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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

IA

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Before: Treacy LJ, Maguire LJ and McFarland J

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Mr Kelly QC with Mr Barlow BL (instructed by HD Solicitors) for the applicant
Mr MacCreanor QC with Ms Auret (instructed by the PPS) BL for the Crown

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MAGUIRE LJ (delivering the judgment of the Court)

Introduction

[1] Since the subject matter of this application for leave to appeal both conviction and sentence involves a series of indecent assaults on a female the complainant is entitled to automatic lifetime anonymity in respect of these matters by virtue of section 1 of the Sexual Offences (Amendment) Act 1992, as amended. Further, since there is a familial relationship between the applicant and the complainant he is referred to in the title of this judgment by the cipher 'IA' and nothing should be published which serves to identify, directly or indirectly, the applicant or the complainant.

[2] The applicant, who is now in his late 40s, was committed for trial at Craigavon Crown Court on 17 April 2019. He was arraigned on 4 June 2019 and pleaded not guilty in respect of an indictment which contained seven counts, all of indecent assault of a female, contrary to section 52 of the Offences against the Person Act 1861. The female concerned was the applicant's younger sister and the events giving rise to the charges occurred between 29 April 1988 and 30 April 1990 (a two year period).

[3] His trial commenced on 2 March 2020 and ran until 5 March 2020. The presiding judge was His Honour Judge Lynch QC ("the judge") who sat with a jury. On 5 March 2020 the jury found the applicant guilty by a majority verdict (10 to 2) of four counts on the indictment, counts 1, 2, 4 and 6. The jury was unable to reach verdicts in respect of the remaining counts (3, 5 and 7) and these were left on the books in the usual way.

[4] Subsequently, on 10 September 2020, the applicant was sentenced by the judge to 18 months' imprisonment, suspended for a period of three years, in respect of count 1. He also received the same sentence in respect of counts 2, 4 and 6 but these sentences were all to run concurrently with each other and with count 1. In addition, the applicant was made subject to a disqualification order disqualifying him from working with children pursuant to the provisions of the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003. Finally, the applicant was made subject to notification requirements under the Sexual Offences Act 2003 for a period of 10 years (often referred to, as it will be later, as registration on the Sex Offenders Register).

[5] Prior to sentence, the applicant made an application for leave to appeal his conviction and sentence (even though the sentence had not been determined). This was received by the court office on 2 April 2020. In respect of the appeal against conviction, the applicant was refused leave to appeal by Horner J on 2 November 2020. As regards the appeal against sentence, the basis for it was later settled on 22 January 2021. The court will deal with it below.

Background

[6] The applicant was the second oldest of a sibship of six children, three boys and three girls. They were brought up by their parents in the Craigavon area of Armagh. The complainant in these proceedings is a younger sister of the applicant. She is now 39 years of age. The offences for which the applicant was convicted, as has already been noted, occurred between April 1988 and April 1990. At that time the complainant would have been 7/8 years of age and the applicant would have been 14/15 years of age.

[7] The complainant gave evidence at the trial and, in simple summary, the evidence she gave in relation to the four counts in respect of which the applicant was found guilty was as follows (using the numbering of the counts on the indictment):

Count 1 – She had been in her brother's bedroom rolling around. The applicant was tumbling about and tickled her. She was wearing a dress and the applicant's hand brushed between her legs. She had underwear on and the applicant's hand brushed across her vagina under her dress. She was aged 7 at the time.

Count 2 – Later that same day the complainant was in bed and the applicant called her out of her room and took her to the bathroom. He said "Can I tickle you again?"

She thought it was a game and agreed to be tickled. The applicant put a towel down and locked the door. He then touched the complainant between her legs. She had a nightdress and underwear on. The applicant rubbed his finger over her vagina, initially over her underwear and then took her underwear down and rubbed her vagina again. This lasted for around 5 minutes at the end of which the applicant pulled her underwear back up. He checked the hallway and told her to go back to bed.

Count 4 – The complainant described how the applicant knocked on the bedroom door and told her to shout that she was there. The applicant took her to the bathroom. What then occurred was "pretty much the same as previous incidents." Her underwear was down and he touched her. In addition, she described an act of digital penetration.

Count 6 – The complainant was called to the bathroom by the applicant where they heard a noise. She was told to hide in the shower. The applicant opened the bathroom door and said he was in the bathroom and would be 5 minutes. Later, she said that he had been using his fingers on her, describing this as another instance of digital penetration.

How matters came to light

[8] It is of help to trace how matters came to light following the events described above.

