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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**5/11/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

Respondent:

v

STASYS BARANAUSKAS

Applicant:

_____

Before Stephens LJ, Treacy LJ and Horner J

_____

HORNER J (delivering the judgment of the Court)

Introduction

[1] The applicant, Stasys Baranauskas ("SB") was convicted by a jury at the Crown Court sitting at Craigavon on 30 June 2017. The offences of which he was convicted are:

(i) assault occasioning actual bodily harm, contrary to Section 37 of the Offences against the Person Act 1861 ("the Act") on Raimondas Dailied ("RD");

(ii) grievous bodily harm with intent on RD, contrary to Section 18 of the Act;

(iii) assault occasioning actual bodily harm on a female whom I refer to as IB, contrary to Section 47 of the Act;

(iv) aiding and abetting rape (penile) of IB, contrary to Article 5(1) of the Sexual Offences (NI) Order 2008;

(v) aiding and abetting rape (anal) of IB, contrary to Article 5(1) of the Sexual Offences (NI) Order 2008;

(vi) attempted rape of IB, contrary to Article 3(1) of the Criminal Attempts and Conspiracy (NI) Order 1983 and Article 5(1) of the Sexual Offences (NI) Order 2008;

(vii) sexual assault, contrary to Article 7(1) of the Sexual Offences (NI) Order 2008; and

(viii) false imprisonment of IB, contrary to Common Law.

He was acquitted of sexual assault on IB by penetration, contrary to Article 6(1) of the Sexual Offences (NI) Order 2008.

SB was sentenced on 8 December 2017 and received an extended custodial sentence of 15 years in total for all the offences.

[2] SB seeks leave to appeal those convictions from this Court because his initial application for leave to appeal under Section 45 of the Criminal Appeal (NI) 1980 was dismissed by Maguire J. He refused leave to appeal in respect of three grounds which he identified with some difficulty, namely:

(a) whether the evidence relating to the bad character of SB should have been admitted;

(b) whether the learned trial judge ("LTJ") should have given to the jury a special warning in respect of the evidence of the main witness, IB; and

(c) whether the LTJ should have withdrawn the case from the jury in accordance with limb 1 of *R v Galbraith* at the direction stage.

[3] Maguire J referred to many other arguments/potential grounds advanced in the skeleton argument which accompanied the Notice of Appeal as "insufficiently developed to cause the Court to grant leave". By the time the appeal reached this Court there was a Notice of Appeal, a skeleton argument and a revised skeleton argument which raised different grounds of appeal many of which were still not properly or fully developed. SB subsequently lodged a further "grounds of appeal" on 17 September 2018 which included 9 grounds of appeal. Senior Counsel for SB in concluding his oral submissions summarised his appeal on the basis of 6 different grounds of appeal. The Court was also presented with 3 ring binders of authorities from SB including 57 cases and extracts from Blackstone on Criminal Practice (2018) and the Bench Book. No attempt was made initially to comply with the Practice Directions and asterisk those authorities that the Court should read in full and highlight those sections of the other cases that the Court was required to read before the appeal. This was done belatedly following a direction from the Court. At the appeal hearing the vast majority of authorities remained unopened and were not referred to even in passing. In fact 2 authorities were opened briefly to the Court, one of which was of no relevance, factually or legally, to the present appeal.

[4] On 18 September 2018 before the hearing of the appeal the Court of Appeal office drew SB's legal advisors' attention to what appeared to be defects in the

grounds of the appeal by, for example, referring at Ground 2 to 'all the circumstances of the case' without indicating what those circumstances were and at Ground 4 complaining that the trial judge had "failed to properly consider all the relevant factors in the exercise of his discretion" without identifying those factors on which SB was relying.

[5] In response SB's legal team asserted that:

(a) the grounds of appeal document represented "a genuine and earnest attempt to focus the appeal but not to change or amend the grounds of appeal";

(b) the grounds of appeal had not been altered from the grounds amplified in the original skeleton argument;

(c) The use of the phrase "in all the circumstances" was justified; and

in general sought to stand over the grounds of appeal as drafted.

