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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

M

_____

Before: Deeny LJ, Treacy LJ and Sir Paul Girvan

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DEENY LJ (delivering the judgment of the court)

Introduction

[1] On 10 November 2017 the appellant, M, who was then aged 64, was convicted on four counts at Belfast Crown Court by a jury. He was found guilty of the rape on a date unknown between 14 April 1971 and 1 September 1972 of B. He was also convicted on 3 counts of indecent assault on the same female B between 14 April 1971 and 31 December 1973.

[2] The conviction on the count of rape was by a majority of 10-2 and by a majority of 11-1 in respect of the indecent assaults. This is a topic to which the appellant wishes us to return. He was acquitted of 28 other counts of sexual offences against two sisters of B, C and D. He was subsequently sentenced to 5 years' imprisonment with one year probation on the count of rape with a sentence of one year imprisonment on each count of indecent assault to run concurrently but consecutive to the rape sentence. He is currently serving that sentence. He appealed within time but a key application to admit fresh evidence was only lodged on 25 April 2018.

[3] The application for leave to appeal was considered by the Single Judge, Horner J. He granted leave on the ground that it was arguable that the conduct of the trial process was unfair to the defendant and may render the convictions unsafe. He refused leave to appeal on the ground that language used by Crown Counsel in closing was inappropriate. This ground was not pursued before us. He also refused leave on the ground that the judge ought to have given a warning in accordance with *R v Makanjuola* [1995] 2 Cr App R 469 CA on the basis that this was within the

judge's discretion. Pursuant to s.45 of the Criminal Appeal (NI) Act 1980, he left to this court the issue as to whether fresh evidence should be admitted i.e. the report of Dr Helen Harbison disclosing, inter alia, that B had significant gambling debts at the relevant times. This information had not been available during the hearing of evidence.

[4] At the hearing before us on 11 September 2018 Mr Gavan Duffy Q.C. appeared for the appellant with Mr Stephen Toal. Mr Terence Mooney Q.C. appeared for the prosecution with Mr Sam Magee. The court had the assistance of helpful written and oral submissions from counsel.

Application to adduce further evidence

[5] The appellant sought leave to adduce fresh evidence before the court pursuant to Section 25 of the Criminal Appeal (Northern Ireland) Act 1980:

> "25. Evidence
>
> (1) For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice—
>
> (a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to the Court necessary for the determination of the case;
>
> (b) order any witness to attend and be examined before the Court (whether or not he was called at the trial); and
>
> (c) receive any evidence which was not adduced at the trial.
>
> (1A) The power conferred by subsection (1)(a) may be exercised so as to require the production of any document, exhibit or other thing mentioned in that subsection to—
>
> (a) the Court;
>
> (b) the appellant;
>
> (c) the respondent.

> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—
>
> (a) whether the evidence appears to the Court to be capable of belief;
>
> (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
>
> (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
>
> (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings……"

[6] The evidence which the appellant wished to adduce pursuant to Section 25(1)(c) is a report of the consultant psychiatrist, Dr Helen Harbinson MD, FRCPsych. MMedSci., dated 7 December 2017, relating to the complainant B. This was commissioned by the prosecution as a victim impact report and was therefore before the judge for sentencing but not before the jury at the trial. In applying Section 25(2) as to whether we should admit this evidence we take into account the dictum of Kerr LCJ in *R v Walsh* [2007] NICA 4 at [25].

> "[25] In R v Rafferty [1999] 8 BNIL 8 this court considered this provision and concluded that the power of the court to admit fresh evidence was fettered only by what is necessary or expedient in the interests of justice; the factors listed in section 25 (2) are merely factors which are to be taken particularly into account. It is clear, however, that not only must the court consider these factors but it must also address the question of what the interests of justice require in relation to possible fresh evidence. "

[7] The appellant contends that this report contains 3 pieces of information emanating from the complainant which were not available at the trial and which were inconsistent with her evidence or otherwise likely to be capable of casting doubt on the safety of the convictions. Counsel points out that at internal page 8 of the report she told the doctor that the appellant had intercourse with her when she was a little girl of 10 or 11 and that this happened on 4 occasions. The doctor repeats this at page 9 of the report and adds:

> "It is unusual in my experience for a first episode of abuse to include sexual intercourse. Normally there is a

> build up to that over a period of time. The abuse happened about 45 years ago. I find it difficult to get a clear picture from [B] of precisely what happened. She was distressed when talking about it. The significant passage of time had also had a bearing."

