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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

CRIMINAL APPEAL (NORTHERN IRELAND) ACT 1980

THE KING

v

LT

Brian McCartney KC with Conan Rea (instructed by McConnell Kelly & Co, Solicitors) for the Applicant
Tessa Kitson KC with J Johnston (instructed by the PPS) for the Respondent

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Before: Treacy LJ, Horner LJ, Kinney J

TREACY LJ *(delivering the judgment of the court)*

Introduction

We have anonymised the applicant's name to protect the identity of the complainant and so this will appear as the cypher LT. The complainant is entitled to automatic anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992.

[1] The applicant was tried at Downpatrick Crown Court sitting at Laganside before Judge Ramsey KC and a jury on an indictment containing 21 counts of sexual abuse against his step daughter. These were 5 counts of rape, 4 counts of gross indecency with or towards a child; 2 counts of causing or inciting a child under 13 to engage in sexual activity; 1 counts of sexual assault of a child under 13; 1 count of sexual assault of a child under 13 by penetration; 1 count of sexual activity with a child family member involving penetration; 1 count of sexual activity with a child family member (non-penetrative); 1 count of adult inciting child family member to engage in sexual activity; 4 counts of sexual activity with a child family member (non-penetrative); 2 counts of sexual assault.

[2] The trial commenced on 25 January 2022. The jury retired on 8 February at approximately 1:45pm. They deliberated until approximately 11:30am on 10 February when they returned a unanimous verdict of guilty on all counts. The matter was adjourned for sentence and the defendant was ultimately sentenced to 16 years' imprisonment on 11 October 2023.

[3] Leave to appeal the conviction was refused by the Single Judge. The applicant renewed his application before the full court. We refused the application and dismissed the appeal at the conclusion of the hearing with written reasons to follow. This judgment contains those reasons.

[4] One of the grounds of appeal had been a contention that the trial judge erred in failing to accede to a defence application of "no case to answer" at the close of the prosecution case [the *Galbraith* point]. This ground was regarded as unarguable by the Single Judge. It was pursued again in the renewed application for leave to appeal before the full court. Although the skeleton argument lodged on behalf of the applicant developed this ground in some detail it was ultimately abandoned by the applicant. This was notified by email to the court office the evening before the appeal was scheduled to start. The decision not to pursue the point was in our view a correct and sensible approach to have adopted.

[5] The applicant also applied for leave to adduce, in accordance with Section 25 of the Criminal Appeal (Northern Ireland) Act 1980, new material in the form of a letter from an alleged juror alleging irregularities in the deliberative process of the jury. The nature and background to this application was also developed in detail in a skeleton argument dated 25 May 2023 and signed by both senior and junior counsel for the defence. It was submitted in the written argument that the interests of justice called for its admission on the basis that the material was capable of belief and, if admitted, might afford a ground for allowing the appeal. The applicant's four page skeleton argument and the book of authorities both referred to a series of decided cases relating to this point. This caselaw was being relied on by the applicant in support of admission of the material and any related ground of appeal based on alleged jury irregularity.

[6] The prosecution in their skeleton argument robustly challenged this aspect of the applicant's appeal. Because issue had been joined on this important matter of alleged jury irregularity the court had to consider the written arguments and the relevant caselaw in detail before it sat to hear the appeal. Indeed, it appeared to the court that this ground of challenge, together with the *Galbraith* point, were likely to be the central grounds of challenge. When the court sat to hear the appeal senior counsel for the applicant was closely questioned by the court about a number of matters that raised issues of concern. The court was anxious to probe the provenance of the typed letter which purported to be from a juror, and which had been addressed, not to the PPS or the police, but to senior counsel for the applicant some six weeks after the conclusion of the trial. Indeed, the Crown in its skeleton argument specifically called