[6] At the appeal hearing Mr Brian McCartney QC advanced SB's application for leave to appeal with unfailing good humour and skill in the face of considerable adverse comment from the Court about the manner in which the application for leave to appeal had been presented first to the single judge and then to this Court. As has been noted Mr McCartney did attempt at the end of his oral submission to summarise SB's case in six points. After Mr McCartney had concluded his submissions, the Court decided it was not necessary to call upon the prosecution to respond to the arguments that had been advanced on behalf of SB.

[7] Leave to appeal was refused on all grounds. The Court reserved its judgment for a later date, as it particularly wanted to provide advice to practitioners about how a criminal appeal should be conducted in this Court. The different iterations of the grounds of appeal had been confusing. The Court has endeavoured to understand the complaints made by SB about the defects in the original trial process. But this has proved difficult and time consuming. Consequently much of the Court's time has been unnecessarily wasted.

Background Facts

[8] The events which led to the conviction of SB on 8 counts and Darius Porcikis ("DP") and Deividas Mikulinas ("DM") on various counts took place on 13 July 2011 at Craigavon. All those involved were Lithuanian nationals living in Northern Ireland. Some of the offences were committed against a man called Raimondas Dialide ("RD") including GBH with intent. A number of other offences were committed against a woman, IB. It was IB who accused SB of attempting to rape her and of aiding and abetting her rape. IB suffered physical soft tissue injuries but also symptoms consistent with post-traumatic stress. RD suffered life changing injuries as a consequence of the attack carried out on him.

[9] DP was convicted of assaults, rape and sexual assault in 2014 arising out of his role in these events. He received an extended custodial sentence of 18 years following his trial in 2014. DM was convicted of assault occasioning actual bodily harm and he received a 12 month conditional discharge. The separate trial of SB took place some 3 years later in June 2017.

[10] On 26 June 2017 at the conclusion of the trial the LTJ ruled in the absence of the jury that the prosecution case was "inherently weak and tenuous" and he proposed to direct the jury to find SB not guilty on all counts. The prosecution appealed under Article 17 of the Criminal Justice (NI) Order 2004. On 28 June 2017 the Court of Appeal allowed the appeal concluding that the decision of the LTJ was defective as it took account of an immaterial matter that is the failure of IB to identify SB in a line-up, which was a matter for the jury. The LTJ then gave his charge to the jury on 29 June 2017 and the applicant was convicted, without him testifying in his own defence, on 30 June 2017 of those counts referred to above.

[11] It is against those convictions which SB now seeks leave to appeal under Section 45 of the Criminal Appeal (NI) Act 1980. As we have already observed he was refused leave to appeal to this Court by a single judge, Maguire J, on three grounds, namely:

(a) Whether the evidence related to the bad character of SB should have been excluded.

(b) The issue of whether a Makanjuola warning ought to have been given to the jury by the LTJ in respect of the evidence of IB.

(c) The issue of whether the LTJ should have withdrawn the case from the jury in accordance with limb 1 of *R v Galbraith*.

[12] Maguire J refused to deal with the other issues which had been raised on SB's behalf. He explained why he had taken this course at paragraph [11] of his decision:

> "[11] Notice of appeal was filed on 28 July 2017. The grounds of appeal do not appear to have been set out in it. It was, however, accompanied by a skeleton argument signed by Counsel. The Court has not found this document as helpful as it could and should have been. In particular, many of the issues which it purports to raise are referred without adequate detail. Consequently, many of the contentions simply lack substance and/or provide no adequate explanation of the precise point which is being advanced. It goes without saying, that in respect of an application for leave, the onus rests on the applicant to establish that he has an arguable case bearing

> a reasonable prospect of success. If that is not done, ordinarily the Court will refuse leave. In the present case, the Court is of the opinion that it will refuse leave on all '**grounds**'. Often though not invariably, this will be because of the absence of any coherent exposition of the matter in question which sufficiently relates a contention advanced to the facts of the case in the papers which have been presented to the Court."