This account differed from her statements to the police and jury of one rape and three indecent assaults.

[8] She told the doctor that 3 of her sisters D, C and E were being abused:

> "They used to sit on the stairs together while E too was being abused by M."

This statement differs from anything said by her or others in evidence or to the police.

[9] The complainant told the doctor that by April 2015 she had sold her house to pay accumulated debts of £30,000. She was a heavy drinker. Her husband had been unemployed for many years although previously in employment. Counsel contended that this gave her a motive to invent this allegation against the appellant on the basis that she could recover compensation to pay her debts. They say that online it is stated that the award of compensation for an offence of rape resulting in mental illness was £27,000. Although there was no evidence regarding that figure B did not deny in evidence that she had lodged a criminal injury claim. The Crown did not offer another figure for compensation. The police report for that claim alleges she was raped while in P7 by M but goes on to allege four further attempts by M at intercourse rather than three as otherwise alleged by her.

[10] It is right to note that the complainant told the doctor that C and D can make compensation claims for the abuse they experienced because it continued after they left the family home but that she cannot claim. Whether or not she was aware of this when she made the complaint or at the trial is something that might be explored in cross-examination.

[11] At the hearing Mr Mooney sought to introduce certain documents with the intention of glossing the apparent conflict outlined at [7] above and avoiding the necessity of calling the doctor and, perhaps, the complainant. After a short adjournment he consented to the application to admit the new evidence, with the consent of the appellant to the court also receiving and taking into account three documents:

(a) a witness statement of the complainant taken by police on 10 September 2018;
(b) the manuscript notes of the doctor used by her for her report;
(c) Mr Magee's note of a conversation with the doctor of that morning.

The Court agreed to this course, while reserving the right to hear from these two ladies if it became necessary to arrive at a decision on the appeal.

Impact of new evidence

[12] We have carefully considered this report and these documents. We note that at pages 2-7 the consultant psychiatrist considered her previous history which included both physical illness and unhappy episodes in her life. We note that at no time did she make an allegation of childhood sexual abuse. Indeed, to a consultant psychiatrist on 30 September 1992 she "described a happy childhood". At page 7 we note the following, to a counsellor whom she was attending after taking an overdose in 2014:

> "When I asked why she disclosed the abuse at that particular time she said she had seen a film on TV the night before that reminded her of it. She could give no other explanation."

[13] The prosecution, rather belatedly, obtained the manuscript notes of Dr Harbinson's interview with the complainant. As they were somewhat difficult to read Mr Mooney directed his learned junior to consult on the telephone with Dr Harbinson immediately prior to the sitting of the court. The relevant passage in her notes to the reference to intercourse four times is believed to read as follows on foot of that note:

> "Happened in parents' bedroom - made her take her clothes off. I cried and said I … he had sexual intercourse with her – doesn't know where others were. Sex from start. I knew it was wrong – she fought back – he stopped – there were months in between – happened x IV."

The doctor explained to counsel that she was reliant on her notes and had no personal recollection of the complainant. Counsel read to her B's witness statement of 10 September and invited her comment. She replied:

> "If that is what she intended to convey to me then I misunderstood her. I wrote down what I understood her to say."

She was read back counsel's note and agreed it. The point being made by the prosecution is that there is the opportunity for misunderstanding between the complainant and the doctor in recording the history. But Mr Duffy points out that the doctor did tell counsel that she wrote down what she understood the complainant to say. Furthermore she repeated it in her conclusions.

[14] The statement obtained from B by the directions of Crown counsel on the day before the appeal is something of a two-edged sword. The complainant was shown Dr Harbinson's report and taken to the "details of the abuse", which included her being quoted as saying that intercourse "happened on four occasions". B said to the police officer:

> "I can say the intercourse happened once, the other times he tried to by pulling at my pants. I held on to my pants he then, presumably he then rubbed against my back until he ejaculated. This happened at least three times."

The Crown case has been that there were four incidents in total whereas now B seems to be saying that there might have been more than four in total. She goes on to say that the intercourse was only on one occasion, but she would have been referring to four occasions of sexual acts not sexual intercourse.

[15] She does not seem to have been asked about sitting on the stairs with her sisters listening to M abusing her sister E. Nor does she comment on the revelation that she had substantial debts in and about the relevant time. B told a mental health nurse practitioner on 16 April 2015: she had to sell her house to pay accumulated debts of £30,000. Prosecuting counsel sought to say that therefore the sale of the house had removed the debt and reduced any motive to make false allegations in order to obtain compensation. But on internal page 9 of Dr Harbinson's report we see the following: "She and her husband are in £30,000 of debt which she is doing her best to pay off gradually".

