting and accepting responsibility for his personal deficits and their impact on other people in his own mind. [The applicant] has frequently been guarded and self-serving regarding disclosing personal information during his current committal to prison, and some marked inconsistencies have been evident. However there has been no indication to date from the clinical picture presented, from review of the background information available to me in this case or from the information that [the applicant] has disclosed on his personal history of markedly abnormal attitudes and patterns of thinking and behaviour characteristic of the more severe disorders of personality associated with a constitutional tendency to antisocial and callous behaviour or an inherent incapacity to experience remorse or guilty.
>
> It has been clearly apparent during my contacts with him to date that [the applicant] understands and accepts that behaviour of the nature cited in the current charges is wrong in all circumstances, and in my opinion, [the applicant] has sufficient intellectual ability and personal resources to engage in a meaningful manner with professional instruction and supervision aimed at elucidating and addressing inappropriate ideas and attitudes that would have facilitated behaviour of the nature cited in the current charges, developing his insight into its damaging effects and at reinforcing the necessity of avoiding any similar behaviour in all circumstances in the future, should he be motivated to do so."

The applicant's solicitors obtained a further expression of opinion from Dr Bownes, described as an addendum and dated 13 March 2002. We gave the applicant leave to adduce this document and heard further argument on 19 March. In the second paragraph Dr Bownes stated:

> "During my contacts with [the applicant] to date, he has displayed a range of inappropriate ideas on

> related themes that are likely to have played a significant role in his behaviour in the index offences by allowing him to avoid fully recognising and confronting its seriously unacceptable and damaging nature, and that are indicative of a considerable investment in justifying and rationalising his actions in his own mind. At our most recent meeting on 11th March 2002, these included ideas on the general theme that the injured party had invited and encouraged his behaviour in the context of a mutually pleasurable sexual relationship that he referred to as 'an affair' [the applicant] has also attributed his behaviour in the index offences to disinhibiting effects of alcohol on his judgement and self-control and to difficulties and grievances related to his relationship with his wife that included his concerns about his wife's fidelity."

Dr Bownes went on to say that the applicant may not indulge in sexual abuse of other persons in the future:

> "In my opinion based on my reading of the evidence available to me in this case and on the ideas and attitudes he has displayed on related themes to date [the applicant's] behaviour in the index offences was of a nature, context and duration that is unlikely to be indicative of an ongoing sexual interest in children or adolescents, or of an intrinsic preference for coercive or deviant sexual activities that would be indicative of an inevitable ongoing risk of serious harm to the general community."

He concluded by saying that he thought that the applicant –

> "has sufficient mental capacity and personal resources to avoid any behaviours that would bring him into further conflict with the criminal justice system in the future."

The judge considered all these matters (except Mr Bownes' addendum) in his sentencing remarks and reached the conclusion that the appropriate sentence was one of fourteen years' imprisonment. He considered, as he was

obliged to do by statute, the question of imposing a custody probation order and concluded that he should do so on the ground that "the closer the scrutiny over you that can be maintained the better for you and the better for the public." He accordingly made a custody probation order, consisting of thirteen years' custody, to be followed by three years' probation supervision.

Mr McCrudden submitted that the sentence was manifestly excessive at an equivalent of fourteen years' imprisonment. We are unable to agree. We can find no mitigating features, apart possibly from the applicant's state of health. Counsel pointed to the fact that no force was used, but that is at most the lack of an aggravating feature; moreover, all the classic techniques of the paedophile were brought into play, bribery, abuse of a position of trust, blackmail and threats. The aggravating features of this case are all too plain. The applicant systematically abused these young girls for his own gratification and wrought dreadful damage to their lives. He has shown no remorse or even proper comprehension of the extent of his wrongdoing, and has even sought to blame L for seducing him. Finally, not only did the applicant not plead guilty, but, to use the judge's words, fought the charges in a manner and with such ferocity that the trial was a grievous ordeal for both of his victims. We cannot regard a sentence of fourteen years as in any respect excessive.

We consider, however, that the use of a custody probation order was less appropriate in the present case than an order under Article 26 of the

Criminal Justice (Northern Ireland) Order 1996. Article 26(1) and (2) provide as follows:

> "26.-(1) Where, in the case of an offender who has been sentenced to imprisonment or ordered to be detained in a young offenders centre–
>
> (a) the whole or any part of his sentence or order for detention was imposed for a sexual offence, and
>
> (b) the court by which he was sentenced or ordered to be detained for that offence, having regard to –
>
> (i) the need to protect the public from serious harm from him, and
>
> (ii) the desirability of preventing the commission by him of further offences and of securing his rehabilitation.
>
> ordered that this Article shall apply.
>
> instead of being granted remission of this sentence or order for detention under prison rules, the offender shall, on the day on which he might have been discharged if the remission had been granted, be released on licence under the provisions of this Article.
>
> (2) An offender released on licence under this Article shall be under the supervision of a probation officer appointed for or assigned to the petty sessions district within which the offender resides until the date on which he would (but for his release) have served the whole of his sentence or order for detention."

It is unhappily clear from the pre-sentence report that the conditions for successful probation are lacking, comprehension of wrongdoing, remorse and

a real desire to amend. It seems to us that the appropriate course, as the probation officer herself indicated in the last paragraph of the pre-sentence report, would be a period of supervised licence under Article 26. We would remind sentencers, as we stated in *R v McGowan* [2000] NIJB 305 at 310 and very recently in *Attorney General's Reference (No 1 of 2002)* (2002, unreported) that Article 26 is designed specifically for the supervision of persons convicted of sexual offences and should ordinarily be put into operation when the conditions specified in Article 26(1)(b) are satisfied. The applicant's counsel suggested, on the basis of Dr Bownes' addendum, that the necessary condition in sub-paragraph (i), the need to protect the public from serious harm from him, was not satisfied. We are unable to accept this submission. The applicant had engaged in a prolonged course of sexual abuse of his two step-daughters. He still shows little sign of insight into the nature of his conduct, let alone remorse, and the first passage which we have quoted from Dr Bownes' addendum shows the extent of his self-delusion. We could not be satisfied from the opinion expressed by Dr Bownes that the is unlikely to repeat his offending with other victims, and in our opinion the continuing risk of serious harm to the public is quite enough to justify our ordering that Article 26 shall apply. If we had been dealing with the matter as *res integra*, we should have imposed a sentence of fourteen years and made an order under Article 26. Since the judge reduced the period of custody to thirteen years, however, we do not propose to increase that term (although we have power to do so). Instead of the custody probation order we shall vary the

sentence on the rape charges to thirteen years and order that Article 26 shall apply. The other sentences are affirmed and remain concurrent.

For the reasons which we have given we shall accordingly dismiss the application for leave to appeal against conviction. We shall allow the application to appeal against sentence and shall vary the sentences as we have indicated.

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

B

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J U D G M E N T

O F

CARSWELL LCJ

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