[9] The first occasion, so far as the court can tell, when anything to do with the incidents was mentioned appears to have occurred sometime in 1995. By this stage the complainant was approximately 14 years of age. According to her, there was an occasion when the applicant was chasing her around the kitchen trying to grab her. At one point she became upset. She then told her sister, O, that the applicant had touched her vagina and had used his mouth on her. Her sister said nothing at the time but she later said that the complainant had said to her that the applicant had touched her on the bum sometime in the past.

[10] The second occasion when the matter arose was at a date in 1999. At the time she was a student living in Scotland and had a boyfriend. The complainant made a disclosure to him. According to the boyfriend's account given later, she told him that her brother "used to put himself inside", on multiple occasions.

[11] Shortly after this, there were other disclosures in Scotland brought about by the complainant speaking with her GP who referred her to a counsellor to whom she also spoke. It appears, according to a GP record, that she told her GP that she had been raped by a family member when she was 7 or 8, though she later denied that she used the word "rape." When she spoke with her counsellor (circa 2000) she told her about the alleged sexual abuse. She described this as having occurred on a few occasions when she was approximately 7/8 years old. She said that her older

brother was responsible for this. He, by then, was living in England. At the time of these disclosures the counsellor recorded that she was having regular nightmares, anxiety symptoms, fearful thoughts and a tendency to panic. These she related to the abuse. The counsellor also recorded that at that time she socialised with her boyfriend and she smoked marijuana daily.

[12] The next disclosures were to her parents in 2005/2006. She appears to have disclosed to her mother that she had been sexually abused as a child by her brother. Her mother asked her "did he rape you?" To this she replied "no."

[13] It was not until 10 June 2017 that the complainant made a complaint to the police. On that day she made a statement to the Scottish police in respect of her brother's sexual abuse of her. This led to a police investigation being carried out by the Police Service of Northern Ireland. It appears that some 3 to 4 weeks before the report made to the Scottish Police there had been discord about the attendance of the complainant and the applicant at a family wedding. In fact, the complainant did not attend it, even though she had wanted to do so, because her brother would be present at it. When the applicant was interviewed by the Police Service of Northern Ireland, while he denied her allegations against him, the applicant admitted that he had touched the complainant inappropriately on a single occasion when he was 12 and she (he thought) was 5. The incident was described as being of a spur of the moment nature entered into to satisfy the applicant's youthful interest in seeing what girls looked like. It was on the basis of this investigation that charges were preferred against the applicant leading to the trial. The consistency of the complainant's account was the subject of substantial cross examination at the trial, but it is unnecessary for the court to enter into a discussion of this aspect.

The Appeal against Conviction

[14] The appeal against conviction relates to incidents in the course of the trial and consists of three grounds:

(i) The judge erred in refusing to grant a bad character application in favour of the defence to allow defence counsel to cross-examine the complainant on her marijuana use, as referred to above ("the bad character ground").

(ii) Prosecution counsel, it is said, made improper remarks during her closing speech to the jury and attacked the credibility of crown witnesses when cross-examining them ("the improper behaviour of prosecution counsel ground").

(iii) There was, it was alleged, a material irregularity during the period of the jury's retirement which ended in the judge allegedly falling into error by informing the jury that if it failed to reach a verdict it would be discharged ("the jury retirement ground").

[15] The court will consider each of these grounds in turn.

The Bad Character Ground

[16] The principal witness called by the prosecution in the proceedings was the complainant who gave her evidence at an early stage in the trial. After she had given her evidence-in-chief, counsel for the applicant made an oral application to cross-examine her in relation to her use of cannabis in 2000. This arose not from anything she had said in her evidence but from the process of disclosure prior to the trial.

[17] There had been disclosure of documents prior to the trial and no complaint was made to the court about the extent of same or about it not being provided in a timely way. The disclosure included materials in the form of medical and counselling records, in particular, those from the complainant's time in Scotland.

[18] Among the disclosure was documentation relating to the complainant when she was living as a student in Scotland in 2000. At that time she was aged 19 and it would appear that this was her first substantive period living away from home. As has already been noted, there are records of her having seen her GP in Scotland and having allegedly made a report that she had been raped by a family member, though she denied later using the word "rape." At all events, the GP referred the applicant to a chartered clinical psychologist ("the counsellor") and there is a letter among the disclosure dated September 2000 from the counsellor back to the GP, after the former had first assessed her. This letter was the stimulus for the defence application to cross-examine in respect of the issue of marijuana. What is recorded in it, is that the applicant had presented as a young student with concerns about child sexual abuse. She reported abuse of her by an older brother when she was 7/8 years old. The abuse was described as happening on a few occasions, though she was unsure how long it went on for. It is noted that the brother in question now lived in England. The counsellor recorded the complainant's mood referring to tearfulness, regular nightmares, anxiety symptoms, fearful thoughts and a tendency to panic, all of which the complainant related to the past abuse.

