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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

THOMAS REYNOLDS

Before: Morgan LCJ, Higgins LJ and Girvan LJ

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] The appellant faced trial on three counts in a bill of indictment dated 30 May 2008. The first count alleged indecent assault contrary to Section 21(1) of the Criminal Justice (Northern Ireland) Order 2003, the particulars alleging that on 7 June 2007 the appellant indecently assaulted M, a male child. The second count alleged the incitement of M to commit an act of gross indecency on 7 June 2007 contrary to Section 22 of the Children and Young Persons Act (Northern Ireland) 1968. The third count alleged gross indecency with M on the same date contrary to Section 22 of the Children and Young Persons Act (Northern Ireland) 1968. Following a trial before His Honour Judge Babington and a jury the appellant was convicted on 10 February on the third count and on 11 February 2009 on the other counts. He was sentenced to a total period of 3 years imprisonment. Licence conditions were imposed under Article 26 of the Criminal Justice (Northern Ireland) Order 1996. He was disqualified from working with children and required to sign the Sexual Offenders Register for an indeterminate period. The appellant was granted leave to appeal against conviction.

[2] At the conclusion of the hearing of the appeal the court indicated that it would allow the appeal and quash the verdicts on each count. After argument the appellant was directed to be retried on all three counts. We set out in this judgment our reasoning for quashing the verdicts.

The evidential background

[3] The events giving rise to the charge occurred in a Belfast Leisure Centre in June 2007. The appellant and M both used the swimming pool in the centre on occasions. The appellant was an adult male aged 35 years and M was a boy of 14. Both the appellant and M were swimming in the public swimming area around 7.00pm on that date. The events giving rise to the charges occurred after they left the swimming pool and went into the changing area.

[4] According to M he went into an area known as Group Changing Room 2 in order to dry himself. This was a small room with a wooden bench around the walls. A modesty screen was in place so that when the door was opened no one from outside could see people inside the changing room. There was a lock on the door. M asserted that he forgot to lock the door. He heard a couple of clicks and on turning round saw the appellant. He gave evidence that the appellant, who was naked, came up behind him, put his arms around his stomach and pulled him towards the appellant. The appellant started rubbing himself and rubbing M's penis. M could feel him pressing into him. The appellant then proceeded to masturbate M and asked M to do the same to the appellant. When M refused the appellant went to the other side of the group changing room and masturbated himself to the point of ejaculation over a bench. The complainant in his initial statement to the police stated that he had put his clothes on in the Group Changing Room and then left. In his evidence at trial he changed that evidence and stated that he went out of the room to a cubicle to retrieve his clothing. He asserted that having left the swimming pool he walked past the swimming pool building where he met the appellant who asked him when he would be back to which M replied "I don't know".

[5] When the complainant arrived home he telephoned his mother. When she came home the appellant was crying uncontrollably and he told his mother he had been assaulted at the swimming pool. His mother went to the leisure centre and reported the matter to the police. They attended promptly and cordoned off the changing room too. Samples were taken from the location in the changing room which M had alerted them to. Material subsequently identified as the semen of the applicant was found on the bench in the room at the position described by M. This represented clear evidence that the appellant had indeed masturbated in that location. At a police identification process M identified the appellant as a person involved in the events in the room.

[6] When first interviewed by the police on 12 October 2007 the appellant denied the allegations made against him. He admitted that he had masturbated in Group Changing Room 2 but said that he thought he had locked the door on entering the changing room and that there was no one else present. He said that he had ejaculated into his hand and had flicked the semen on the floor. He said that after that he went to a shower in the

gentleman's toilet area. He claimed that M entered that area and sat on a sink facing the showers looking at the appellant who then closed the cubicle door. The appellant then returned to Group Changing Room 2 allegedly to relax. When he went in there M was present. He attempted to speak to the appellant who said that he considered M's conversation to be sexually inappropriate and the appellant left the room and went to the showers and then to the sauna. The appellant denied M's versions of events and he said M must have observed the appellant masturbating in the changing room and made the allegations up. After his second shower and time in the sauna the appellant said he went into the cubicle opposite his locker and started getting changed. While changing the appellant said he looked up and saw M peering over into his cubicle from an adjoining cubicle. He claimed that the complainant said "Are you going home now?" and replied "Yes" and got changed quickly and left the leisure centre.

[7] The Crown adduced evidence without objection from the appellant in relation to certain events on 5 June two days before the alleged offences occurred. The complainant in his recorded interview on 31 August 2007 which was admitted in evidence described seeing a man on that date who was wearing black cycling shorts who was aged about 38 to 40. He said this man followed him into the shower area. He said he saw this man had an erection under his swimming shorts in the showers. He also described that prior to that this man had come into the toilet areas and while he could have used an urinal at the other end of the facilities he came and stood beside M in the adjoining urinal and looked towards M's penis. M said that this individual removed his shorts before he used the urinal and then put them back on. M identified that man as the appellant and as the man who had committed the offences on 7 June.