into question the provenance of the letter posted to the applicant's senior counsel at the Bar Library some six weeks after the guilty verdicts were delivered. The matters contained within the letter, from a person purporting to be a juror, so long after the conclusion of the trial, raised legitimate areas of inquiry in the minds of the court. The document was typed and bore no trace of handwriting. The alleged juror refused in the letter to disclose his/her jury number stating "I am unable to give you my jury number due to me allowing myself to break my oath" [sic]. No member of the jury raised any issues of the type alluded to in the letter during the trial. And we observe that this was a conscientious jury who had no hesitation about sending in notes to the judge raising important matters connected with the trial. Further probing however became unnecessary as the court was then informed that this ground was **not** now being pursued. We record that the applicant's solicitor had notified the court on the day before the appeal was due to start that the *Galbraith* point was not being pursued. However, no intimation was given that the jury irregularity point was also being abandoned. Accordingly, the point having been expressly abandoned, we do not feel compelled to pursue our scrutiny further and need say no more about it as it has ceased to be part of the applicant's case.

Rewatching of ABE interviews

[7] As it transpired the central ground of the applicant's appeal focused on the replaying of a substantial portion of the ABE interviews to the jury, after their retirement, and in response to a specific request from the jury to listen to the recording again. The applicant contends that the trial judge erred in allowing the jury to rewatch the majority of the complainant's ABE interview and, in particular, failed to properly balance the risk of them attaching disproportionate weight to same by reminding the jury in detail of the cross examination of the complainant from his notebook.

[8] In order to understand whether there is any merit in this point it is, as always, important to bear in mind the full context in which the impugned matter occurred. This context will of course include the important consideration of whether the procedure now complained about was adopted with the express or implied consent of the defence. Relatedly, it also important, but not determinative, to see whether or not the defence raised any issue at trial about that of which they now complain on the applicant's behalf. Defence lawyers have duties to their client and to the court. If something occurs during the course of the trial which may impair the safety of any potential conviction it is their duty to draw it to the attention of the court especially if it is capable of being addressed within the trial process and thereby speedily remedied. A complaint made on appeal which seeks to undermine the safety of a conviction will rarely prosper if it was not the subject of opposition or requisition during the trial. This is even more obviously so if the complaint relates to something which was done with the express or implied consent of the defence or if it raises points on appeal which are fundamentally inconsistent with the way the trial was conducted by the defence. We note that this applicant did not discharge his lawyers, that the same highly experienced legal team continues to represent him on this appeal, and he has not sought to criticise the manner in which the case was conducted.

[9] Likewise, if the prosecution have concerns about anything done or not done by the judge that could imperil the fairness of the trial or undermine the safety of a verdict it is their duty to raise their concerns with the court particularly if legitimate matters of concern are capable of being remedied within the trial process.

[10] We turn now to the details of this issue. During their deliberations the jury presented two notes to the court. The first note stated:

> "Dear Judge Ramsey
>
> Would it be possible to get a copy of [the complainant's] transcript? As when listening to her ABE it was hard to hear the evidence towards the end, and a few bits are unclear.
>
> Kind regards
> The jury"

The second note was similarly addressed and signed with the body of the note stating:

> "Could we please listen to the last half of the first interview and the whole second interview?"

The word "listen" was underlined.

[11] As is apparent from the notes the jury expressed a difficulty in hearing some of the complainant's evidence. It appears that in accordance with the prevailing practice the jury did not have the transcripts of the ABE interviews when listening to and watching what constituted the complainant's evidence-in-chief. This practice is, we understand, underpinned by a concern that the provision of a transcript might distract the jury from observing the demeanour of the witness when giving her evidence in chief. The judge refused their initial request to be given a transcript of the complainant's ABE to consider in the jury room. Upon invitation from the court the jury identified the portions of the ABE evidence they wished to hear again, and this was played for them in open court. The jury had replayed the last 37 minutes of the first ABE and all of the second ABE. The judge had discussed the notes from the jury with the prosecution and defence senior counsel. The transcript records the judge saying: "I've discussed the note with Counsel. We will make that [ABE] available for them…"

[12] Importantly, as confirmed during the appeal, neither the defence nor the prosecution raised any objection to responding positively to the jury's request to listen again to the ABE evidence or to the manner in which was replayed. As the prosecution pointed out there was agreement across the board as between the trial judge, the prosecution and the defence regarding same. In these circumstances the applicant's

contention that the trial judge erred in allowing the jury to listen again to the ABE rings distinctly hollow. They expressly or at least impliedly consented to and approbated the approach adopted by the judge, a position arrived at after he had consulted with counsel for both the prosecution and the defence in the absence of the jury. No party objected.

