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19 November 2021

COURT REFUSES LEAVE TO APPEAL AGAINST CONVICTION

Summary of Judgment

The Court of Appeal¹ today refused leave to appeal against conviction in the case of a father convicted of rape of his young son and sexual assault of his daughter.

Background

The applicant, the father of the two complainants, was not named to avoid identification of the children. The complainants were referred to as X (a male child who was aged between four and eight years old when the offences for which the applicant was convicted occurred) and Y (a female child who was aged five). The offences were committed between 2009 and 2014.

The children revealed the abuse to their mother in April 2014 immediately after a medical appointment as there was a concern about his gait when walking. After seeing a consultant X told his mother that his father had been “hurting me”. His sister, Y, then told the mother that she had come into the room and saw X with his trousers down and pulled X’s trousers up and said “bad daddy”. X is reported to have said that the sexual offending happened 70/80 times and that his father said he would shoot him and Y if he told anyone. X and Y then attended at ABE interview where they made further allegations of abuse against their father.

X was examined by a consultant paediatrician who gave evidence about the presence of a healing scar on X’s anus area. At trial two other experts gave evidence that X had a healing scar on his anus which was consistent with his allegations. One expert called on behalf of the defence opined that it was a genetic condition called “diastasis ani”.

Y was spoken to by a social worker and examined by a consultant paediatrician. No medical evidence was called at the trial in relation to Y.

The applicant denied the events occurred with the defence case being that the mother encouraged and schooled the children to give false evidence. The applicant was convicted of four offences of rape in relation to X and one count of sexual assault in relation to Y and was sentenced on 21 October 2017 to a 14 year custodial sentence comprising seven years imprisonment and seven years on licence.

On 21 October 2019, the applicant lodged a notice of appeal against conviction. Section 16 of the Criminal Appeal (Northern Ireland) Act 1980 provides that notice of application for appeal shall be given within 28 days of conviction, however under section 16(2) the time may be extended at any time by the court. The principles governing extension of time are set out in *R v Brownlee*² and are that substantial grounds must be provided to explain the delay and where there appears to be merit in the grounds of appeal it will usually be granted.

¹ The panel was Keegan LCJ, Treacy LJ and Colton J. Keegan LCJ delivered the judgment of the court.

² *R v Raymond Brownlee* [2015] NICA 39, paragraphs 8(ii) and (vi).

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The court noted that substantial grounds to explain the entire period of delay in bringing the application in this case had not been forthcoming and so the only basis upon which it would consider an extension of time was where the merits of the appeal are such that it would probably succeed.

Grounds of appeal

The grounds of appeal centred largely on the trial judge's charge to the jury. Before dealing with the individual grounds, the court commented that it is incumbent on counsel and the judge to consider whether there is, or may be, any doubt about the issues of fact to be left to the jury or the appropriate legal directions. If there are issues with the summing up they should be raised at the time and dealt with by the trial judge who has heard the evidence and is familiar with the nature of the issues so the jury can consider them if necessary:

"The fact that those involved in the trial did not feel it necessary to raise any issues with the judge's charge suggest that there was no contemporaneous concern that he erred in any way."

The court cited the test for the Court of Appeal when dealing with appeals against conviction³. This provides that the court should concentrate on the single and simple question "does it think that the verdict is unsafe". It should examine the evidence given at trial and gauge the safety of the verdict against that background. The court must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal. The court then proceeded to consider the six grounds of appeal on the basis of this test.

1. The evidence given by the mother in respect of X's behaviour and demeanour over a period of time should not have been admitted.

The applicant argued that the mother's evidence that X was soiling at night before the allegations were made should not have been admitted as it was atypical for an eight year old to do this and that there was evidence of anal damage which was itself the subject of conflicting expert evidence. The evidence at issue was that of the mother saying that in 2013 X started to soil himself at night, wore pull ups and wrapped himself in a towel when she took his pull ups off. She also noticed that he had started to walk strangely.

Having considered the transcript of the trial the court agreed with the prosecution submission that the mother's evidence was a statement of fact to explain the background of her observations and was not a proposition put as supportive of the allegations made by X. The court said it was not convinced that this was prejudicial, that it would have distorted the view of the jury or that the ground of appeal bore much relationship to the facts of this case. It was not satisfied that this was demeanour evidence but said that even if it was this evidence was not central or powerful evidence linked to the allegations. The absence of a specific direction did not lead the court to question the safety of the conviction and it said this evidence had no bearing at all on the allegations made and was not of such a nature as to confuse the jury in any way. The court concluded that this ground of appeal had no prospect of success.

³ *R v Pollock* [2004] NICA 34

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2. The judge's direction in relation to separate consideration of the complainants was inadequate.