The grounds of appeal

[8] The appellant argued that the judge had failed to direct the jury correctly in relation to the evidence relating to the events on 5 June. He contended that the judge was wrong to refuse to permit the appellant to introduce evidence of bad character relating to the complainant. The appellant also argued that the judge elevated to a high point of relevance the alleged identification of the defendant in relation to the events of 5 June 2007; failed to deal adequately with lies which the appellant had told and failed to give balanced directions particularly relating to the notes and video stills and most relevantly in relation to the complainant's evidence that the appellant had followed him round.

The additional grounds of appeal

[9] On the opening of the appeal Mr McCollum QC on behalf of the appellant sought leave to add to the grounds of appeal two additional grounds. Firstly, he argued that the judge failed to deal adequately with Crown counsel's allegedly inappropriate submissions in relation to the appellant's good character and failed to instruct the jury to ignore Crown counsel's allegedly inappropriate submissions in relation to the jury's entitlement to draw adverse inferences against the appellant.

[10] Having read the Crown's closing speech and the judge's summing up as a whole we do not consider that the additional proposed grounds of appeal have been made out. While we accept Mr McCollum's submission that it is generally undesirable for the prosecution to enter the debate about the defendant's good character and that this is a matter with which the trial judge should deal in his charge to the jury, we conclude that the jury was adequately directed on the question of good character. Crown counsel's comments made a point that could not have been missed by the jury in any event, namely that a person with no history of bad character is still capable of committing an offence. The way in which Crown counsel dealt with the voluntariness of the appellant's co-operation with the police was not as well expressed as it could have been but what was said contained nothing legally improper. Accordingly, we refuse leave to appeal on those grounds.

The issue of bad character evidence relating to the appellant

[11] The appellant argued that the evidence adduced in relation to the events of 5 June constituted evidence of bad character. No proper application to advance such bad character evidence was made by the prosecution and the appellant did not consent to its admission although it was accepted that his counsel had not actually objected to it. Mr McCollum stated that the appellant had never been consulted about whether the evidence should have been admitted. He argued that the evidence would not have passed through any of the gateways set out in Article 6(1) of the 2004 Order. No directions were given as to the manner in which the evidence was to be received. The jury should have been given proper directions and a warning about placing undue reliance on such evidence. Not only did the trial judge fail to give proper directions he gave a confusing direction in relation to the identification evidence relating to the events on 5 June. It was argued that the evidence of 5 June 2007 was wholly inadmissible. It had no probative value. It was not important explanatory evidence relevant to any issue and it offended against the principle of having a trial within a trial particularly when the appellant did not accept that he was present at all on 5 June.

[12] The Crown argued that the evidence was admissible and relevant not as bad character evidence under Article 6 of the 2004 Order but as evidence which had to do with the alleged facts of the offences within Article 3. If it was evidence of bad character it fell within Article 6(1)(c) as it was important

explanatory evidence. In any event it was evidence admitted by implicit agreement at the commencement of the trial. Thus, the court was entitled to infer that in the absence of objection as to its admissibility the evidence came in within Article 6(1)(a) of the 2004 Order.

[13] This ground of appeal raises the question whether the evidence was admissible under Article 3(a) as evidence "to do with the alleged facts of the offence". If it was, the provisions of Article 6 et seq would not be relevant. If not admissible under Article 3(a), the question arises whether the evidence was evidence of bad character which was admissible under one of the gateways in Article 6(1). The question arises whether the judge in his summing up adequately directed the jury as to how they should approach the evidence in relation to the issues which they had to determine. The gravamen of Mr McCollum's argument was that irrespective of whether the evidence fell within Article 3(a) or Article 6 it was incumbent on the judge to give proper directions to the jury and it was alleged that he failed to do so.

[14] Leaving aside for the moment the effect of Article 3(a) there is no doubt that the evidence which the Crown sought to adduce in relation to the events of 5 June constituted evidence of bad character as defined by Article 17(1). "Misconduct" for the purposes of Article 17(1) means the commission of an offence or other reprehensible behaviour. What was alleged by the complainant in relation to 5 June amounted to evidence which, it was open to the jury to conclude, showed that the appellant was acting indecently towards M. M's description of events in the urinal was open to a conclusion that the appellant deliberately exposed himself to the complainant, an offence under the Sexual Offences Act 2003. The evidence alleged by the complainant of the appellant following the minor through the changing area in the leisure centre and showering in full view with a visible erection under his swim shorts was evidence which the jury could accept as showing the least indecent and thus reprehensible behaviour.