Application for Leave to Appeal

[13] This Court, like the single judge, has had enormous difficulty in understanding the basis upon which SB was seeking leave to appeal the jury's decision. There were various documents purporting to contain the grounds of appeal upon which SB relied. Mr McCartney also provided an oral summary of the grounds that SB relied upon when he concluded his oral submissions. However, some of these grounds did not marry with ones that had gone before and consequently it has been an extremely difficult task for this Court to understand the precise nature of SB's complaints about his convictions. This is a matter to which the Court intends to return at the conclusion of this judgment. Doing the best it can the Court considers that the following grounds of appeal were advanced on behalf of SB. They were:

(i) Was there a failure to follow the Turnbull Guidelines in respect of the identification evidence of DM? ("Ground 1")

(ii) Did the LTJ fail in this circumstantial case to properly direct the jury to examine, entirely and in the round, all the evidence before they were able to safely convict? ("Ground 2")

(iii) Should the LTJ have given a Makanjuola Warning in respect of IB given that there were inconsistencies in her evidence? ("Ground 3")

(iv) Should the LTJ have admitted some of the previous convictions of SB as bad character evidence under Article 8(1)(a) of the Criminal Justice (NI) Order 2004 without evidence as to the circumstances of those convictions? ("Ground 4")

(v) Should the convictions of DP, and in particular the conviction of DP for the rape of IB, have been admitted and having been admitted should the judge have told the jury that "it is not a made-up story"? ("Ground 5")

(vi) Should the LTJ have withdrawn the case under Limb 1 and/or Limb 2 of *R v Galbraith* at the close of the prosecution case? ("Ground 6")

Discussion

Ground 1

[14] Blackstone's Criminal Practice [2018] at F19.9 states:

> "First whenever the case against the accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken the judge should warn the jury of the special need for caution before convicting the accused on reliance of the correctness of the identification or identifications."

[15] Thus the pre-condition for a warning under the Turnbull Guidelines is an allegation of mistaken identification. In this case:

(a) There was no challenge to DM's identification of SB with DP. On the contrary it was claimed that the issue of this identification was irrelevant.

(b) It was never put to DM that he was mistaken in his identification of DP or SB.

(c) The LTJ was never requisitioned on this issue.

(d) The closing by the defence to the jury highlighted not that DM was mistaken in his identification of SB but that it was a "red herring".

There is no substance to Ground 1.

Ground 2

[16] It was not altogether clear whether SB was actually pursuing this as a ground of appeal and it seemed to become merged or perhaps submerged by the complaint about the failure to provide a Makanjoula Warning. It can be dealt with in a straightforward manner.

(i) The LTJ's direction to the jury in respect of circumstantial evidence was entirely in accordance with proper principles. He told the jury the Crown had to establish guilt beyond reasonable doubt, that circumstantial evidence may be fabricated and further that it was important to look for circumstantial evidence which was neutral or inconsistent with SB's guilt.

(ii) The jury heard all the evidence including inconsistencies in the testimony of IB to which we will refer to below. Those inconsistencies were highlighted by the LTJ in his charge to the jury. For example the LTJ highlighted the inability

of IB to identify SB during the Viper procedure as evidence which was inconsistent with SB's guilt

(iii) The LTJ was not requisitioned after he had given his charge as to how he had dealt with the issue of circumstantial evidence and the inconsistencies of IB.

There is no substance in this ground.

Ground 3

[17] Senior Counsel for SB highlighted various inconsistencies in the testimony of IB. These included:

(a) Whether or not a lubricant was used during the rape of IB.

(b) The alleged planting and positioning of the baby oil in the flat after the rape.

(c) Whether IB had previously had sexual intercourse with DP once or twice.