Reading these two matters together it would imply that she and her husband had been forced to sell their house but were still left with debts. Her statement of 10 September does not address this. This is clearly a matter of some importance as supporting one wing of the defence i.e. that the complainants had a financial motive for making allegations against M, a man who had no criminal record and with whom B at least had been friendly for a considerable period of time after these alleged events.

[16] What is clear on the authorities is that in making our decision we apply the statutory provision i.e. Section 2(1) (a) of the 1980 Act i.e. that the Court of Appeal "shall allow an appeal against conviction if it thinks that the conviction is unsafe". What is also clear on the authorities is that in deciding that we must take into account all the relevant circumstances of the trial brought to the attention of the court. We shall therefore proceed to consider the other grounds relied on by the appellant.

Was the trial process unfair to the defendant?

[17] In his amended grounds of appeal, for which leave was given at the hearing, the appellant advanced the following as his first ground:

> "The learned trial judge erred in the management of the trial, in that the judge created a situation that led to pressure being exerted on the jury to make a decision by giving the majority verdict direction at 3.30 on a Friday after the jury had indicated they were in a state of 'deadlock'."

[18] To understand this point one must attend to the chronology furnished to the court. The accused, as he then was, was interviewed by the police in July 2014. He was not however arraigned until 7 March 2016 and his first standby trial was not until 5 June 2016, presumably because of the disagreement between the legal profession and the Department of Justice as to remuneration for criminal trials. He was then to be tried before HHJ Miller and a jury on 9 October 2017. This was adjourned because Mr Gavan Duffy asked the judge to reconsider the disclosure which had been given to the appellant which he felt might be inadequate. The trial was adjourned further on 11 October. On 12 October the judge did direct disclosure of the police report in the criminal injury claim to which I have referred and possibly some other documentation. His disclosure from the medical records was limited and did not include the entry regarding debts found by Dr Harbinson, but the significance of that may not have apparent to the learned judge if indeed that note was amongst the papers which he had. There was a difficulty about a Crown witness and the case was adjourned and finally did commence on 16 October 2017. The three complainants were called in the course of that week and cross-examined as were three other witnesses. On Monday 23 October 2017 counsel for the appellant says it was intended to receive one short statement from the Crown and then proceed to call his client. However, on that occasion the Crown applied to the judge for leave to call a further witness, Frazer O'Brian. We have been given a copy of his statement. Essentially, he provided evidence as a former corporal in the UDR contradicting a claim of the appellant's. M had said to the police at his interview that at most of the material time when these crimes alleged by B were said to have occurred he was in fact living in Girdwood Barracks. He said he was there "24/7". Mr O'Brian said that there were no living quarters there for the UDR. They lived at home. There was a rotating guard unit but soldiers would only be in there for 24 or 48 hours at a time. In the UDR hut again there would be a rota of someone available to look after the vehicles, if required, in the unit in which both he and M served, but again that would only be on a rotating basis.

[19] We do not have the transcript of the exchange but we were informed by Mr Duffy without dissent from the prosecution that he objected to the admission of that statement at such a late stage. One of his grounds for objecting was that it would upset the duration of the case which it was otherwise hoped would finish that

week or at the latest the following Monday or Tuesday. The jury had been told at the beginning that they would be free by those dates or earlier and they were coming to the end of their jury service. Nevertheless, the judge admitted the statement but did give Mr Duffy and those instructing him time to gather any evidence to contradict what Mr O'Brian was saying.

[20] As Mr Mooney himself pointed out several times to us in argument this case was dealing with events almost 45 years previously. M had clearly made the case in his police interviews as long ago as 2014 that he had been living in Girdwood Barracks for a large part of the relevant period. It was entirely remiss of the Crown not to look into that claim at some point between 2014 and the trial of the case. In fact they only did so after Mr Duffy put that particular point to witnesses in the trial. They then consulted the historian of the Ulster Defence Regiment who posted on Facebook. This came to the attention of Mr O'Brian who came forward to give evidence as somebody familiar with Girdwood Barracks in 1971 and 1973. No reason was advanced to us why that should not have been done months or even years earlier by the prosecution. It was therefore a decision generous to the Crown to allow that evidence to be admitted so late. There was no express ground challenging that decision, but it does form part of the factual matrix which we have to take into account when at the safety of the conviction.

