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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**18/04/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

R

v

DC

Charles MacCreanor KC with Conn O'Neill BL (instructed by O'Neill Solicitors) for the Applicant
Jonathan Connolly BL (instructed by the Public Prosecution Service) for the Respondent

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Before: Treacy LJ, Sir Paul Maguire & Rooney J

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

We have anonymised the applicant's name to protect the identity of the complainant and so this will appear as the cypher above. 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.

Introduction

[1] The applicant was convicted on 4 December 2020 on a total of eight counts - five counts of causing a child under 13 to engage in sexual activity, contrary to Article 17(1) of the Sexual Offences (NI) Order 2008 and 3 counts of sexual assault of a child under 13, contrary to Article 14 of the Sexual Offences (NI) Order 2008. He was sentenced by HHJ McColgan KC to five years' imprisonment in respect of the offences under Article 17 and 12 months, concurrently, in respect of the Article 14 offences.

Factual Background

[3] This is an historic sexual abuse case in which the complainant alleged a course of sexual offending by her uncle spanning several years when she was a child. As is common in such cases there was a significant time delay between the last alleged incident and the disclosures that led to the prosecution of the applicant. As is also

common in these cases, the only direct evidence relating to the alleged offending came from the complainant. Her allegations were all denied by the applicant who also exercised his right not to give evidence at his trial.

History of the Proceedings

[4] The trial originally commenced in February 2020 at which time both the complainant and her mother gave evidence. That trial had subsequently to be aborted and it was listed for rehearing in November 2020. The new trial gave rise to the convictions noted at para[1] above, some of which relate to specific offences, others to specimen accounts.

[5] Leave to appeal was refused by the single judge, Humphreys J. The applicant renewed his application for leave before this court. At the conclusion of the hearing, we dismissed the application.

Grounds of Appeal

[6] The application is moved on the basis of the following grounds of appeal:

> "1. The judge, though directing the jury to be extremely cautious when considering the evidence of the complainant failed to fairly direct the jury on the evidence that had grounded the grant of the "care warning."
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> 2. The judge failed to direct the jury properly as to why there was a need for such caution.
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> 3. The judge failed to properly warn the jury about he patent reliability issues in the prosecution case.
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> 4. The judge failed to put the defence case fairly to the jury.
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> 5. Given that the defence in this case of historic offences was that of a simple denial, often described as having no defence, the judge failed to ensure that what limited defence points existed were fully and fairly addressed in the judge's charge.
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> 6. The judge's charge was imbalanced and unfair to the applicant."

[7] The first three grounds all relate to the judge's handling of the inconsistencies in the complainant's evidence – inconsistencies which the defence characterises as "the patent reliability issues in the prosecution case."

[8] A review of the trial judge's charge shows she dealt extensively with these inconsistencies. The trial judge reminded the jury that defence cross-examination:

> "… elicited a number of inconsistencies in the prosecution case as well as a number of deficiencies."

[9] She stresses:

> "It will be for you to examine these inconsistencies and deficiencies in the prosecution case when you retire to your jury room to consider your verdicts. It is imperative that you are extremely cautious when you examine [the complainant's] evidence. You must look at the inconsistencies and consider for yourselves whether or not you think they are unimportant, whether you think they are important or whether indeed you think they are very important. If you think they are either important or very important then you will need to consider whether or not any or all of those matters affect the reliability of her evidence as a whole or indeed on any particular issue."

[10] She explains that rather than going through the list "word for word":

> "I am going to concentrate on a number of themes that were explored and the results that emerged …"

[11] She begins by drawing attention to inconsistencies around the dates and times when events happened. She looks at inconsistencies arising from the ABE evidence and from direct evidence given in the February 2020 trial and in the November 2020 trial by this witness. She stresses:

> "That is an inconsistency in [the complainant's] case ladies and gentlemen, it's a matter entirely for you as to how important you regard that …".

[12] Inconsistencies around other themes which are discussed by the judge include those around the alleged offences at her granny's house, around whether or not her uncle ever "wanked" and whether or not his partner had ever lived in her granny's house; around a specific allegation concerning an incident in her brothers' bedroom and one that occurred in her uncle's marital home.

[13] A significant part of the judge's charge related specifically to the inconsistencies in the complainant's evidence. Throughout her charge she stressed that the evaluation of these inconsistencies, the extent to which they were thought to be important and to raise questions about the reliability of the complainant's evidence – these were matters that the jury must decide for itself.

[14] Having reviewed the judge's charge we find no evidence to suggest the claim that there was any failure to warn the jury about inconsistencies and potential reliability issues in the prosecution case.