(d) IB's failure to identify SB on a VIPER procedure.

[18] We note that the defence had the opportunity to ask the LTJ to give a Makanjoula Warning before he commenced his charge to the jury but chose not to do so. The issue of whether a Makanjoula Warning should have been given was only raised after the LTJ's charge, when to do so in the words of the prosecution it would have made "a carefully crafted balance in the judge's overall charge entirely redundant and impelled the jury to disbelieve the victim". There can be no doubt that it would have been very difficult for the LTJ to give such a direction after his charge. However the LTJ did draw attention to the various inconsistencies in the testimony of IB. The jury heard her give evidence. Lord Taylor CJ summarised the relevant principles in *R v Makanjoula* [1995] 3 All ER 730 at 735. It is important to realise that the issue of whether or not to give such a warning is a matter of discretion for the LTJ. Devlin J in *R v Cook* [1959] 2 QB 340 at 348 said:

> "It is well settled that this Court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision."

[19] This was subsequently cited with approval by Viscount Dilhorne in the House of Lords in *Selvey v DPP* [1970] AC 304 at 342.

[20] This was a matter pre-eminently for the LTJ's discretion. SB has come nowhere near to persuading this Court that the LTJ was wrong in the exercise of his discretion on this issue given the circumstances of this case or that it has resulted in an injustice to SB.

Ground 4

[21] Article 6 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 states the following:

> "(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—
>
> ….
>
> (d) it is relevant to an important matter in issue between the defendant and the prosecution."

[22] Article 8 of the Order indicates what constitutes a matter in issue between the defendant and prosecution and states:

> "8.—(1) For the purposes of Article 6(1)(d) the matters in issue between the defendant and the prosecution include—
>
> (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence."

[23] It is subject to Article 6(3) of the said order, which states:

> "(3) The Court must not admit evidence under paragraph (1)(d) or (g) if, 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."

[24] The bad character in this case included a conviction for a robbery which was committed on 30 May 2005, conviction for assault occasioning actual bodily harm on 25 August 2010, a conviction for assault occasioning actual bodily harm on 13 July 2006 and a conviction for domestic violence on 16 March 2014. Again, this was an exercise by the trial judge of a discretion vested in him. In fact, the trial judge excluded a conviction for exposure by SB when he exposed his penis to the custody sergeant and invited him to "suck on this" on 26 August 2010. We consider that this evidence of his convictions for these offences was highly relevant to demonstrate a propensity on the part of SB to acts of extreme violence. In the case of *R v Darnley*

[2012] EWCA Crim 1148 at paragraph 32 the Court of Appeal in England and Wales said:

> "We agree with the observations of Professor John Spencer at paragraph 4.58 of his book "Evidence of Bad Character" (2nd Edition) where he suggested the concept of weak evidence referred to in Hanson should be limited to evidence which links the defendant to the offence but which the Courts would normally treat with caution, such as a **fleeting glance** identification or a cell confession. This is not this case."

[25] As in *R v Darnley*, there was evidence at the crime scene, namely the palm print, to connect SB to the scene of the crime. There was also evidence of SB's association with DP at a time proximate to the commission of the offences, his proximity to the crime scene, his general description and the fact that this person so identified was wearing a bracelet of similar description to that worn by the assailant. The evidence against SB was most certainly not "a fleeting glance".

[26] There was also a complaint that the LTJ failed to tell the members of the jury of the circumstances of the offending of which SB was convicted. They were told only of the convictions. However, Mr McCartney accepted that the circumstances of the offending of SB would have been more prejudicial to SB than simply telling the jury of the fact that he had been convicted of these offences. In those circumstances the course taken by the LTJ can be easily understood as it was for the benefit of SB.

Ground 5

[27] Article 72(2) of the Police and Criminal Evidence (NI) Order 1989 makes it clear that a person who has been convicted of an offence is taken to have committed that offence unless the contrary is proved:

> "(2) In any criminal proceedings in which by virtue of this Article a person other than the accused is proved to have been convicted of an offence by or before any Court in the United Kingdom … he shall be taken to have committed the offence, unless the contrary is proved."