[21] Mr Mooney points out that since then clearly the defence have not been able to trace any other witness to the contrary. We observe that the resources of the Public Prosecution Service as an organ of the State are likely to make it easier for them to trace records and information than for this appellant but he had not brought forward any former comrades to contradict Mr O'Brian.

[22] The effect of the introduction of this evidence and the opportunity given to search for contradictory evidence was that the trial came to a halt on 25 October and was adjourned on 26 October until Monday 6 November. Various admissions were then read out to the jury and subsequently on 7th the defendant gave evidence and was cross-examined. The hearing was completed on 8 November with speeches from the Crown and defence. The judge charged the jury on the morning of 9 November and sent them out at 2.00 pm. No verdict having been arrived at, he released them at 4.15 pm that afternoon. They returned on 10 November. They retired from 10.00 am to 1.00 pm. At 1.10 pm a note was sent out apparently indicating that they were "deadlocked" but then there was a further communication saying they no longer required guidance. They therefore resumed their consideration from 1.50 to 3.25 pm. At 3.25 pm the judge called them in and gave them the majority direction. He had in fact told them on 9th that in certain circumstances he could accept what is known as a majority verdict, but did not go into that in further detail. His reason for delay in giving them a majority verdict was that there was such a multiplicity of charges that he anticipated that they would be some time. He directed them that he could now accept a verdict as long at least 10 of them were in agreement. The jury had indicated that they were unanimous about one count but he declined to take a single verdict from them.

[23] He then noted that it was 3.30 pm and sent them out but said that in any event he would call them back at 4.00 pm and release them for the day. While he told them that that did not mean that it was necessary for them to reach decisions in the next half hour Mr Duffy complains that the timing of these matters and the effect of this direction was to put a degree of pressure on the jury. This was particularly so as it was a Friday afternoon and he told them he would bring them back on Monday afternoon to accommodate a medical appointment that one of them had on Monday morning. The judge also told them that he would make arrangements for Tuesday.

[24] Mr Duffy relied on two decisions of the Court of Appeal in England: *R v Coates and Graves* [2004] EWCA Crim 3049 and *R v D and Heppenstall* [2007] EWCA Crim 2485. These related to delays in the completion of trials. We do not consider that they assist the appellant here. Indeed, Mr Duffy acknowledged that it was a matter of debate as to whether his client had benefited from giving his evidence several weeks after the complainant, or not.

[25] The issue of the time at which a jury should be sent out has been the subject of consideration in several cases. In *Thompson* [2002] 5 BNIL 9 (CA) the court said that it was generally undesirable to send out the jury after 3.00 pm in a complex or lengthy case to ensure that they are not fatigued or feel under pressure to reach a quick verdict. However, in that case the court was satisfied that injustice had not been done. See also *R v McBride* [2001] NIJB 397. The appellant there through his counsel complained of the trial judge accepting a majority verdict at about 5.00 pm on the first day of their consideration. The court did not quash the conviction but Carswell LCJ said the following at page 403.

> "It is a necessary component of a fair trial that jurors should not be required or permitted to sit for such long hours that their quality of concentration and decision may be impaired, particularly in a long or complex case. <u>It is equally important that they should not be put under any pressure to complete their deliberations and bring in a verdict.</u> It was submitted on behalf of the applicant that the majority verdicts should not have been taken after such a long day, or that at the least the judge should have inquired if they felt fresh enough to continue, would like refreshment or would prefer to continue their deliberations the following morning." (Emphasis added)

[26] Carswell LCJ had to consider this issue also in the case of *R v McMorrin* [1999] NIJB 50. The conviction was not quashed, but the following paragraphs from page 52 of the judgment of Carswell LCJ are of relevance and value:

"The judge sent the jury out at approximately 3.30 pm and, as Mr Mooney (Philip) properly pointed out, it was a Friday afternoon, after a long hearing of eleven days with long sittings in court on the immediately preceding days. The jury returned majority verdicts at 6.12 pm. They had been back to court shortly between 3.35 pm and 3.40 pm for further direction following requisitions, and they came in with a question between 4.30 pm and 4.44 pm. At that time they said they were deadlocked and the judge then went ahead, notwithstanding the fact that it was only an hour since they had originally gone out, to give them a majority direction. The direction itself was given in proper terms, as Mr Mooney recognised, but he took some issue, not unreasonably, with the fact that the judge did not follow the classic *Deegan* type of procedure [see *R v Deegan* [1987] NI 359] of sending the jury out to try further to reach a unanimous verdict and only introducing the question of a majority verdict after a period of more than two hours and ten minutes had expired.