It was accepted by all that the trial judge referred to the fact that there were separate complaints and that each charge should be dealt with separately (referred to as a "standard direction"). The issue was whether he should have gone further and warned that one complainant's evidence could not be used to establish guilt in relation to another complainant's evidence (commonly referred to as a "second limb warning"). There is no rule of law in relation to this as each case will depend on its own particular facts. The relevant facts in this case were:

- Child Y was a witness to the allegations made by child X;
- There was a body of medical evidence which had to be assessed by the jury;
- The jury could not have been in any doubt about the defence case which was simply that these allegations were concocted;
- There was no criticism of the trial judge's summary of the evidence and arguments of both sides;
- It was clear that the jury was capable of sorting one allegation from another, of distinguishing stronger evidence and weaker evidence as demonstrated by the fact that it acquitted on a number of charges and decided that one count was not made out but another was appropriate. This pointed to the fact that this was a careful jury who analysed all of the evidence in reaching the result they did.

The court accepted that there was a valid legal argument to make in relation to the adequacy of the charge, however, it concluded that the outworking of this did not lead to any unease in terms of the safety of the conviction.

3. There was no evidence to support the alternative count nine (sexual assault of Y) and the judge's direction was inadequate in relation to that.

In assessing this ground of appeal, the court looked at the trial judge's charge in relation to the ninth count. Having done so, it said it considered it was a very proper and neutral direction which would allow a jury to make a choice. In addition, it noted that the trial judge properly highlighted inconsistencies in Y's account. Overall, the court said it could not see any material failing on the part of the trial judge and found no merit in this ground of appeal.

4. The judge's direction was inadequate in relation to the mother's evidence in that he did not state that that evidence was not independent.

The court examined the judge's charge as a whole in determining this appeal point. The court considered that it would have been better for the judge to have given a warning in relation to the independence or otherwise of the source of the complaint in the overall assessment of the case but said this omission did not lead it to a position where it had any reservations about the safety of the conviction having looked at the case as a whole.

5. There was an improper direction given by the judge to the jury regarding the standard of proof in relation to the defence medical expert.

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The appeal point was that the judge, by virtue of the charge he gave on this issue, effectively reversed the burden in relation to the defence medical evidence by using the phrase that the jury had to be “sure.” The court did not agree that the jury were given an improper direction regarding the standard of proof. On the contrary the judge with conspicuous care set out all of the medical evidence from both the prosecution and defence and the jury were particularly well placed to assess that evidence. The court did not consider there was any point of substance in this ground of appeal and certainly not one which caused it to doubt the safety of the conviction.

6. The judge failed to give an adequate direction in relation to the dangers of contamination.

Whether there is an obligation upon the trial judge to address the jury upon the risk of collusion or of innocent contamination or both depends upon the development of the evidence in the trial. The court noted that in this case a contamination argument was never part and parcel of the defence case and, therefore, this ground of appeal was totally divorced from the reality of the case that was put before the court. It concluded there was no merit in this ground of appeal.

Overall conclusion

The court was greatly concerned that this appeal had been brought two years after a conviction in June 2017 and was in effect an “extremely belated criticism of the judge’s charge”. However, the court considered the substance of each and every aspect of the appeal. Having examined the case in detail and having applied the test in *R v Pollock* to the facts of the case the court said that whilst there were some issues with the charge it did not have any sense of unease about the safety of this conviction.

Nonetheless, the court said there were some important lessons to be taken from this case. The court said that it should be the established practice for counsel in accordance with their obligations and duties to discuss matters such as this with the judge prior to the charge to the jury:

“We repeat the point that if errors or omissions are apparent in the judge’s charge counsel must exercise their right to requisition rather than wait until the end of the trial and then appeal. We understand that legal teams may change and mistakes may then be exposed however we consider that this eventuality should be rare if experienced counsel were originally instructed. It is also worth remembering that mistakes may have a serious impact both for an accused who may have a valid complaint in relation to fairness but also for a complainant in a serious sexual offence cases who may not be able to face a retrial. Either way, there is the real potential that the interests of justice are not served. This appeal has exposed a very unsatisfactory situation which we hope is not repeated given the potential effects upon the criminal justice system and upon public funds if convictions are quashed and cases have to be reconsidered years after conviction and sentence.”

Disposal

The court found this case to be substantially out of time, that the reasons for the delay were not adequately explained, that the conduct of this appeal was concerning in a number of respects, and in

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any event, that none of arguments raised would result in a successful appeal. The court refused leave to extend time and dismissed the appeal.

NOTES TO EDITORS

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

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lady Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921

E-mail: Alison.Houston@courtsni.gov.uk