[28] No such contrary proof was offered in this trial. SB, as the Court has noted, did not testify and no evidence was adduced to disprove or challenge the convictions. Indeed, it was not disputed during the trial that the convictions adduced in evidence related to the second part of the incident which involved, the prosecution contended, SB. Indeed, defence counsel did not challenge the introduction by the prosecution of the conviction at the time. Nor was there any requisition of the LTJ after he had completed his charge to the jury. The charge to the jury by the judge on this issue was fair and accurate. More importantly when the

LTJ said that "it is not a made up story", the context in which he said it was in relation to DP's convictions of those offences which had been admitted in evidence. In that context the judge was entirely correct to say what he did and cannot be the subject of any criticism.

Ground 6

[29] The first limb of *R v Galbraith* is usually described as being engaged "where there is no evidence that the crime alleged has been committed by the defendant". This is clearly not the position here. Instead, SB seeks to argue that it can be used in a broader way where, for example, "an essential prosecution witness has failed to come up to proof, or where there is no direct evidence as to an element of the offence and the inferences which the prosecution ask the Court to draw from the circumstantial evidence are inferences which, in the judge's view no reasonable jury could properly draw": see Blackstone's Criminal Practice [2018] at D 16.56. This was clearly not the case here and has been further underlined by the way in which the Court of Appeal dealt with the prosecution's appeal against the LTJ's original decision to grant an application of no case to answer on the evidence.

[30] SB's argument under the second limb is equally hopeless. There was evidence to go to the jury and the Court of Appeal made this clear on the prosecution's appeal. In those circumstances there can be no substance to any complaint that the evidence in this case was "too inherently weak or vague for any sensible person to rely on it". The case made by the prosecution was neither inherently weak nor tenuous.

Conclusion

[31] The jury heard all the evidence against SB in this case. They were expertly guided by the LTJ in his charge. The jury convicted SB on all but one of the counts. The various grounds of appeal advanced in this case are all without merit. The application for leave is refused

Practice in relation to appeals in criminal cases

[32] The applicant, like virtually every other defendant in Northern Ireland, was represented by independent counsel and solicitors at his trial. In this case, as in most others, that was paid for by the State's Legal Services Commission. Those representatives knew what the issues were at trial and would have had a feel for the dynamics of the trial. It was their duty to the applicant to provide him with skilled advice upon whether or not there existed arguable grounds of appeal, and to draft them with precision and care if they existed. That was to be done within the time set out in section 16 of the Criminal Appeal (NI) Act 1980. We would observe that ill-defined and shifting grounds of appeal result in a wholly disproportionate amount of staff and judicial resources in preparation and hearing time and can also

lead to the waste of significant sums of public money, for example in the obtaining of transcripts. The more time the Court of Appeal Office and the judges spend on ill-defined grounds of appeal, the longer the waiting times are likely to be for other cases, which is a matter of considerable concern.

[33] We consider that the following are the principles governing grounds of appeal:

(i) As a general rule, all the Grounds of Appeal an applicant wishes to advance should be lodged with the Notice of Appeal.

(ii) The filter mechanism provided by the application for leave to appeal by the single judge is an important and essential part of the appeal process. This Court will not permit any attempt by practitioners to bypass or undermine it.

(iii) It is the duty of counsel when drafting grounds of appeal to include only grounds which appear to them to be capable of argument before the Court, see *R v Nolan* [1979] NI 94 at 95 letter E.

(iv) The formula "that the verdict was unsafe" if used should continue "in the following respects" or "for the following reasons" and the particular points relied on should then be stated in the notice, see *R v Nolan* at 95 letter B. The practice of stating that the verdict was unsafe "in all the circumstances of this case" or that the trial judge "failed to properly consider all the relevant factors in the exercise of his discretion" is not good enough; such a notice is not in law an effective notice of appeal.

