Judicial Communications Office

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COURT DISMISSED APPEAL AGAINST CONVICTION

Summary of Judgment

The Court of Appeal[1] today dismissed an appeal against conviction brought by Gerard McKenna ("the applicant") who was convicted of a number of serious sexual offences including the rape and sexual assault of a child under 13, sexual activity with a child between 13 and 16 years old, offering to supply a Class A drug and taking and removing a child without lawful authority or reasonable excuse from lawful control.

The offences were committed against two complainants aged 12 and 14 on 23 December 2019. The applicant was sentenced to nine years' imprisonment and three years extended sentence. The sentence is the subject of a reference by the Director of Public Prosecutions (DPP) as unduly lenient which is stayed pending this appeal. The applicant's co-accused (Paul Sheridan) pleaded guilty to similar offences and was sentenced to six years' imprisonment. His case is also subject to a DPP's reference.

The charges arise from events on 23 December 2019 when the applicant and his co-accused visited a children's home and left with the two complainants. Staff at the home called the police and the complainants were located with the police forming the view that they were all intoxicated. The complainants were returned to the home but immediately left again and met with the applicant and his co-accused. The deputy manager of the home found one of the complainants with the applicant who, when told the complainant was 12, started to get angry and abusive and the police were again called. The complainant on her return to the home told a member of staff that both men had had sex with her and digitally penetrated her.

The police were notified and recorded an interview with the complainant on body-worn video. The complainant was examined the following day at the Rowan Centre and undertook an achieving best evidence ("ABE") interview on 30 December 2019. This interview recorded her allegations that the co-accused had made her perform oral sex and that he had sex with her. It also recorded that the applicant had sex with her. It did not, however, specifically refer to the applicant having engaged in digital penetration of the complainant. At interview, the applicant admitted kissing one of complainants but denied all the offences. He claimed to believe the complainant to be at least 16 years old.

The trial commenced on 17 May 2021. On 20 and 21 May, the investigating officer gave evidence stating that he had been directed by the Public Prosecution Service (PPS) to visit the complainant and play the ABE interview and to clarify why the digital penetration allegation was not specifically referred to in her ABE. This resulted in a short statement given by the complainant on 14 May which concluded "I had forgotten to mention this but want it noted." The investigating officer was cross-examined by the defence about the additional statement which was made without a record being taken and without a social worker present. The defence then made an application in the absence of the jury that, in view of the wholly irregular way the additional statement had been obtained, it and

[1] The constitution of the court was Keegan LCJ, Treacy LJ and McBride J. Keegan LCJ delivered the judgment of the court.

the subsequent oral evidence should be excluded, and the jury directed to acquit on this count. A second application was made to stay the prosecution on the basis that the way the additional statement came into existence constituted an abuse of process. These applications were refused by the trial judge on the basis that no unfairness would occur as, on balance, all matters were before the jury which could make up its own mind on unfairness. No issue was taken by the defence with the trial judge's charge to the jury which the court said was significant.

Appeal

The appeal was pursued on the ground as to the admission of evidence in the statement taken on 14 May 2021 which supplemented the complainant's ABE interview. There were two limbs to this appeal point:

- The trial judge erred in law by failing to exclude evidence in relation to count 1 (sexual assault of a child under 13 by penetration) which was improperly obtained. It was contended that had this been done there would have been no evidence relating to that count upon which a jury could convict;
- The trial judge erred in refusing to stay the remainder of the case against the applicant as an abuse of process of the court as the remainder of the evidence was so tainted by the manner in which the evidence on count 1 was obtained.

Article 76(1) of the Police and Criminal Evidence (Northern Ireland) Order 1989 empowers a trial judge to exclude evidence if it appears that, having regard to all the circumstances, 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. It is therefore a matter of judicial discretion whether to exclude the evidence. The point made by the defence in this case was the unfairness occasioned by the way the statement taken on 14 May 2021 had been obtained, which was a mistake which could not be cured. The court referred to the Criminal Evidence (Northern Ireland) Order 1999 which provides for evidence to be given by ABE, which is a form of special measures, and either corrected or added to by way of an application to permit supplementary questioning. The court said that was what had happened in this case without objection as the prosecution asked additional questions of the complainant after the ABE based on the supplemental statement.