[19] Of particular note, for present purposes, the letter referred to the complainant socialising regularly with her boyfriend and to her smoking marijuana daily. Notably, the counsellor made no comment about this latter activity.

[20] The letter ended by the counsellor placing the complainant's name on a therapy waiting list.

[21] The application made by defence counsel to the judge was to the effect that he wished to explore the above material on the basis of bad character so as, *inter alia*, to discover the extent of the applicant's use of marijuana, its impact on the complainant's mental health and its relationship, if any, to her memories from childhood.

[22] The prosecution seems to have learnt of the application casually and objected to it.

[23] The net result was that there was an oral argument in respect of the issue before the judge in which the applicant's counsel sought to persuade the judge to enable him to pursue the reference to marijuana. The legal basis for the application was Article 5 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order"), the material part of which read as follows:

> "5.—(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—
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> (a) it is important explanatory evidence,
>
> (b) it has substantial probative value in relation to a matter which—
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> (i) is a matter in issue in the proceedings, and
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> (ii) is of substantial importance in the context of the case as a whole, or
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> (c) all parties to the proceedings agree to the evidence being admissible."

[24] The language above was elucidated by Article 5(2) of the 2004 Order as set out below:

> "5(2) For the purposes of paragraph (1)(a) evidence is important explanatory evidence if—
>
> (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
>
> (b) its value for understanding the case as a whole is substantial."

[25] Article 5(3) is also worthy of quotation:

> "(3) In assessing the probative value of evidence for the purposes of paragraph (1)(b) the court must have regard to the following factors (and to any others it considers relevant)—

(a) the nature and number of the events, or other things, to which the evidence relates;

(b) when those events or things are alleged to have happened or existed;

(c) where—

(i) the evidence is evidence of a person's misconduct, and

(ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,

the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;

(d) where—

(i) the evidence is evidence of a person's misconduct,

(ii) it is suggested that that person is also responsible for the misconduct charged, and

(iii) the identity of the person responsible for the misconduct charged is disputed,

the extent to which the evidence shows or tends to show that the same person was responsible each time."

[26] Finally, Article 5(4) indicated that:

"(4) Except where paragraph (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court."

[27] The judge's ruling on the application seems to have been made *ex tempore*. He said:

"Mr Barlow intends to cross-examine her, if the court permits, in relation to smoking marijuana. The relevance

> of it is a context in which she had flashbacks in relation to the alleged offences and he submits that it has therefore an impact on her reliability. He indicates that it is generally well-known that potential effects of the ingestion of the drug marijuana. The prosecution object to the admission of this evidence by virtue of cross-examination on the basis that it is simply not relevant to the proceedings before me [and] the jury."

[28] The judge commented further that the application was not one which, in his opinion, came within Article 5(2). Further, he indicated that he did not share counsel's understanding of the effects of marijuana, which had not been the subject of expert evidence. The judge was of the view that he could see no relevance to the proposed cross examination. In these circumstances he refused to permit the application.

[29] At the hearing before this court, the following points emerged about the hearing of this application:

(i) There was no notice in writing given of the intention on behalf of the applicant to adduce bad character evidence. This was contrary to Rule 44N of the Crown Court Rules.[1] At the hearing before this court, there was no explanation given as to why the rules of court were not followed.

(ii) Consequently, the prosecution did not give any formal notice of any reply to the defendant's notice.[2]

(iii) As a result of these failures, the application appears to have been made casually whereas the very purpose of the rules is to ensure that in a matter of this nature, it should be dealt with only after the parties and the judge have had the opportunity to consider the way in which it would be presented.[3]

(iv) The application appears to have been dealt with without the parties having properly researched it. This point is evidenced by the fact that no legal authorities appear to have been referred to by either side to assist the judge in his determination of the application. Nonetheless, in this court, the applicant has relied on what purports to be a relevant legal authority, which was available at the time of the hearing before the judge but was not cited to him.

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[1] Notice in writing shall be given in Form 7E and shall be served on the Chief Clerk and every other party within a time limit. Further any party who wishes to oppose the application shall notify the Chief Clerk and every other party within a time limit.