[15] Indeed, the crux of the first three grounds of appeal advanced by the applicant appears to be a dissatisfaction that the judge did not herself evaluate the evidential inconsistencies and characterise them more trenchantly as "reliability issues." The danger of any such approach is that it would involve straying into the jury's area of responsibility and the judge in this case wisely and correctly avoided any such error.

[16] The last three grounds of appeal are presented as a failure to put the defence case fairly to the jury. The various elements underpinning these three grounds are considered in detail by the single judge in his ruling. We agree with this analysis, gratefully adopt it here and for convenience we reproduce it here:

> "[14] There are a number of elements to the applicant's claim in this regard. Firstly, issue is taken with the learned trial judge's direction that this was a case in which either the complainant or the applicant were lying. It is said that this focus on 'lies' was unfair since the applicant did not give evidence. However, the trial judge's charge must be read as a whole. It includes specific direction on the burden and standard of proof and a *Makanjuola* warning in respect of the complainant's evidence.
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> [15] Secondly, it is contended that the evidence in chief of the complainant from the ABE transcript was presented to the jury twice. The first occasion this occurred was during the trial when the judge was explaining to the jury what was meant by specific and specimen counts. The second time was during the charge when the ABE interview was, of course, part of the evidence which the judge was obliged to address and summarise. There was nothing remotely unfair about this course of action, particularly when one considers that she also gave a *Makanjuola* warning, addressed the inconsistencies in the complainant's evidence and summarised the applicant's account at interview to the jury.

[16] Thirdly, the applicant alleges that the learned trial judge ought not to have made reference to the evidence which supported 'peripheral matters', particularly in relation to the occasion when the complainant stayed overnight at the applicant's home. It is an essential part of the judge's role in charging to the jury to summarise the evidence. She made it clear that the evidence referred to was not supportive of a sexual offence actually having occurred but only related to the 'surrounding circumstances.' Importantly, the judge also reminded the jury that the applicant's case was nothing happened the night the complainant stayed.

[17] Fourthly, issue is taken with inconsistencies in the complainant's evidence which were not outlined to the jury. In her charge, the learned trial judge did not recite the entirety of the evidence but rather summarised the main inconsistences thematically. In *R v Creaney* [2015] NICA 43, Morgan LCJ stated:

> 'In a trial lasting several days it will generally be of assistance if the judge summarises those matters not in dispute and succinctly identifies those pieces of evidence in conflict. Brevity is a virtue. The jury will invariably have the assistance of speeches from counsel dealing with the issues of controversy in the case as a result of which the Court of Appeal is unlikely to be persuaded by appeals based merely on the failure of the judge to refer to a particular piece of evidence or a particular argument.'

[18] The learned trial judge complied with her obligation to highlight the inconsistencies in the complainant's evidence, to explain to the jury how those inconsistences might be important and how they might be addressed by them.

[19] Fifthly, issue is taken with the learned trial judge's reference to the applicant's police interview in her charge. The skeleton argument asserts that it is *"hard to fathom why the Court drew special attention to this portion of the interview."* No positive case is made that this caused the charge to be unfair or the conviction unsafe. It is the judge's role to summarise the evidence, not for the applicant to pick and choose what should be referred to.

> [20] Sixthly, the case is made that the learned trial judge did not properly address the issue of the drawing of an adverse inference against the applicant by reason of his decision not to give evidence. It is argued that the judge ought to have reiterated the weaknesses in the complainant's evidence as part of the direction in relation to the drawing of such an inference. The learned trial judge stated:
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>> 'The defendant has chosen not to give evidence and that is his right. He is entitled not to give evidence, to remain silent and to make the prosecution prove the case against him … the legal position is that if he does not give evidence the court will direct the jury, which I am now about to do, that you are entitled to draw such inferences as appear proper from his failure to give evidence before you … It is a decision that you should only reach if you are sure that the prosecution case is of such strength that it calls for an answer and you are sure that the true reason for not giving evidence is that he did not have an answer that he believed would stand up to cross-examination. If you are sure of both those things then you are entitled to regard his failure to give evidence as providing support for the prosecution case. You must remember at all times that the burden of proof is on the prosecution to establish and prove the case against the defendant and while his failure to give evidence can provide support to the prosecution case you cannot convict the defendant only or mainly because he didn't give evidence.'"

[17] Having read this charge in full we find no basis whatsoever to support the claim that the applicant's case was not fairly summarised to the jury.

Conclusion

[18] In historic sexual abuse cases like the present case, the judge's charge to the jury must be read in its entirety to ensure that appropriate guidance on the applicable law has been given to the jury and that the evidence, including all its weaknesses and inconsistencies, has been summarised appropriately and that both sides' arguments have been presented fairly by the judge.

[19] In the present case we are satisfied that the charge discharged each of these elements. Accordingly, we dismiss this appeal.