[15] Such evidence of bad character was admissible evidence under Article 6(1)(d) as it was relevant to an important matter at issue between the defendant and the prosecution. So far as material Article 8(1) provides:-

> "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 had such a propensity makes it no more likely that he is guilty of the offence."

[16] The evidence relating to the events of 5 June was, if believed by the jury, evidence which could be interpreted as pointing to a propensity on the part of the appellant to act indecently in the presence of a boy. It was also of relevance to the issue whether what subsequently happened on 7 June in the changing room was deliberate indecency towards a boy or was something which occurred accidentally and unintentionally on the part of the appellant.

[17] On occasions evidence may fall within Article 3(a) as evidence to do with the facts of the offence and at the same time be evidence which would otherwise constitute evidence of bad character under Article 6. If the evidence falls within Article 3(a) the procedural steps required in applications to admit evidence of bad character under Article 6 are not strictly required although in practice where the evidence may fall within Article 3(a) and Article 6(1) it would be desirable for the avoidance of doubt for the Crown to give notice under the Crown Court Rules under Article 16 of the 2004 Order.

[18] The proper approach to the interpretation of the words "has to do with" in Article 3 is stated by the Court of Appeal in R v McNeill [2007] EWCA Crim 2927 in which Rix LJ stated at paragraph 14:-

> "In our judgment, it would be a sufficient working model of these words if one said that they either clearly encompass evidence relating to the alleged factors of an offence which would have been admissible under the common law outside the context of bad character or propensity, even before the Act, or alternatively as embracing anything directly relevant to the offence charged, provided at any rate they were reasonably contemporaneous with and closely associated with its alleged facts . . ."

[19] However, as Professor Spencer in Evidence of Bad Character (2nd Edition) points out, although there is a potential overlap between Article 3(a) and the gateways under Article 6 it must be noted that it is a limited one. Evidence which has to do with the facts of the offence is not the same as evidence which is relevant to the offence or even evidence which is central to the prosecution case. While it can be argued that the evidence of the complainant in respect of the events of 5 June if believed by the jury had to do with the offence because it amounted to a form of sexual grooming as a precursor to the events of 7 June (this being the view adopted by the trial judge when sentencing the appellant) we tend to the view that the evidence falls into the category of bad character falling within Article 6(1)(d). However, in practice in this appeal nothing of legal significance depends by which of the two routes the evidence was admissible.

[20] What is clear is that where evidence of bad character of this nature is adduced, whether it falls within Article 3(a) or Article 6, it is incumbent on the trial judge in directing the jury to properly assist them in dealing with that evidence. A number of matters relating to the evidence in respect of the events of 5 June required to be explained to the jury:-

(a) Before the jury could take that evidence into account they would have had to have been satisfied beyond reasonable doubt that the man described by the complainant as the man who did the things allegedly done on 5 June was the appellant. The jury required to be satisfied that M correctly identified the man carrying out the acts on 5 June and 7 June as the same man.

(b) The jury would further have to have been satisfied that the appellant acted indecently in the manner in which he conducted himself in following the complainant in permitting himself to be seen with an erection under his shorts in the shower, in looking at the complainant's penis in the toilet area and in positioning himself beside him in the urinals and removing his shorts. Unless the jury were satisfied that he intentionally acted indecently on 5 June in relation to some or all of those matters the evidence was irrelevant to the jury's consideration of the case against him on the counts in the indictment.

(c) If the jury were satisfied to the requisite standard that the appellant intentionally indecently did some or all of the acts alleged on 5 June it was then a matter for the jury to decide how they should take that evidence into account in deciding whether or not the defendant committed the offences on 7 June. The jury would have required a warning that it would be wrong to jump to the conclusion that he was guilty of the offences alleged on 7 June or any of them if they concluded that he behaved improperly on 5 June. That evidence relating to 5 June could not of itself prove that he was guilty of the offences on 7 June. Evidence of indecent intent on 5 June did not of itself prove that the defendant would have proceeded to the acts of gross indecency alleged against the defendant on 7 June but it was evidence which the jury could take into account in arriving at their conclusions.

[21] The judge did give a direction in relation to the identification of the defendant by the complainant. Since there was no dispute that the appellant was the man who masturbated on 7 June and spoke to the complainant at some

point on that date, the issue of identification on which the judge directed the jury must have related to the identification of the man involved on 5 June as being the same individual. The judge in his summing up said:-

> "The case against the defendant depends to an extent on the correctness of one or more identifications of him which he alleges to be mistaken. I say this because his case relating to Tuesday (5 June) is that he does not know whether he was there. To avoid the risk of any injustice in this case such as has happened in some cases in the past I must therefore warn you of the special need for caution before convicting the defendant in reliance of the evidence of identification . . ."