Conclusion on the issue of exclusion of evidence

The court said it was clear in this case that a mistake was made about how the supplementary statement was taken but said it had been necessary to clarify the issue pre-trial. It commented that the supplemental statement on the complaint of digital penetration cannot have come as a bolt out of the blue but that, once a statement was required, there should have been a note of how it was taken and there should not have been such an obvious prompt from the police officer to the complainant:

> "We think it clear that there was breach of good practice. However, that is not the end of the matter. The real question is whether this approach had led to unfairness in the trial of the applicant. … In deciding whether the judge was correct the case must be considered as a whole and in context."

The court said that once that exercise is undertaken the frailties of the argument advanced by the defence became apparent for the following reasons.

- The complaint of digital penetration was made prior to ABE, immediately after the alleged events to both a social worker and a police officer.
- The issue, including the officer accepting what he had done was a mistake, was fully canvassed at trial in the presence of the jury and the reliability of what the injured party said about digital penetration was a matter for the jury.
- The complainant was only 12 years of age when these events took place and was a vulnerable child in care who rightly was afforded special measures to give her best evidence.
- A witness in these circumstances is entitled to have his or her memory refreshed and it seemed sensible to have any issues with evidence clarified pre-trial.

Whilst the court accepted that there had been a breach of good practice in how the statement was taken, that did not automatically result in its exclusion as a matter of law. In each case, the judge must decide do any breaches of good practice result in such unfairness that the evidence should be excluded rather than left to the jury with suitable warnings.

The court considered that whilst the way in which the statement was taken was unsatisfactory, the judge was correct not to exclude it. It said the judge exercised his discretion in a manner which cannot be faulted, considered the mistake made by the investigating officer and placed it in context:

> "Going forward, it seems to us that this case is a timely reminder of the need to take care when the complainant, who gave evidence by way of ABE, is shown the ABE to refresh memory and where additions or corrections are made to evidence. It may be in some cases that a trial cannot proceed if matters arise which are problematic and cause insuperable unfairness to a defendant. However, this is not such a case for the reasons we have given above.
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> We do not discern any bad faith on the part of the police officer, who on any reading, was taking instructions from the PPS to deal with this issue. He also admitted his mistake. We agree that his candour is not the end of the matter however it does satisfy us that there was no attempt to cover up or conceal what was a flawed process. We bear in mind that the PPS were rushing to get this case into shape because it had not been properly put in the court diary. We find it astonishing that such an elementary error should occur in such a serious and sensitive case as this. It is also unsatisfactory to say the least that we do not have the full picture of PPS actions disclosed. Arguably the main fault lies with the lack of clarity of the PPS directions going forward. We think that this is a matter of enough concern to warrant some review by the Director to ensure that there is no repeat.

Overall, the court considered that the judge was entirely correct to refuse to exclude the evidence and leave this matter to the jury. It said this approach did not result in unfairness to the applicant.

Conclusion on the issue of abuse of process

The court considered this argument to be totally without merit and divorced from the reality of this case. It said the second limb test for abuse of process is an extremely high one and successful applications will be rare. A balance must be struck between the public interest in ensuring that those accused of serious crime are prosecuted and the competing public interest in ensuring that the misconduct did not undermine public confidence in the criminal justice system and bring it into dispute:

> "In this case, there can be no argument that the applicant was going to stand trial notwithstanding the additional statement. This was a serious case involving several offences. The application, if granted, would have led to the applicant not facing trial at all for any of the six charges against him. Whilst there was a mistake made and a breach of good practice, this comes nowhere near the misconduct which would be needed to ground an abuse of process application."

Overall Conclusion

The court dismissed the appeal against conviction.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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