Neutral Citation No: [2023] NICA 70 ***Judgment: approved by the court for handing down (subject to editorial corrections)****	***Ref:*** **TRE12311** ***ICOS No:*** **21/029309/A01** ***Delivered:*** **13/11/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

THOMAS MARKEY

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Terry MacDonald KC with Sean Mallon (instructed McCallion Jones Solicitors) for the Applicant
Terence Mooney KC with Laura Ievers (instructed by the PPS) for the Respondent

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Before: Treacy LJ, Horner LJ and McFarland J

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

Introduction

[1] This is a renewed application for leave to appeal against conviction following the refusal of the Single Judge to grant leave. Following a jury trial at Downpatrick Crown Court the applicant was convicted of one count of rape contrary to Article 5(1) of the Sexual Offences (Northern Ireland) Order 2008. He was sentenced to a Determinate Custodial Sentence of seven years, split 50/50 between custody and probation.

[2] At the conclusion of the hearing we dismissed the application with detailed reasons to follow, and we now give those reasons.

Reporting Restrictions

[3] The complainant is entitled to automatic lifetime anonymity in respect of this matter by virtue of section 1 of the Sexual Offences (Amendment) Act 1992.

History of Proceedings

[4] The applicant was committed to Downpatrick Crown Court, sitting at Laganside Courthouse, on 22 April 2021. The first rape trial was aborted on 17 February 2022. The re-trial commenced on 7 March 2022 ending on 11 March 2022 with the jury convicting the applicant. The applicant was sentenced on 18 May 2022 in the terms outlined above. The legal team representing the applicant at the first trial continued to represent him at the second trial.

Background

[5] The complainant is an adult female. She met the applicant through the Tinder dating site. They engaged in direct and indirect contact. It was agreed they would stay over at a hotel on 19 September 2020: the complainant made it clear that she would not engage in sexual intercourse before then and the applicant acknowledged this.

[6] On 16 September 2020 the complainant invited the applicant to her home in Bangor and he travelled there the following day. They consumed alcohol. She introduced him to her friends. There was no arrangement that he would stay over but, as the evening progressed, she invited him to do so. She reiterated that no sexual intercourse would take place.

[7] They shared a bed. They engaged in passionate kissing. The complainant said that she then fell asleep wearing her pants and top. She woke to find the applicant penetrating her and, despite her protests, he continued to ejaculation.

[8] She was distressed and ordered a taxi for him straightaway. He took the cash intended for the hotel and left. The complainant ran to her friend's house nearby. She reported the incident and police were called.

[9] After he left her house, the applicant sent the complainant a text:

> "So sorry love. Hope youre OK. Really didn't expect that. I really thought everything was OK but obviously not. Im so sorry. I thought everything was OK. Hope you're OK."

[10] The applicant was arrested and interviewed. He contended their sexual contact was consensual. He said there was kissing and oral sex which led to penile penetration. He then fell asleep for a period before initiating sexual intercourse a second time during which the complainant "freaked out." He was confused by her reaction and sent the text in the aftermath as he felt it was the "right thing to do."

Grounds of appeal

[11] The first four grounds of appeal are inter-related and arise out of the decision of the trial judge during the retrial to admit evidence which had, by agreement and without any objection, been admitted in the first trial. The first ground asserts that there was a material and procedural failure whereby the jury received a document which contained a previous internet search history of a "porn hub" website from the applicant's mobile phone. The next three grounds, which are essentially dependent on the correctness of the first, relate to the alleged unlawful failure to discharge the jury and the failure to exclude the internet search history.

[12] For the sake of completeness we set out the grounds of appeal:

Grounds of Appeal

[13] The grounds of appeal are as follows:

(1) There was a material and procedural failure whereby the jury at trial received a document which contained previous internet search history of a 'Porn Hub' website from the applicant's mobile phone;

(2) The trial judge refused to discharge the jury following defence application after it was discovered that the 'Porn Hub' evidence was contained within the document physically provided to the jury;

(3) The trial judge erred in his approach whereby he stated that the jury would not be discharged before he had heard the full defence application to discharge the jury, such a position being contrary to the interests of fairness and the defendant's Article 6 ECHR rights;

(4) There was a material and procedural failure by the trial judge wherein he then refused to exclude the 'Porn Hub' internet search material;

(5) The trial judge permitted the prosecution to cross-examine the defendant on his 'previous sexual history.'

Agreed facts/formal admissions re 'Porn Hub' internet search history

[14] During the first trial, a series of agreed facts were read to the jury as part of the prosecution case. These facts were committed to writing and the jurors were given a copy. Attached to this document were three pages extracted directly from the committal papers. These three pages had been part of a report on the applicant's mobile phone.