[2] 44 N (3)

[3] Such lack of formality was deprecated by the England and Wales Court of Appeal in R v G (AI) [2018] 2 Cr App R 26 [31]

[30] In these circumstances the court is of the clear view that the application at the centre of this ground of appeal was the product of poor practice on the part of each side. Applications of this sort are of great importance in the trial process and, as a general rule, the rules of the Crown Court should be rigorously adhered to with the consequence that the parties should have closely prepared the ground before an application is moved, with *inter alia*, due attention being given as to the need for adequate consideration and research being given to the existence of relevant legal authorities.

[31] There is plain authority in Northern Ireland to support the above. In *R v King* [2007] NIJB 376 Gillen J had to deal with a bad character application made by the prosecution out of time and without any excuse being offered for this. While he ultimately dealt with the application substantively by permitting it as a matter of discretion, he referred to "a culture of non-compliance" with the Rules of Court indicating that such was not to be tolerated. He noted that:

> "Time limits are required to be observed. The objective of the rules is to ensure that cases are dealt with efficiently, fairly and expeditiously and this depends on adherence to the time tables set out."

Quoting from the England and Wales decision in *Robinson v Sutton Coldfield Magistrates Court* [2006] Cr App R 13 in respect of the court's discretion to shorten or extend a time limit or extend it after it had expired, he recorded that Owen J had made it clear that:

> "[a]n application for an extension will be closely scrutinised by the court. A party seeking an extension cannot expect the indulgence of the court unless it clearly sets out the reasons why it is seeking that indulgence."[4]

Bearing these remarks in mind, Gillen J offered a non-exhaustive list of factors which he thought were relevant to dealing with such applications.[5] It is not proposed to set all of these out here, but, in addition to his endorsement of the need for close scrutiny of such applications, he pointed out the effect on the other party or parties' opportunity to investigate a late application suddenly brought forward and the pressure that such applications may place on the other party or parties and/or the judge, which might be such as to involve adjournments being applied for or granted.

[32] In the present case, as already noted, the judge refused the application after hearing argument. Unfortunately, the matter of adherence to the rules does not appear to have been broached, notwithstanding the very late stage in the day – it

[4] See paragraph [16] of Owen J's judgment.
[5] See paragraph [23] *et seq.* of Gillen J's judgment.

appears after the complainant had given her evidence in chief - when the issue was raised. The matter seems to have been dealt with casually.

[33] In this court's view, first instance judges should be prepared to deal robustly with this sort of application and should only hear it where the rules have not been adhered to when it is plainly in the interests of justice to do so.

[34] As the judge proceeded to hear the application and the outcome has been appealed, notwithstanding the court's concerns about the process used, it will consider the points which the applicant has made.

[35] The legal authority cited to this court, which had not been opened to the judge, is *R v G* [2007] EWCA Crim 2468. This was, like the present case, a case of sexual abuse of a young female over a substantial period of time. The defendant was, however, unlike this case, an uncle of the victim. At trial, following disclosure of documents, an application was made by the defendant to admit bad character evidence in relation to the victim. This came about as a result of the provision of records which showed that the victim "smoked cannabis, sniffed butane gas and was taking LSD at around the time she first made allegations against the appellant." Other records also showed that she had been using amphetamines. It was argued, on the appellant's behalf, that the material sought to be adduced had substantial probative value in relation to a matter in issue in the proceedings. This aspect of the application was unsuccessful before the trial judge who was of the view that the only matters in issue between the prosecution and the defence were whether the events giving rise to the charges occurred and whether the victim was to be believed in relation to her account of the matter. In the judge's view "drugs use can have no relevance to that issue whatsoever." Accordingly, the judge declined to allow any reference to or any questioning about the complainant's previous drug use.

[36] On appeal, it was argued that the use of drugs by the victim was potentially highly relevant on the footing that the complainant may have resorted to false allegations against the appellant as a spurious excuse for drug abuse. The drug abuse might, it was suggested, be thought to provide a distinct explanation for other behavioural patterns, including the allegations before the court.

[37] The Court of Appeal allowed the appellant's appeal against the trial judge's refusal to allow the bad character application.

[38] In doing so, the court commented that:

> "It seems to us that the matter … runs somewhat wider. The drug use in which K indulged as a young person is highly material, it might be thought, to her character generally and ultimately therefore to her reliability in reporting the allegations of sexual abuse by the appellant."