It has regularly been said to be undesirable to send out a jury after 3.00 pm in a case involving much detailed evidence or complex issues. That is very sound advice and we would underline it again for the guidance of Crown Court judges. It is also said on behalf of the applicant that after the several long days, and taking into account the length of time that the jury had had to concentrate on the judge's charge during that day, there was a risk that they would be fatigued, more so than in a case which had occupied a shorter time. The risk of a late retirement is obvious; that the members of a jury may be unused to long periods of sitting in court, they may be tired and their concentration may be impaired, and they may be prone to the temptation to agree on a result simply to finish with the case and to get home. This applies at least as strongly on a Friday afternoon as at any other time. Where there is sufficient reason to be concerned about this then a conviction may be unsafe. There are cases reported in England in which convictions have been set aside where juries were sent out at an undesirably late time. On the civil side in respect of a coroner's jury I have decided a case myself to that effect in *Re Bradley* [1995] NI 192."

[27] But the court nevertheless went on to conclude that there was a fairly net issue in the trial and the conviction was safe.

[28] We consider that what happened here was far from ideal. This jury had originally been empanelled on 9 October 2017 and were now deciding the case on 10 November. Although it is not in dispute that they were a willing and conscientious jury we agree with Lord Carswell that "they may be prone to the temptation to agree in a result simply to finish with the case and to get home". That was particularly so, not only in the light of the length of the trial but the fact that their jury service had been due to end at an earlier date and that it was a Friday and that the judge said he would send them home at 4.00 o'clock in any event. They were then left with the invidious choice of reaching a verdict and being released from their onerous responsibilities if they could make up their minds by about 4.00 pm or else having to come back the following Monday and possibly Tuesday for further deliberations and further dislocation to their personal lives or occupations. We consider that this is not a pressure they should have been put under. It would have been preferable to have given the majority verdict when they came that morning or possibly at 1.00 o'clock or 2.00 o'clock when they clearly had not reached unanimous verdicts. It was unfortunate to give it so close to what would otherwise have been the normal time to rise.

[29] In the circumstances where it was given, somewhat belatedly, they should have been given enough time to digest that and reflect upon that rather than being told that they judge was minded to send them home at 4.00 pm. We therefore find that the appellant's complaint in this regard is justified.

Makanjuola direction

[30] The third surviving and final ground of the appeal on behalf of the appellant is that the judge ought to have given a direction in accordance with *R v Makanjuola* [1995] 2 Cr App R 469 CA. Mr Duffy sensibly dealt with this in a succinct fashion. He acknowledged, as Horner J had found, that the granting of the direction on the facts before the judge at the trial was such as to allow him to make that decision within his discretion. But Mr Duffy says if the court takes into account the additional inconsistencies to be found in the account given by B to Dr Harbinson clearly such a warning would have been appropriate and would be appropriate in any retrial of the matter. We accept that submission.

[31] We would say in addition that in considering the necessity for such a direction the court should always bear in mind in any historic case that the defendant is at a greater disadvantage from the delay than the State and the complainant. In such case great care should be taken to try and ensure that an accused person does not suffer from the long delay. It is understood that the victims of such abuse may find it difficult to talk about such matters for many years. But

nevertheless it is a very relevant consideration that a defendant is being asked to counter allegations arising, as here, so long after the alleged events.

Conclusions

[32] We take into account the following passage from the judgment of Girvan LJ in the *R v Harbinson* [2012] NICA 20 at [29]:

> "[29] The principles governing the court's approach to fresh evidence have been most recently adumbrated in R v Ahmed [2010] EWCA Crim 2899. In that case Hughes LJ at [24] emphasised that the responsibility for deciding whether fresh material renders a conviction unsafe is laid inescapably on the court which must make up its own mind. It must consider the nature of the issue before the jury and such information as it can gather as to the reasoning process through which the jury will have been passing. Whilst the court is likely to ask itself by way of check what impact the fresh material might have had on the jury, the test is not what effect the fresh evidence would have had on the jury but on the court itself. See also R v Pendleton [2001] UK HL 66, R v Dial [2005] 1 WLR 660 and R v Buridge [2010] EWCA 2847. In a cautionary observation at [25], Hughes LJ said in Ahmed that in most cases of fresh evidence, it will be impossible to be 100% sure that it might not possibly have had some impact on the jury's deliberations since ex hypothesi the jury have not seen the fresh material. The question which matters, however, is whether the fresh material causes the court to doubt the safety of the verdict of guilty."