[15] At the time the "Agreed Facts" were forwarded by the prosecution for approval, the intention to attach the three pages from the examiner's report was conveyed. The "Agreed Facts" make specific reference to the appended document and

to the nature of it. Paragraph 6 of the "Agreed Facts" states:

> "The defendant's phone was examined by police. An extract from the examiner's report is appended hereto. This sets out information from the relevant time regarding calls and texts as well as searched items *and a web history."* [our emphasis]

The facts were read to the jury before they received the extract. It was clear from the agreed facts that the appended phone report included texts, call logs and internet searches. The jury was made aware that they would be receiving the agreed facts in writing as well as the extract to which paragraph 6 referred.

[16] No objections were raised in the course of the first trial and the jury was discharged on 17 February 2022 for unrelated reasons. The re-trial commenced a short time later on 7 March 2022. The same teams of counsel were involved in each trial. The formal admissions that were made in the first trial were never withdrawn by the defence nor was there any application by the defence to the trial judge at the re-trial for leave to withdraw those admissions. In the intervening time from the conclusion of the first trial on 17 February and the commencement of the re-trial on 7 March 2022 it was never indicated by the defence team that they wished to resile from the formal admissions that they had previously made. On the contrary the Agreed Facts were read to the jury at re-trial and the same written document was provided. It was only then that an issue was raised on behalf of the applicant. The Prosecution unsurprisingly proceeded on the basis that the document was admissible pursuant to s10(3) Criminal Justice Act 1967 ("the 1967 Act") which provides:

> "An admission under this section for the purpose of proceedings relating to any matter shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter (including any appeal or retrial"

[17] When the matter was raised at the re-trial the trial judge took steps to ensure that nothing had been placed before the second jury that had not been before the first jury. The judge removed the relevant document from the jurors pending legal argument.

[18] The day after raising the issue there was an application to discharge the jury. At the outset the trial judge made it clear that he would not be acceding to such an application if it were based simply on the jury receiving the document in the form of the phone extract. The judge proceeded to hear submissions about the admissibility of the document and whether it amounted to bad character evidence, having already taken the precaution of removing the document from the jury.

[19] Having found that the document and its contents were admissible, the judge

concluded that there were no grounds to discharge the jury.

[20] The trial judge took steps to satisfy himself that the "Agreed Facts" had been provided in writing to the first jury together with the phone extract. At that stage it appeared that this was the limited basis for challenging its admissibility and the Judge clearly indicated he would not be discharging the jury on that basis.

[21] When it became clear that further submissions were to be made about the Pornhub evidence the trial judge afforded the defence every opportunity to challenge its admissibility before entertaining the application to discharge. Having also removed the document from the jurors, the trial judge at all times took account of the applicant's rights and the interests of justice.

[22] The relevant material was part of the committal papers. It was admitted by agreement at the first trial. The trial judge held that it was not evidence of bad character. It was advanced as direct evidence of the applicant's motive. The extract demonstrates that immediately after the complainant invited him to her house, he was looking for pornographic material on the internet. The trial judge accepted that on the facts of this case that this was relevant evidence of his state of mind at that particular time.

[23] Accordingly, the judge concluded that evidence fell within Article 3 of the Criminal Justice (NI) Order 2004 on the basis that it is relevant to an issue and therefore admissible. There is limited information on the nature of the pornographic material sought or viewed, but no suggestion that it was illegal and no suggestion that it could be connected directly to rape or sexual assault.

[24] In his comprehensive ruling the trial judge held that he was satisfied the form and contents of the "agreed facts" were such that it could be placed before the jury and that the impugned material did not amount to "bad character" evidence such as to warrant an application. He further observed, that even if it did constitute "bad character" evidence, it would have been admitted pursuant to Article 6(1)(d) as being "relevant to an important matter in issue between the defendant and the prosecution."

[25] As pointed out above no objections were raised in the course of the first trial to the admission by agreement of the impugned material. The re-trial commenced shortly thereafter. Section 10(4) of the 1967 Act provides:

> "An admission made under this section may with the leave of the court be withdrawn in the proceedings for the purpose of which it was made or in any subsequent criminal proceedings relating to the same matter."

The formal admissions contained within the agreed facts made in the first trial were never withdrawn by the defence who were represented by experienced senior and junior counsel. They did not signify in advance of the re-trial that the defence position

had changed, nor make any application to the judge at the re-trial for leave to withdraw those admissions. Notwithstanding that weeks intervened between the conclusion of the first trial and the commencement of the re-trial, it was never indicated by the defence team that they wished to resile from the formal admissions that they had previously made or that a bad character application needed to be made. On the contrary, the Agreed Facts were read to the jury at re-trial and the same written document was provided. Only then was an issue raised on behalf of the applicant.