[39] At a later point Laws LJ, who provided the court's judgment, went on:

> "In our judgment the judge … took all too narrow a view of the possible significance of this young girl's conduct … her use of drugs and other dysfunctional behaviour … surely had the potential to affect the jury's view of her as a reliable witness of truth. Such matter might perhaps have gone to her motivation in making these allegations against the appellant. More broadly, they spoke as to the nature of her character. They suggested instability and personal difficulty of quite a serious kind. It is simply in the nature of ordinary human conduct that matters of that sort might well be considered relevant to the assessment by a jury of her veracity as a witness in making allegations of sexual misconduct such as were made here."

[40] In these circumstances he concluded that:

> "Since the jury knew nothing of her drug taking and other associated forms of conduct, the verdict is unsafe. An important element in the case was not before them for their consideration. That being so, it seems to us that the appeal is good and the conviction must be quashed."

[41] Before this court Mr Kelly QC (who appeared with Mr Barlow BL for the applicant) argued that *G* underpinned the significance of drug taking by the victim in this sort of case. On the other hand, Mr MacCreanor QC (who appeared with Ms Auret BL for the Crown) sought to distinguish *G* on the basis that the behaviour of the victim in that case was far in excess and variety from the behaviour of the complainant in the present appeal but that, in any event, the alleged drugs abuse related directly to a point in time when the victim first made complaint, unlike the present case, where the behaviour at issue *i.e.* the daily use of marijuana occurred in 2000 a long time after the events with which this case deals and a long time before the case ever became the subject of a formal complaint to police, which did not occur in this case to 2017.

The court's assessment of this ground

[42] This ground of appeal raises the issue of whether the broad approach evinced in *G* should be adopted by this court in the present appeal.

[43] In the court's view, this question should be answered in the negative, largely for the reasons given by Mr MacCreanor. Factually, in this case, the alleged marijuana taking occurred at a point long after the alleged abuse had occurred or

was alleged to have occurred. In these circumstances, it is difficult to see how drug taking in 2000 by the complainant, over 10 years after the end of the period during which the alleged abuse had occurred, can have any real relevance to the issues which arise in the present criminal proceedings. This is especially so, given the complainant's young age at the time of the alleged abuse and the absence of any suggestion that at the times of the alleged abuse the complainant was engaged in the consumption of drugs or other substances or was other than a normal child. Relevantly, it further appears that there is no suggestion that the complainant was taking drugs at the time when she in fact reported the matter to the police in 2017. In contrast, in *G* there is a litany of complaints in relation to the complainant in respect of the consumption of a wide range of different drugs "around the time she first made allegations" against the appellant. This pattern distinctly has no application to the present appeal. As already noted, in the present appeal the first reference to the abuse which allegedly befell the complainant occurred in 1995, when the complainant was 14 and was living at home. Thereafter there was a further disclosure to her boyfriend in 1999 and later there were further reports after 2000, leading ultimately to the report to the police in 2017, long after the marijuana-taking in 2000. While the court can see that the issue of the consistency of complaints made by the complainant in the present case would be a suitable subject to be explored before the jury, it is, in fact, clear such an exploration indeed had occurred at the trial. A similar investigation is not warranted in respect of the counsellor's notes, especially as this might well only have the effect of leading some persons to view the complainant in a negative light, while at the same time offering little, if anything, of probative value.

[44] Every case must, the court accepts, be determined on its own facts in a context such as this. However, on the facts of this case, we consider that the judge was correct to take the view that this was an application for which no sufficient foundation had been laid. Indeed, the application was speculative rather than well grounded. In this regard, the court reminds itself that one of the objects of the statutory bad character provisions was the removal of the right to introduce by cross examination old, irrelevant or trivial behaviours of a complainant introduced in an attempt to unfairly diminish the standing of a witness in the eyes of the tribunal of fact. Rather, the new provisions were aimed at eliminating kite flying and innuendo against the character of a witness in favour of concentration upon the real issues to be tried: see *R v Miller* [2010] EWCA 2 Cr App R 19 Crim 1153, at [20].

[45] In these circumstances this court is of the view that the judge's conclusion in respect of the bad character application was correct.

Ground 2 – Improper remarks by prosecution counsel during closing

[46] The applicant's case on this ground principally appears to be based on the content of prosecution counsel's closing speech. It is argued on behalf of the applicant that counsel included in her speech material relating to the complainant's demeanour which, he says, ought not to have been rehearsed before the jury and

which gave rise to the judge in the course of his charge to the jury correcting any misimpression the jury may have received.