[33] We have taken into account the submissions of prosecuting counsel. We note that B was cross-examined about her financial motivation and told the court that she had been informed she would not get any compensation because of the amount of time that had passed. She also said that it was not about the money. S was the eldest of this large family and reports in a statement which was submitted at the trial that her sisters had indeed complained to her over the years of sexual assaults by the appellant. She said in her statement of 11 August 2014 that B had told her this over 8 years ago. There was a dispute between S and M as to which of them had improperly removed items from the parental home after a parental death.

[34] Mr Mooney in his oral submissions ascribed to the appellant two main aspects of his defence. The first of these was that these allegations were being made maliciously against him, he submitted because, the accused had said he had informed the police on the drug dealing activities of his family. He said this was a fantasy on the part of the appellant for which there was no evidence.

[35] We think that is to overstate the matter. The appellants claim to have acted as an informer was borne out by a Constable Haire who had indeed referred him to the Drugs Squad in 1989 to act in this capacity. Admittedly she said he wanted to do that for money which M denied.

[36] In fact his brother N was convicted on serious drug offences a few years later but that was in London. A cousin G was also convicted in this jurisdiction.

[37] M had said at the trial that he had voiced the suspicion at the funeral of his brother T that he had not died of natural causes in Spain but that this was somehow connected with the drug dealing. He said that he had informed on the family to the police. He said he said that to P, his brother-in-law. Mr Mooney pointed out that P denied that. But Mr Duffy asked why would P remember going over to M's car after the funeral and saying "sorry for your loss" to him, 15 years later? Why would he remember such a trivial thing unless M had indeed confided something of significance to him? Furthermore, B had said that P would never have spoken to M but he admitted that he had done so.

[38] It does appear that at the least M exaggerated this matter of informing to the court.

[39] Mr Mooney also rightly pointed out that he had attempted to achieve an alibi by claiming that he was living in Girdwood Barracks for much of the relevant period. That had been wholly undermined by the evidence of Mr O'Brian. Again that is a valid point, but the fact that someone has invented or exaggerated an alibi does not necessarily mean that they are guilty of the offences with which they are charged. The onus is on the Crown. They have to satisfy the jury beyond reasonable doubt that B was both an honest and a reliable witness. Mr Mooney did not have any further answer to those set out above to the clear inconsistencies between what B had said to the police and the court and what she had said to the doctor. For completeness the defence had pointed out an inconsistency between her evidence at the police interview of abuse over two years and her Nexus entry where she said the alleged abuse lasted six months. There was also a question mark over her claim to have been unable to tell her mother about being pregnant.

[40] Mr Mooney submitted that we should follow the decision of the House of Lords in *R v Pendleton* op cit at [19] of Lord Bingham's judgment. He submitted that the inconsistencies and the reference to the debt in the doctor's report were peripheral to the clear inference that the jury did not believe M and so these matters would not "reasonably have affected the decision of the trial jury to convict" in Lord Bingham's words and we should therefore uphold the judgment.

[41] The test to be applied by the court has previously been set out by Kerr LCJ in *R v Pollock* [2004] NICA 34 and endorsed in *R v BZ* [2017] NICA 2:

> "1. The Court of Appeal should concentrate on the single and simple question `does it think that the verdict is unsafe'.
>
> 2. This exercise does not involve trying the case again. Rather it requires the court where a conviction has followed trial and no fresh evidence has been introduced on the appeal to examine the evidence given at trial and to gauge the safety of the verdict against that background.
>
> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
>
> 4. The Court of Appeal must be persuaded that the verdict is unsafe but, if having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[42] In this case the defence were not told of the apparent indebtedness at the time of her complaint to the police of the complainant B. This would have been of value to them in the cross-examination of B as they were alleging a financial motive as part of the reason for her allegations. Furthermore two new and significant inconsistencies in the accounts of B appeared in the doctor's victim impact report after the trial which give rise to a concern on the part of the court that she may not be a precise or reliable historian. Their existence would make a *Makanjuola* warning necessary. They are not peripheral. When one sets those matters against the context of the decision, generous to the Crown, to admit the evidence of Mr O'Brian at a very late stage and the unfortunate timing of the giving of the majority direction with an indication that the jury would be sent home 30 minutes later, this court is left with a significant sense of unease about the safety of this verdict. We think that the conviction is unsafe and pursuant to Section 2 of the 1980 Act we allow the appeal and quash the convictions.