(v) The sole ground for allowing an appeal against conviction in section 2 of the Criminal Appeal (Northern Ireland) Act 1980 is that the Court of Appeal "thinks that the conviction is unsafe." The formula should not include the additional word "that the verdict was … unsatisfactory."

(vi) It is essential that counsel should adhere to the rules of Court and the Practice Direction (Court of Appeal: Notice of appeal against conviction or sentence) of 9 September 1994 and Practice Direction 3/2007 ("the Practice Directions") in drafting and amending grounds of appeal, see *R v Kalia (Jagan Nath)* (1974) 60 Cr. App. R. 200 and the Practice Direction.

(vii) An application for leave to appeal setting out the grounds of appeal must be received by the Court within the proper time. Unless the Court is asked for permission to file further grounds, further grounds cannot be entertained and the original grounds stand, see *R v Haycraft,(Terence Charles)* (1974) 58 Cr. App. R. 121.

(viii) An appeal to the Court of Appeal must state the grounds of the appeal and the practice of stating "grounds of appeal to follow," "grounds being settled"

or "see attached skeleton argument" is not good enough; such a notice is not in law an effective notice of appeal, see *R v Wilson* [1973] Crim LR 572 and paragraph 3 of the Practice Direction of 9 September 1994.

(ix) Time will continue to run against the defendant if the notice of appeal is ineffective, see *R v Wilson* and paragraph 4 of the Practice Direction of 9 September 1994.

(x) If the application for leave to appeal is out of time as a consequence of an ineffective notice of appeal then the Court will apply the principles governing the exercise of the discretion to extend time to apply for leave to appeal set out at paragraph [8] of the judgment of Morgan LCJ in *R v Brownlee* [2015] NICA 39. A failure by counsel to draft effective grounds of appeal will not normally amount to substantial grounds explaining considerable delay within paragraph [8] (ii) of *Brownlee* with the consequence that the applicant would have to establish that the merits of the appeal were such that it would probably succeed, see paragraph [8] (iii).

(xi) Single judges must consider very carefully an application for an extension of time, particularly a significant extension, before granting it. We consider that if it is considered by the single judge that it has been established that there is an arguable ground of appeal bearing a reasonable prospect of success so that leave to appeal should be granted then whilst the single judge may express a preliminary view in relation to an extension of time ordinarily the application for such an extension should be referred by the single judge to the full Court.

(xii) Grounds of appeal should not be overloaded, contain unsubstantiated details, and be inaccurate or prolix see *R v Pybus*, The Times, 23 February 1983.

(xiii) The single judge filter mechanism should not be by-passed by lodging new Grounds of Appeal after refusal of the written application for leave to appeal by the single judge exercising his or her power under section 45 of the Criminal Appeal (Northern Ireland) Act 1980, see *R v James and others* [2018] EWCA Crim 285. If new grounds of appeal are lodged after a refusal then on a purely pragmatic basis this will be considered by the full Court but there should be a fresh written application for leave to appeal and if that application is out of time then the applicant must provide details in writing of the delay and an explanation for it so that consideration can be given as to the cogency of the reasons for the delay and whether there is anything in the explanation that justifies an extension of time. Furthermore the applicant should state whether the issues/facts giving rise to the new Grounds were known to the applicant's representative at the time he or she advised the applicant regarding any available Grounds of Appeal.

(xiv) The Practice Directions should be followed in respect of the citation of authorities. Those which the Court is asked to read in full should be

asterixed. In respect of other authorities relied upon the passages should be highlighted or the passages cited.

(xv) Practitioners should not provide more than one authority for any single proposition of law. It is not necessary for counsel to cite different authorities for one proposition of law. In general counsel should be sparing in their citation of the legal authorities which the Court can and should rely. In this Court less is often more.

(xvi) Surplus citations and repetitive and redundant grounds of appeal do not transform a straightforward appeal into a complex one.