[47] Additionally, in his skeleton argument for these proceedings, the applicant's counsel has cited passages from the transcript of his counterpart's speech (which the court will not set out) in further support of this ground of appeal. Five bullet points, in particular, have been highlighted in this regard and have been carefully considered by the court. These cover a range of issues but several arise out of the applicant's disclosure that he had inappropriately touched the complainant, though she denied the particular incident occurred, and some instances involved questioning of the loyalties of family members.

[48] Further, while not referring to events in the closing speech aforesaid, but rather to events during the cross examination of the applicant, the applicant's counsel has drawn the court's attention to what he describes as prosecution counsel attempting to adduce into evidence "statements of witnesses in order to attack their credibility." In respect of this matter, defence counsel, at the time, raised the issue with the judge who sustained this objection with the result that prosecution counsel desisted from this course.

[49] The prosecution retort in their skeleton argument that whether in the context of cross examining the defendant or prosecution counsel giving her closing speech, there was a range of steps which the defence could take if it was necessary for it to seek to respond, such as *via* the mechanism of raising the matter in question in the defendant's closing speech, or seeking a ruling from the judge immediately after the event or in the aftermath of the judge's charge, by the defence requisitioning the judge.

[50] The prosecution further take issue with the accuracy of some of the detail set out in the applicant's skeleton argument but it is unnecessary to enter into a discussion of these.

The Court's Assessment

[51] It seems to the court that much of the material at issue in this part of the appeal savours of what might be viewed as the product of ordinary cut and thrust in the context of adversarial litigation in which objection as between counsel is routine and where sometimes it is necessary for a ruling to be obtained from the judge (as occurred in relation to the issue of counsel's approach to cross-examining her own witnesses on credibility grounds) or where the judge considers that he should (as occurred in this case) provide a particular warning to the jury within his charge in order to ensure that it receives no misunderstanding on a particular issue. None of this is objectionable in principle and one would usually expect no difficulty to be encountered.

[52] Commonly matters will not be of sufficient significance to warrant any form of judicial intervention though, in a matter of importance, it will be open to counsel to seek the judge's assistance should he/she view this as required.

[53] For the purpose of this appeal, the applicant's representatives have submitted material in the form of bullet points in respect of particular issues which came up in the context of prosecution counsel's closing speech. The court has considered these but is of the clear view that, assuming that they have been accurately provided, there is nothing in these matters which, it appears to the court, could reasonably give rise to a situation where, even arguably, something has occurred which would give rise to the court setting aside or overturning the verdicts of the jury.

In the context of the matters referred to at paras [46] and [48] above, the judge reacted appropriately to the matters which were raised and the court is satisfied that there is no basis for any intervention on its part.

Ground 3 – The jury retirement ground

[54] The factual background in respect of this ground is as follows. The jury retired at 14:53 on 4 March 2020. At 17:13 the jury were asked and confirmed they had no verdicts upon which all were agreed. At 10:00 hours the following day, 5 March 2020, the jury resumed their deliberations. At 11:21 the jury were called in and confirmed they had no unanimous verdicts. The learned judge provided the majority direction and the jury retired. At 14:50 a note was received by the judge from the jury and he shared it with counsel. It indicated that the jury was unable to agree and asked what would happen in such circumstances. The judge indicated to both counsel his response to the question which both counsel agreed with. The jury were brought into court and were directed by the judge in words to the following effect that if they were unable to agree a verdict they would be discharged. He then invited the jury to retire to consider their position. Nearly two hours later, at 16:59 the learned judge returned to the court and the jury were brought in at 17:00 hours. They were asked whether they had any verdicts upon which at least 10 were agreed. They had. They returned verdicts on a 10 to 2 majority on counts 1, 2, 4 and 6. It was indicated that they were unable to return verdicts on the remaining grounds. The jury was discharged.

[55] On the basis of the above facts, the contention of the applicant on this ground was that unintentionally the judge had placed the jury under pressure to reach a verdict and to change their minds.

[56] It was submitted that the jury should not have been directed that they would be discharged if they were unable to return any verdicts and that, for this reason, the convictions were unsafe.

[57] In the skeleton argument prepared by the prosecution on this aspect of the case, it was submitted that the judge was perfectly entitled to answer the jury's note

in the way that he did. In the prosecution's view, there was no basis upon which this court could find that members of the jury had been placed under pressure to change their minds.