[13] Under this ground the applicant also alleges that the trial judge failed to properly balance the risk of the jury attaching disproportionate weight to the evidence they had just reheard.

[14] The judge was referred to the case of *R v Rawlings and Broadbent* [1995] 1 WLR 178 in which Lane LCJ emphasised the need to guard against unfairness deriving from the replay of video recordings after the jury had retired, because it was only the evidence in chief of the witness concerned that was portrayed in the video recording. In deciding whether the judge should exercise his discretion to allow this the court stated:

> "In our judgment it is a matter for the judge's discretion as to whether the jury's request for the video to be replayed should be granted or refused. He must have in mind the need to guard against unfairness deriving from the replay of only the evidence in chief of the complainant. Usually, if the jury simply wish to be reminded of what the witness said, it would be sufficient and most expeditious to remind them from his own note. If, however, the circumstances suggest or the jury indicate how the words were spoken is of importance to them, the judge may in his discretion allow the video or the relevant part of it to be replayed. It would be prudent where the reason for the request is not stated or obvious for the judge to ask whether the jury wish to be reminded of something said which he may be able to give them from his note or whether they wish to be reminded of how the words were said."

The court stated that the replay after retirement should only be permitted in court with the judge, counsel and the defendant present. Further, he said that the judge should direct the jury to guard against the risk of giving the evidence in chief shown on the video disproportionate weight, and should bear well in mind the other evidence in the case. Lastly, Lord Lane CJ said that if the video was replayed, the judge should remind the jury of the cross-examination and re-examination of the witness from his notes.

[15] In *W* [2011] EWCA Crim 1142 the appellant was convicted of rape and penetration of his step-daughter, C, aged 14. The judge informed the jury during his summing up that they could watch a replay of the recorded ABE interview if they wished. Following *Rawlings* the court found that the normal practice was to refuse to replay a video of a child witness unless the jury indicated that they wished to be

reminded of the manner in which the evidence was given, as distinct from what was said. The court emphasised that:

> "… whether the video is replayed or not, any repetition of the child's evidence to the jury after retirement should be accompanied by the warning emphasised and required in *Rawlings* [1995] 2 Cr App R 222 and *McQuiston* [1998] 1 Cr App R 139 and that in addition, in order to achieve fairness and to support the warning given, the judge ought to remind the jury of the evidence given by the complainant outside the video itself and indeed, in order to maintain that fair balance, may also have to refer to other relevant parts of the defence evidence"

The *Rawlings* warning is to the effect that the jury should guard against the risk of giving the video disproportionate weight simply for the reason that they are hearing it a second time and should bear well in mind the other evidence in the case, and the judge should after the tape has been replayed, remind the jury of the cross-examination and re-examination of the complainant, whether the jury ask him to do so or not. *McQuiston* requires a similar warning if the transcript is provided to the jury rather than the video replayed. In the present case the jury had the ABE replayed and were also furnished with the transcript whilst listening to the replay. Although the applicants did not object at the time, they submitted on appeal that there was no proper basis to replay the ABE videos or provide the transcripts of same to the jury, and that providing both substantially increased the likelihood of disproportionate weight being attached to that evidence.

