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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

A

_____

Before: Stephens LJ, Treacy LJ and Sir Anthony Hart

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STEPHENS LJ (giving the judgment of the court)

Introduction

[1] The appellant was convicted at Antrim Crown Court on two counts, one a specific count and the other a specimen count, of sexual assault on a child under 13, contrary to Article 14 of the Sexual Offences (Northern Ireland) Order 2008. There were a number of grounds of appeal but in the event the only ground which it was necessary for this court to determine was whether there was a failure on the part of the prosecution to make proper disclosure, and if so, whether the failure to disclose the material rendered the convictions unsafe. Mr Connor QC and Mr Neil Moore appeared for the appellant and Ms Kitson for the prosecution.

[2] The complainant is a child and is entitled to automatic life anonymity by virtue of Section 1 of the Sexual Offences (Amendment) Act 1992, as amended by the Youth Justice and Criminal Evidence Act 1999. No matter relating to the complainant shall during her lifetime be included in any publication if it is likely to lead members of the public to identify her. In this judgment we will anonymise the name of the complainant by the cypher "C." There is a familial connection between the appellant and the complainant so to protect the identity of the complainant we anonymise the name of the appellant by the cypher "A." For the same reason we will anonymise the names of various other witnesses and family members.

[3] At the conclusion of the hearing of the appeal on 9 November 2017 we allowed the appeal, quashing both of the convictions and declining to order a retrial. We indicated that we would give a written judgment which we now do.

Background Facts

[4] The complainant resides with her mother ("M") and her father ("F"). Also residing in the family home are not only the complainant's siblings but also her half siblings by M's previous relationship including a half sibling who we anonymise with the cipher "S."

[5] The appellant is a longstanding partner of the complainant's paternal aunt with both of whom the complainant and two of her siblings spent one weekend in every month in their care at their home which is in a different town than M and F's family home.

[6] M and F state that on Monday 16 March 2015 the complainant, C, who was then between 5 and 6 years of age, informed M and F either that the appellant "pulls my pants down and licks my bum" or the appellant "licks my bum and I think it's funny." M states that she then asked the complainant where he licked her and that the complainant pointed to her vagina. F then immediately rang social services who reported the allegations to the police on the same day.

[7] On Tuesday 31 March 2015 the complainant was interviewed by the police with the interview being recorded on DVD which was subsequently played to the jury at the trial. During this Achieving Best Evidence interview ("the ABE interview") the complainant set out the nature of her evidence. Although there were some inconsistencies in what she stated a summary of her account is that the offending behaviour had occurred at the last weekend visit some 3 weeks prior to 16 March 2015. That meant that the alleged offending occurred between Friday 20 February 2015 and Sunday 22 February 2015 or possibly between Friday 13 February 2015 and Sunday 15 February 2015. The overall thrust of the complaint was that her paternal aunt had put her to bed on her own in an upstairs bedroom and shortly thereafter the appellant had entered the bedroom and whilst there had pulled down her pyjama bottoms and briefly licked her bottom and then turned her over and licked her "private parts." C stated that the appellant put his finger to his mouth and made a "shush" sound before leaving. The complainant also stated that she was going to tell her aunt but that her aunt was in the bathroom and thereafter the complainant forgot to do so. The complainant went on to state that the same thing happened on consecutive nights. Furthermore, she stated that on one or two occasions over the same weekend the appellant engaged in the same behaviour in the kitchen by lifting her onto a bench covering the washing machine and removing her lower clothing, her underwear and then proceeding to lick her in exactly the same way as in the bedroom.

[8] On 6 May 2015 the appellant was interviewed. He denied that anything of the nature alleged by the complainant had occurred. The appellant did not suggest any reason for the complainant to have made these allegations. He did not speculate

as to what were the reasons which might in theory have been many and varied. He simply stated that they were incorrect.

[9] No-one witnessed what C alleged had occurred so the case depended on an assessment of the credibility and reliability of the evidence of C on the one hand and of the appellant on the other. As a part of the police investigation seven witness statements were prepared. M and F gave statements both dated 8 May 2015. Statements were also given by the three police officers and the social worker who were involved in either the ABE interview or the interview of the appellant. The statements from the police officers were formal statements about the circumstances of either the ABE interview or the interview of the appellant. The last statement is dated 21 September 2015 from the social worker who attended the ABE interview and it was a formal statement about the circumstances of that interview.

[10] The indictment dated 9 June 2016 contained 6 counts. Count 1 was a specific count and count 2 a specimen count of an adult causing or inciting a child under 13 to engage in sexual activity contrary to Article 17(1) of the Sexual Offences (Northern Ireland) Order 2008. Count 3 was a specific count and Count 4 was a specimen count, in relation to the allegations as to what had taken place in the *bedroom*. Count 5 was a specific count and Count 6 a specimen count, in relation to the allegations as to what had taken place in the *kitchen*. In relation to the dates of each of the alleged offences the particulars in respect of each count are that the offence occurred on a date unknown between 25 June 2013 and 16 March 2015.

[11] On 15 June 2016 the appellant was arraigned pleading not guilty to all six counts.