Assessment

[58] The court, *inter alia*, was referred by the applicant to the case of *R v Brown* [2016] EWCA 523. While the factual situation in that case was different from that in the case now before the court, beginning at paragraph [21], Gross LJ made some helpful general remarks which this court will bear in mind. These include the following:

> "(1) Where a judge receives a note from the jury indicating disagreement, or even apparent deadlock, he has a discretion as to how to deal with it.
>
> (2) There is no inflexible mode of responding to such a note.
>
> (3) However, no juror should be put under pressure to reach any particular verdict and a jury must be free to deliberate without any form of pressure being imposed upon those serving on it.
>
> (4) In particular, no juror must be made to feel that it is incumbent upon him or her to express agreement with a view he or her does not hold, simply because it might otherwise be tiresome, inconvenient or expensive."

[59] Against the above background, and in view of the recognition by both sides in this case that the judge generally conducted the trial in a faultless manner, the court has no difficulty in concluding that this ground of appeal lacks merit. The judge properly reacted to the receipt of the note by the jury. He promptly discussed the matter with counsel. He reassembled the court and he provided a straightforward answer to the question which the jury posed to him. In this court's opinion, the judge acted, at all times, comfortably within the ambit of his discretion. As the jury returned to its deliberations, this court can identify nothing which had occurred which could realistically or reasonably be viewed as having placed pressure on any of the jurors to reach a verdict with which he or she did not truly agree.

[60] There is, in this court's view, no reason to be surprised that after a further retirement for in the region of two hours, the jury was able to reach a majority verdict in respect of four counts. Rather this court is confident the verdicts will have been the product of reasoned discussion by the jury which plainly had been acting hitherto in a conscientious way. It is in the nature of jury deliberations that jurors

may adjust their positions in the course of discussion with one another and this is a feature of deliberations in the jury room which is unexceptional.

The Appeal against Sentence

[61] The issue of the applicant's appeal against sentence was pursued before the court.

[62] The main feature of the sentence was the imposition of a term of imprisonment for 18 months suspended for 3 years. The other elements of the sentence have been set out at paragraph [4] above, including that part of the sentence dealing with what the media think of as registration on the Sex Offenders Register.

[63] In essence, the applicant's argument was that the sentence taken as a whole was manifestly excessive in the context of the touching aspect of the complainant's complaints and likewise in the context of incidents of digital penetration committed by the applicant as a sexually curious young person who at the time was aged only 14 or 15 years.

[64] At the relevant time, the parties were agreed that the maximum sentence for an offence of indecent assault was two years' imprisonment.

[65] The main points advanced on behalf of the applicant were that:

(i) The applicant did not represent a significant risk of serious harm or a significant risk of reoffending.

(ii) The applicant did not require a period of supervision by means of the imposition of a probation order.

(iii) The aggravating features in the case of *R v ML* [2012] NICA 27 were not present in this case.

(iv) This was a case of low culpability, though it was also accepted that the harm caused had been significant, as indicated in the Victim Impact Statement.

(v) It was suggested that the applicant had considerable mitigation available to him.

(vi) The applicant was, it was said, this matter apart, of good character.

(vii) The delay in the case was substantial.

(viii) There ought to have been a sentence which would have avoided the requirement placed on the applicant to be the subject of registration as a sex offender, given all of the circumstances of the case. This could have been

avoided if a sentence of imprisonment of less than 12 months had been imposed.

[66] The prosecution response to the above involved the following main features:

(i) The applicant was convicted of four offences. Two of these involved touching on the vagina and two involved offences of digital penetration. At the time the complainant would have been 7/8 years of age and the defendant 14/15 years.

(ii) The effect on the complainant of these events was profound as a child, a teenager, as a young adult and to the present time.

(iii) The sentence of 18 months was imposed as a global sentence on all counts reflecting the seriousness of the offending and the aggravating and mitigating circumstances.

(iv) The sentence was properly within the discretion afforded to the judge who, having heard all the evidence, was best placed to carry out an assessment.

[67] The judge's sentencing remarks run to some 7-8 pages and comprehensively set out the circumstances leading to the applicant's conviction; the contents of the Victim Impact Statement, in which she described the profound effect that the abuse had on her, extending from childhood into her working life and later her requiring therapy; the aggravating and mitigating circumstances, as identified by the judge, which were not in themselves in dispute[6]; the judge's analysis of the family's overall circumstances; and his assessment of the submissions he received.

[68] Additionally, the judge considered with care and in detail the decision of the Court of Appeal in the case or *R v ML* and the comparison which could be made between that case and the present case.

[69] Ultimately, the judge referred to the difficulties of the sentencing exercise in which he had to balance the propriety of sending the applicant to prison, given that the applicant himself was young at the time of the events which had occurred. Moreover, he had otherwise led an exemplary life, and now had a wife and young child. But this had to be weighed against the substantial harm to the injured party and the gravity of the offences.