[16] From *Rawlings* and the later cases the following can be derived:

- The decision whether to grant the jury's request to replay the video is a matter for the judge's discretion;

- The judge must have in mind the need to guard against unfairness deriving from the replay of only the evidence in chief of the complainant;

- Usually, if the jury simply want to be reminded of what the witness said, it would be sufficient for the judge to remind them from his own note;

- If the circumstances suggest that how the words were spoken is important to them, the judge in his discretion may allow the relevant part to be played;

- It would be prudent where the reason for the request is not stated or obvious for the judge to ask the jury whether they wish to be reminded of something said in which case he may be able to do so from his own note or whether they wish to be reminded of *how* the words were said;

- Replay after retirement should only be permitted in open court with the judge, counsel and defendant present;

- The judge should direct the jury to guard against the risk of giving the ABE video disproportionate weight, and should bear well in mind the other evidence in the case;

- If replayed, the judge should remind the jury of the cross-examination and re-examination from his notes.

[17] If the jury simply wanted to be reminded of a distinct piece of the evidence in chief that can easily be achieved by reading the judge's note which will reflect what was said on the recording. In the present case the jury initially requested a copy of [the complainant's] transcript on the grounds that when listening to her ABE it was hard to hear the evidence towards the end, and a few bits are unclear. In their second note jury specifically indicated that they wished to listen to the last half of the first interview and the whole second interview. The word "listen" was underlined.

[18] After the replaying of the ABE evidence the judge said the following before sending the jury out again:

> "I should just tell you two things before I send you back to your room, this is only part of the evidence in the case there's other evidence other witnesses for the prosecution, the defendant's given evidence his daughters given evidence so you look at all the evidence in this case, you don't elevate this evidence over and above importance to all the other evidence, it is important evidence of course but you have to give appropriate weight to all the evidence in the case and I also should remind you that you are hearing the ABE which is her direct evidence you do remember and will recall that Mr McCartney cross examined the witness, he cross examined her about discrepancies about what she was saying here and what she said on other occasions and matters of that nature and you can take all that into account as well when you are looking at the evidence in the case, the importance is look at all the evidence in the case, alright. So, I will send you to your room and you can continue your deliberations, thank you very much."

[19] It is important to observe that defence counsel raised no objection or requisition to the terms of the warning delivered to the jury. If they had considered that the warning was so deficient that it could potentially impair the fairness of the trial or the safety of the conviction it was their duty to raise it with the trial judge so that he could receive the representations of defence counsel and the prosecution response. By this

means the trial judge can give an informed, contemporaneous response, to any complaint that is made. Nothing could have been more straightforward than asking the judge to remind the jury of the inconsistencies and why they said it was important and necessary to do so. If need be, a list of the inconsistencies could have been furnished to the trial judge with a view to persuading him that they needed to be addressed in greater detail than he had already done. There were no traps or prejudice for the defence in approaching it in this way. Whilst the failure to raise it is not determinative, the fact remains that no reason has been advanced to explain why they did not raise it when, as they now assert, the alleged failure is said to undermine the safety of the conviction. Neither the defence team (senior counsel, junior counsel and solicitor) nor the prosecution requisitioned the trial judge to contend that the direction he gave was insufficient in the context of this case.

[20] We consider that in the context of this case the warning that was given was sufficient to alert the jury to the risk of giving the ABE disproportionate weight. The jury were reminded that there was other evidence, other witnesses for the prosecution, that the defendant had given evidence, that his daughters had given evidence and that they should look at all the evidence "and you don't elevate the evidence over and above importance to all the other evidence, it is important evidence of course but you have to give appropriate weight to the all the evidence in the case ..."

[21] At the stage the jury requests were made the judge had summed up the case immediately after closing speeches and referred the jury in general terms to the inconsistencies raised by the defence. He did reference by way of example the differing accounts given by the complainant with reference to the Gran Canaria offence. Counsel for the applicant accepts that it was permissible for the judge to refer generally to the inconsistencies raised at that stage as the summing up came immediately after the defence closing which would still have been fresh in the jury's mind. It is further accepted that the role of a trial judge in charging the jury is undoubtedly a difficult one and, that a judge is under no obligation when summing up to rehearse all the evidence or all of the arguments. Nonetheless, they submit, largely in reliance on *Rawlings*, that the judge should have reminded the jury of the cross examination and re-examination and that the inconsistencies with the complainant's account ought to have been highlighted after the video was played.