[12] On 24 October 2016 the trial commenced with the complainant being cross-examined by video link on 25 October 2016.

[13] At trial an issue arose as to the motive or explanation for the complainant having made the allegations against the appellant. That issue arose on a number of occasions during the course of the trial. We consider that it can be illustrated by an exchange that took place at the conclusion of the appellant's evidence between the learned trial judge in the presence of the jury and the appellant which culminated in an application being made to the judge in the absence of the jury. The exchange was:

> "Q. All right. The final thing I want to ask you is this: it's very clear in this case that you were very fond of (C) and she was very fond of you. I don't think anyone disagrees with that.
>
> A. No, I wouldn't disagree with that.

Q. She trusted you in the sense that she wanted to be on your knee, she wanted you to tickle her, all those things?

A. Yes, Your Honour.

Q. And you were happy to treat her almost like a grandchild?

A. Yes, Your Honour.

Q. I am sure that the question that has crossed your mind a thousand times since the constable came to your door and said "*get back into the house*." Can you attribute any motive to (C) for saying these things about you?

A. To be truthful, your Honour, this whole episode this last two years has just been a living nightmare for me, as much you can understand. I just, I can't make head nor tail of it, Your Honour, I really can't.

Q. Was there any falling out? Did you have an argument or did you sort of criticise her for something that you can remember?

A. Well, I don't know, Your Honour, (my partner) would have been the one that sort of would have spoke to (F) and (M) most of the time.

Q. Right?

A. I don't know that but now there has been things that I have found out sort of recently, you know, which I didn't know nothing, about like, you know.

Q. Now is your chance to say something because …

Mr Connor: Again, Your Honour.

Judge: Sorry, I am asking the defendant.

Mr Connor: Well, I have a further legal application.

Judge: Well, I am asking the defendant what I think everybody in this room wants to know. Why is this wee girl saying this?

Mr Connor: I have an application.

Judge: You can make your application by all means.

Mr Connor: I have an application.

Judge: Thank you, members of the jury, we will not keep you too long."

[14] The learned trial judge gave extensive directions in his charge to the jury in relation to this issue. Those directions included "it is not for (the appellant) to think of a motive, but there must be something bizarre going on for this child to make up a case and stick to it through thick and thin." At the very final part of his charge the learned trial judge concluded by saying "But then one has to ask again when one finally comes to the question why. No-one has to prove it, but why is (C) saying this thing?"

[15] There was also an issue at trial as to the complainant's use of the expression "private parts." In the course of her evidence M stated that she had never heard the complainant using this expression and the police officers who had dealt with the complainant denied using this expression. In his charge to the jury the learned trial judge stated that:

> "There has been no explanation that I have heard or you have heard which explains how the rather adult and somewhat antiquated term "private parts" got into this case and we may never know."

[16] At trial and on the direction of the judge the appellant was found not guilty on counts 1 and 2.

[17] On 1 November 2015 the appellant was convicted by a majority of 11-1 on counts 3 and 4 (*the bedroom incidents*) and found not guilty by a unanimous jury verdict on counts 5 and 6 (*the kitchen incidents*). Sentencing was adjourned to facilitate a probation report and a victim impact assessment.

[18] Dr Michael Patterson, Consultant Clinical Psychologist, prepared a victim impact report dated 5 December 2016. That report recorded, amongst other matters, that M's daughter by an earlier relationship (S) had been sexually abused by her then partner's father (whom we shall refer to as "S's paternal relation"). The report stated

that there had been a police investigation and a number of victims had been identified.

[19] No documents in relation to that previous police investigation had been disclosed by the prosecution in this case. It now transpires that not only was the previous incident investigated by the police but also that there had been a prosecution of S's paternal relation who had been convicted. The significance of the documents in relation to that police investigation and prosecution is to be seen in the context that (a) S lived with M and her new partner F in the family home so that she resided in the same household as the complainant C; (b) the previous incident involved events in a bedroom and in a kitchen; and (c) the term "private parts" was used by S in relation to the previous incidents. It is the appellant's case that the documents were relevant to the question as to how the complainant C, between the ages of 5 and 6, could have made allegations of the nature that she did on the basis that it was entirely possible that she was privy to or overheard discussions regarding the previous abuse of S. It is also the appellant's case that the use of the expression "private parts" by both the complainant and by S may have lent credence to the suggestion that there had been discussions between the complainant and S or between others in the family home either in relation to the previous abuse of S or of a sexual nature. It is the appellant's case that this material could have been of assistance during the course of cross-examination and could potentially have led to a different outcome. Furthermore the appellant contends that the documents ought to have been disclosed and that the failure to disclose renders the convictions unsafe.