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[6] He referred to the aggravating features as being (a) the digital penetration (b) the age of the victim (c) the number of offences involved and (d) the defendant's position of trust in relation to his sister (though the judge considered this aspect as minor in the context of the case). By way of mitigation, he referred to the points made by his counsel which included the age of the applicant at the date of sentencing (46), his hitherto clear record (c) his marital and family status (d) his good work record (e) the fact that he was assessed as a low risk of re-offending and (f) the explanation that his behaviour at the time was linked to his sexual development and curiosity as a young person.

Assessment

[70] This court has carefully considered the case of *ML* which both sides agreed was the most appropriate authority for this sentencing exercise. While in some areas the facts in that case are not unlike the facts in the present case, there are nonetheless a variety of differences. In particular, the offender was younger than the applicant in the present case and the complainant was older than the complainant in this case. The most serious offence in *ML* appears to have been an act of oral sex which resulted from pressure being placed on the sister by the offender. There was also an incident of the performance of oral sex by him in respect of her. Unlike the present case there were no incidents of digital penetration. The effect of damage done to the victim in *ML* does not appear to be as great as in the present case. Like the present case, the allegations were unsuccessfully defended and in both cases the pre-sentence report was favourable with a low likelihood of reoffending in the present case as against a medium likelihood in *ML*.

[71] Helpfully, the Lord Chief Justice in *ML* provided a useful summary of the approach to be taken in an historic sex case where the offender was a child at the time of the commission of the offence. He said:

> "… the following factors should be taken into account:
>
> (i) The statutory framework applicable at the time of the commission of the offence governs the scope of the sentence which may be imposed;
>
> (ii) The sentence should reflect the sentencing guidelines and principles applicable at the time at which the sentence is imposed;
>
> (iii) The primary considerations are the culpability of the offender, the harm to the victim and risk of harm from the offender in the future;
>
> (iv) Where the offender was young and/or immature at the time of the commission of the offences that will be material to the issue of culpability. It is appropriate in considering that issue to consider what sentence would be imposed today on a child who was slightly older than the offender was at the time he committed the offences;
>
> (v) …the court should not seek to establish what sentence might have been imposed on the offender if he had been detected shortly after the commission of the offence…such an exercise is of no benefit in fixing the

> appropriate sentence as sentencing policy and principles may well have altered considerably in the interim;
>
> (vi) The passage of time may often assist in understanding the long term effects of the offences on the victim;
>
> (vii) The passage of time may also be relevant to the assessment of the risk of harm. If the court is satisfied that the offender has led a blameless life after the commission of the offences that will be relevant in assessing future harm;
>
> (viii) The attitude of the offender at the time of disclosure or interview by police is significant. The offender at this stage will be of full age. In these cases the immediate acknowledgement of wrongdoing by the offender provides vindication for the victim and relief at being spared the experience of giving evidence at a criminal trial. Such an acknowledgement will attract considerable discount in the sentence."

[72] In *ML*, the Court of Appeal viewed the case as one of low culpability but significant harm but also as a case in which the complainant had to endure the rigours of a trial. It was not, however, a case like the present case, where the judge ultimately chose to employ a suspended sentence. In *ML* a one year sentence of imprisonment was imposed.

[73] In the court's view, the judge in the present case properly addressed the issues before him and reached a conclusion which was comfortably within the ambit of his discretion. The court can see no basis on which it should intervene in a case where the judge anxiously considered all of the issues and identified the elements which had to be considered and balanced. In the court's view, the judge justifiably opted for a suspended sentence and there simply is no basis upon which the court could say that he did not approach the balance he identified in a proper manner or in a way that left anything significant out of account.

[74] The court plainly was not required to ape the actual sentence imposed in *ML* and was entitled to have regard not only to the differences between the cases but also to the particular circumstances of the applicant and the complainant. We see no attraction in altering the careful conclusion reached by the judge.

[75] While the court understands why the applicant has argued for a sentence of less than 12 months' imprisonment *viz.* that it would bring about the removal of

notification requirements[7], such a sentence is unrealistic in a case of this nature and an alteration of sentence along these lines would not be justified.

Conclusion

[76] In the end, the decision of this court is to refuse leave to appeal in respect of grounds 2 and 3 of the appeal against conviction and in respect of the sentencing appeal. In respect of ground 1 of the appeal against conviction, the court grants leave to appeal but dismisses the appeal.

[7] See Paragraph 62 of Schedule 3 to the Sexual Offences Act 2003