[22] However, as noted above, in his summing up the judge addressed the jury in relation to inconsistencies referencing, by way of notable example, the complainant's differing accounts in relation to a specific offence. It is important to note that at the conclusion of his summing up the trial judge was not requisitioned, and it was never suggested at that stage that his summing up was deficient in terms of the way he had handled the defence case. After the jury was permitted without objection to listen to the ABE he gave the further direction noted above which was not the subject of any contemporaneous challenge. In his remarks the judge specifically invited the jury to recall that senior defence counsel had cross examined the complainant about discrepancies "about what she was saying here and what she had said on other occasions and matters of that nature, and you can take all that into account as well

when you are looking at the evidence in the case, the importance is to look at all the evidence in the case."

[23] So it can be seen from the above that the trial judge in his further direction to the jury after replaying the ABE specifically reminded them of two important matters:

- That the ABE was only *part* of the evidence in the case. He reminded them that they had heard evidence from other prosecution witnesses (mother and siblings) and defence witnesses (defendant and his daughter). He informed them that the entirety of the evidence had to be considered, and they could not give the video any unbalanced weight to the detriment of the other evidence they had heard.

- He reminded the jury that what they had reheard was the complainant's evidence in chief. He referred to the fact that she had been cross examined, to the issue of discrepancies and inconsistencies and how those matters should also be taken into account. His concluding remark was "…the importance is [to] look at all the evidence in the case." This followed on from his charge the previous day wherein he dealt with the defence case regarding inconsistencies; financial motives; mother's agenda driving allegedly false allegations; and the defence closing speech dealing with inconsistencies.

[24] Having earlier directed the jury without complaint or requisition regarding the defence case concerning inconsistencies, financial motives, and the mother's agenda, we do not consider the judge, in the circumstances of this case, was required to again repeat these matters in detail.

[25] Blackstone 2024 at para D19.17 states:

> "In relation to playing evidence that was adduced at trial of an ABE interview of a complainant, three requirements were identified in *Rawlings* [1995] 2 Cr App R 222: (a) the replaying should occur in court with the parties present; (b) the jury should be warned to guard against giving the replayed evidence disproportionate weight and (c) the jury should also be reminded of relevant cross-examination in order to maintain balance. Provided the effect of these three requirements was met by a judge, failure to follow them exactly would not result in unfairness (M (A) [2015] EWCA Crim 1848)."

[26] He may not have followed the three requirements exactly, but their effect was met by the trial judge. If the defence or the prosecution consider that the effect of the requirements have not been met such as to result in unfairness it is incumbent on counsel to raise the matter with the trial judge so that, if required, the matter can be remedied in trial. The courts have often remarked that the instincts displayed by trial

counsel, who are faced with the issue during trial, are helpful in indicating whether the procedure that has been adopted is fair or not.

[27] The jury was sent home overnight. Despite having overnight to reflect, the defence again did not raise any complaint or objection the next morning before the jury proceeded to continue with their deliberations.

[28] In light of the above we do not consider that any unfairness has resulted from the procedure adopted nor do we consider the conviction unsafe.

Contamination and collusion warning

[29] The applicant complains that the trial judge erred in failing to direct the jury re the risks of contamination/collusion in respect of the evidence of the other family members and the complainant. However, contamination was not an issue raised by the defence in closing. The defence case was expressly put as one of deliberate fabrication with the mother "driving this enquiry" with statements from the complainant's siblings all being "co-ordinated … by the mother … and how she feels [about] the accused."

[30] In fact, the trial judge did deal with the issue of collusion even though the word was not expressly mentioned, nor indeed was it expressly mentioned in the defence closing. The trial judge referred to the defence case that the other children were being "put up to this … [because it was] all coordinated by the mother". He mentioned the criminal injury scheme, issue of motive and mother's role and reminded the jury "now remember of course, at all times his case is that these things never happened."