[20] At the hearing of this appeal we were informed by Ms Kitson that the material had not been within the knowledge of the prosecution service at any time before receipt of Dr Patterson's report. We were also informed by Ms Kitson that on 20 December 2016 she spoke to M about the reference in Dr Patterson's report to a previous police investigation identifying a number of victims and was told by M that there had been no previous police investigation. We were also informed at the hearing of this appeal that at an early stage during the course of the police investigation into the allegations against the appellant the investigating police officer had been informed by M that there had been a report to the police in relation to S's paternal relation and a potential sexual offence in relation to S but that M did not want police to be involved and did not want to pursue a formal complaint. The documents that have now become available reveal that there was a complaint in 2003 to the police and the response of M to the police in relation to that complaint was that she did not want to make a formal complaint. It is correct that there was no police investigation into the 2003 complaint. We were also informed by Ms Kitson that the investigating police officer was not informed by M as to the subsequent complaint in 2004 which led to a police investigation in respect of S's paternal relation in respect of further allegations made by S and also in respect of allegations made by another child. Also that the investigating police officer was not informed that there had been a prosecution of S's paternal relation or that on 7 October 2005 he had been convicted on his plea of guilty of 6 sexual offences against S and 6 against the other child. The explanation proffered is that M thought that the police did not

use S's evidence in relation to his conviction and up until recently was unaware that he had been convicted of 6 offences against S as M had never been informed by police of the convictions. We were also informed that the early plea could explain why M and S were never asked to give evidence against S's paternal relation.

[21] Furthermore, at the hearing of this appeal we were informed by Ms Kitson that after becoming aware at an early stage of the police investigation into the allegations against the appellant as to a complaint against S's paternal relation the investigating police officer had checked the police NICHE system in relation to him but that this had not revealed any convictions. That the investigating police officer has subsequently found out "by making contact with the Offender Management Unit that his conviction was never shared with the police system even though up until his death he was managed as a sex offender." That as S's paternal relation had no relevant record on the NICHE system at time of checking the investigating police officer did not make mention of this to the DPP. Further that "it wasn't until the old file was retrieved that this has all been married together."

[22] On 20 December 2016 a sentence of 3 years 6 months' imprisonment was imposed on the appellant with 1 year and 6 months as the custodial element and 2 years on licence.

[23] On 14 January 2017 the appellant applied for leave to appeal against conviction. The grounds of appeal dated 14 February 2017 included:

> "The prosecution failed to disclose that the complainant's older step sister (with whom she resided) had been sexually abused by an unrelated individual. This may have provided an answer to the question posed by the learned trial judge (as to why the complainant would make such allegations if not true) and would certainly have formed part of the cross-examination of the complainant's mother."

This ground was also referred to in the appellant's skeleton argument dated 13 February 2017.

[24] The single judge gave leave to appeal in relation to that ground of appeal and directed that details of the older sibling's complaint and how it was disposed of should be obtained for the assistance of this court.

[25] The details were made available to the prosecution and to the appellant on 27 October 2017 and were provided to this court on 8 November 2017 the day before the hearing of the appeal which took place on 9 November 2017.

Discussion

[26] *R v Hadley and others* [2006] EWCA 2544 sets out the test on appeal in relation to a failure by the prosecution to make disclosure at trial. The first question is whether the material ought to have been disclosed as being material that would have undermined the case for the prosecution or assisted the case for the defence. The second question is whether the failure to disclose renders the convictions unsafe. In some cases the failure to disclose will not render the convictions unsafe because the court is satisfied that the evidence tending to establish the appellant's guilt was so strong that the undisclosed material could have made no difference to the outcome.

[27] In relation to the first question as soon as the appellant denied doing what the complainant had alleged during the course of his interview on 6 May 2015 then it became his case that she was incorrect in her allegations and that there must have been some reason or explanation for her to have made the allegations. The undisclosed material provided a potential explanation and not only should it have been disclosed but it should also have been considered in relation to the decision as to whether to prosecute. The issue as to the potential motive or as to the potential explanation for the complainant making the allegations was brought into stark relief at the trial. There was a continuing obligation to make disclosure and the material should have been disclosed at trial. Ms Kitson on behalf of the prosecution quite properly conceded that the documents ought to have been disclosed and we consider that she was correct to make that concession. We note the explanations as to why the material was not disclosed. We deprecate the explanation that the NICHE system had no record in relation to S's paternal relation emphasising that non-disclosure is a potent source of injustice. If it had not been for the report from Dr Patterson then this material may never have come to light.

[28] In relation to the second question there were similarities between the offences involving S which occurred in a bedroom and in a kitchen. There was also a similarity in relation to the use of the expression "private parts." On the other hand there were differences between what had occurred to S and the complainant's allegations. The differences may have undermined the impact on the jury of the undisclosed material but the question for this court is whether it is capable of affecting the mind of a reasonable jury properly directed. The appellant does not have to establish that the disclosure of the material *would* have affected the outcome of the proceeding but rather that it is reasonable to suppose such failure *might* have affected the outcome of the defence. This was a case in which the outcome depended on an assessment of the credibility and reliability of the complainant and of the appellant there being no corroborative evidence one way or the other. The issue as to why the complainant was making the allegations was an issue of significance at the trial. Ms Kitson on behalf of the prosecution quite properly conceded that the failure to disclose renders the convictions unsafe. We consider that she was correct to make that concession. We consider that the undisclosed documents would have provided significant cross-examination material. We

consider that the material could have had an effect on the verdicts of the jury in relation to counts 3 and 4.

Conclusion

[29] We quash the convictions.

[30] The prosecution have indicated that they do not seek a retrial. We do not order a retrial.