[22] The judge then went on to give a standard form direction in relation to the matters to be taken into account in weighing up identification evidence. While he correctly warned the jury of the need for caution about the identification of the man on 5 June neither in that passage or elsewhere in the summing up did the judge adequately deal with other matters which fell to be dealt with as set out in paragraph [20] above.

The issue of bad character evidence relating to the complainant

[23] The second ground of appeal turned on the question whether the appellant should have been entitled to cross examine the complainant in relation to an informed warning given to him by the police on 7 June 2007 in relation to a theft carried out by the complainant on 18 December 2006. The complainant had admitted the offence and agreed to accept an informed warning by the police as a disposal of the case. That informed warning was administered at 4.00pm at Donegall Pass police station in the presence of his mother on 7 June the day of the alleged offences.

[24] At a pre trial hearing Her Honour Judge Philpott QC refused a defence application to have evidence of the informed warning admitted under Article 5 of the 2004 Order. The application was renewed before the trial judge who also refused the application. He concluded that it was neither important explanatory evidence nor did it have substantial probative value if admitted. He said it could be seen as a matter of credibility.

[25] Mr McCollum argued that the trial judge's approach was flawed. The credibility of the complainant was a key matter in issue at the trial. The complainant admitted telling some lies in the course of his evidence and various statements he made. If he was guilty of an offence of dishonesty the jury might have felt his explanation for saying the things that were untrue was difficult to accept. The Crown allowed evidence of recent complaint to be

given by the mother. It was clearly intended to lend support to the truth of the allegations. If there was another explanation for him being upset that day and if he wished to get himself back into his mother's good books the circumstances of the informed warning ought to have been placed before the jury and the appellant should have been able to explore that issue.

[26] Under Article 5(1) of the 2004 Order evidence of bad character of persons other than the defendant is admissible only if:-

> "(a) it is important explanatory evidence.
>
> (b) it has substantial probative value in relation to a matter which –
>
> (i) is a matter in issue in the proceedings
>
> (ii) is of substantial importance in the context of the case as a whole, or
>
> (c) all parties to the proceedings agree to the evidence being admissible."

[27] For the purposes of Article 5(1)(a) evidence is important explanatory evidence if without it, the court or jury would find it difficult or impossible to properly understand other evidence in the case and its value for understanding the case is substantial. Under Article 5(4) except where Article 5(1)(c) applies evidence of the bad character of a person other than the defendant must not be given without the leave of the court.

[28] A matter in issue in the proceedings covers both issues of disputed facts and issues of credibility. As the court said in Stephen Yaxley-Lennon reported in R v Weir [2006] 2 All ER 570 at paragraph 33:-

> "Although couched in different terms from provisions relating to the introduction of the defendant's bad character in our view Article 5(1) does cover matters of credibility. To define it otherwise would mean that there was significant lacuna in the legislation with the potential for unfairness."

[29] The trial judge in ruling against admissibility of the evidence which the appellant sought to introduce concluded that it was neither important explanatory evidence nor did it have substantial probative value. He went on to say:-

> "Furthermore, if allowed in, it is inevitable it could be seen as a matter of credibility."

However, the fact that it was a matter that went to credibility would not of itself preclude its admissibility and the trial judge was in error if he thought that.

[30] In view of our conclusions that the verdicts should be quashed on the first ground of appeal it is unnecessary to determine whether the judge was wrong in law to exclude the evidence which the appellant sought to introduce in relation to the informed warning. The trial judge in the new trial which has been directed will have to exercise his or her discretion afresh under Article 5(4). Since the issue of the credibility of the complainant is of importance in the trial, the fact that he committed an act of dishonesty some months prior to the relevant incident may be of some relevance to the question of credibility. The context of the timing of M's complaint to his mother, the state of his emotions at the time of his complaint and the possibility of a strained relationship between the applicant and his mother following their joint visit to the police station for the administration of the informed warning may have relevance to the question whether the complainant was genuine or may have exaggerated or distorted events in order to enable him to get back into the good books of his parents. A trial judge might properly conclude that the context of M's complaint to his mother closely following in time the informed warning heightened the relevance of the evidence of the informed warning and the timing and circumstances to such extent that it would be appropriate to permit the evidence to be adduced.

Disposal of the appeal

[31] The appellant did not expand on the remaining grounds of appeal and while Mr McCollum did not abandon them he did not press them.

[32] For the reasons we have given we have quashed the verdicts and directed a retrial.