[32] Prior to charging the trial judge discussed with counsel the matters to be included in his charge. The applicant did not identify the need for a direction on contamination or collusion. No requisitions were made by the defence following the charge nor after the ABE was replayed.

Conclusion

[32] Concentrating on the single and simple issue of whether we think the verdict is unsafe we unanimously conclude that the surviving grounds of challenge are devoid of merit, that the convictions are not unsafe, and the appeal is dismissed.

Postscript – Note of Caution

[33] Sometimes it is the most basic things that really need thought about. In the present case the jury appear to have been seeking clarification, not repetition, of the evidence due to an apparent difficulty in hearing the recording. The trial judge was best placed to know how to address the problem the jury had raised with him. Without objection, the jury was then allowed to listen again to the recordings they had

requested and, on this occasion unlike when the recording was first played, they were able to follow it with the transcript which was returned at the end of the replay.

[34] We have referred at paragraph [11] to what we understand the prevailing practice to be whereby jurors listen and watch the ABE evidence in chief without the benefit of the transcript. It may appear unusual that the jury who must ultimately decide the question of guilt or innocence, is less well equipped than the judge and the lawyers who, unlike them, do have access to the transcript when listening to the ABE evidence in chief. This advantage enjoyed by the judge and the lawyers may immunise them to some extent from experiencing any problems the jury may face.

[35] It is vitally important that, well before a jury trial starts, the technical quality of the ABE recording to be used is road tested to ensure that a jury will be able to follow the evidence in chief. The reticence about providing the jury with the transcript can only be justified if it is verifiably true that the jury can hear and follow the evidence in the first place. One way of circumventing problems that might arise from the quality of the recording or the ability of the jury to follow the recording, might be to have the video with subtitles. If that was feasible, they would still be able to observe the demeanour of the witness, and the added safeguard of the subtitles would ensure that they could also grasp the content of the evidence given.

[36] The problem in the present case may not have been the risk of repetition of the evidence but the fact that the jury were having difficulty following some of it the first time round, hence their wide-ranging request. In a well prepared trial this should not have been necessary as the quality of the recording, and any editing, should have been established long before the trial.

[37] If a witness was giving evidence in chief in court in the ordinary way and could not be properly heard the judge would take simple steps to ensure the witness could be properly heard - such as 'speak up', 'move the microphone closer', 'slow down, the judge has to take a note' etc. Those safeguards are not possible with a pre-recording.

[38] If the judge, jury or lawyers consider that the recording is of poor quality, inhibiting the jury from properly hearing the evidence in chief, steps will have to be taken to rectify the problem. This will likely involve discussions with counsel about the appropriate way forward. The problem should not arise in trial if the appropriate steps have been taken well before the trial. If that is not done the immunisation that we referred to earlier could lead to a concerning situation where the evidence in chief could not be fully followed, with the possible consequence that any cross examination could be nullified or diminished by the jury's incomprehension of the evidence in chief upon which understanding the cross examination is based.

[39] There may be a concern that although the ABE constitutes the evidence in chief it may be received in a different way. This may be because the judge and the lawyers receive the evidence with pre knowledge. They also listen to the ABE in court armed with a transcript which ensures they do not lose the thread. This contrasts with the

way in which the ABE may be received by the jury, particularly if the quality is poor, and they are trying to follow without the benefit of a transcript or subtitles. It is anomalous that the jury, the ultimate decider of guilt or innocence, is placed in a worse position to understand the central evidence, than are the judge or the lawyers who are not responsible for this grave responsibility.

[40] It seems to us that the reticence about providing the jury with the transcript can only be justified if we are certain the jury can hear and understand the evidence. If the concern is that the provision of a transcript to the jury distracts them from observing the witness, there is no alternative to a good quality ABE which the jury can properly hear.

[41] Fortunately, in the present case, no issue was raised below or on appeal regarding the quality of the ABE. Further, any problem arising from an inability of some, or all of the jury, was adequately addressed by the steps taken to accommodate their requests.