[26] It is surprising that a course of action, agreed with the defence legal team in the first trial and never objected to in the re-trial until after the impugned material had actually been deployed, is now advanced by the same legal team as a basis for asserting the conviction is unsafe. We consider that this course of events demonstrates just how threadbare and untenable is the claim that this was an unsafe conviction. We consider that the judge was entitled to conclude on the facts of this case that the impugned material was relevant evidence of the applicant's state of mind at the relevant time thus falling with Art 3 of the 2004 Order. Furthermore, we also agree with the trial judge that even if, contrary to what we have held, it did constitute "bad character" evidence, it would have been admissible pursuant to Article 6(1)(d) as being "relevant to an important matter in issue between the defendant and the prosecution."

[27] We turn now to consider the fifth and final ground of appeal which asserts that the trial judge permitted the prosecution to cross-examine the applicant on his previous sexual history.

[28] No application was made to cross-examine the complainant on her sexual history and no application had been made by the prosecution to cross-examine the applicant as to his viewing of pornography or his intimacies with people he had met through use of the same medium as that used by the complainant to meet him.

[29] The applicant makes the case that the prosecution reference to the applicant's use of Tinder, and to his relationships with other women he may have met via that medium was tantamount to the introduction of bad character evidence.

[30] Defence counsel contends that any questions about sexual relationships with women he met on Tinder amounted to bad character evidence. We reject that contention for the reasons set out below.

[31] The applicant referred to his use of Tinder in his police interviews. Prosecuting counsel began his cross-examination with questions about the applicant's use of Tinder. He asked him how long he had used this dating site and how many women he had developed relationships with as a result of engaging with them on Tinder. He asked the applicant if he had sexual intercourse with any of these women and whether any of the relationships had lasted for any length of time. These questions were directed towards exploring whether the applicant used Tinder as a means of meeting women for sex or as a means of exploring the possibility of meeting a potential long-

term partner, thus exploring the applicant's motivation behind his desire to develop a relationship with the complainant in this instance. Prosecuting counsel then asked him questions about the importance of having respect for women, and, in particular, for the complainant. He accepted that it was important to respect a woman's clearly stated wishes regarding sex. He was then cross-examined on why he did not know the complaint's surname. The implication being that the applicant must have been only interested in one thing if he did not even go to the trouble of asking or finding out from the complainant what her surname was. No objection was taken to this line of questioning at the time and the judge in his summing up was careful to remind the jury that they could not draw any conclusion or inference against the applicant solely on the basis of his use of Tinder .

[32] The part of the prosecution cross-examination that related to the use of Tinder was not linked to the issue of the Porn Hub mobile phone internet browser search history. The cross-examination in relation to that matter came at a later part of the cross examination and was targeted at demonstrating that immediately after there had been an exchange of WhatsApp messages on the evening of 16 February in which the applicant had been invited to the complainant's house the following evening, the applicant was browsing the internet for sexual gratification. In other words, the upcoming visit to the house was associated in the mind of the applicant with sex and, having regard to the content of the WhatsApp messages which were highlighted by both prosecuting counsel in cross-examination and Mr McDonald KC, in re-examination, that was a reasonable connection to make.

[33] 'Misconduct' means the commission of an offence or other reprehensible behaviour. Thus, any evidence suggesting guilt of an offence is potentially evidence of misconduct, whether or not the accused has been convicted of it. We do not consider that there was anything put to the applicant in cross-examination, regarding his use of Tinder, which was suggestive of misconduct on other occasions. To the contrary, prosecuting counsel was exploring the issue of the applicant's motivation for using Tinder (short-term relationships involving sex or the possibility of developing a longer-term lasting relationship). This line of questioning did not suggest misconduct on the part of the applicant. It merely examined the issue of his motivation for using Tinder. As Blackstone notes at F13.4:

> "Other evidence which does not constitute evidence of bad character within the meaning of the Act, but which nevertheless shows the accused in a bad light, may be admitted on normal principles of relevance, subject to the application of the PACE 1984, s. 78 (Manister, heard with Weir [2005] EWCA Crim 2866, [2006] 2 All ER 570)."

[34] We are satisfied that the judge was entitled to conclude on the facts of this case that the impugned material and associated cross-examination was relevant evidence of the applicant's state of mind at the relevant time thus falling within Art 3 of the 2004 Order and would, in any event, have been admissible as being "relevant to an

important matter in issue between the defendant and the prosecution" pursuant to Art 6(1)(d) of the same Order. For the reasons given earlier we reject the contention that the judge permitted the prosecution to cross-examine the applicant on his previous sexual history.

Conclusion

[35] In *R v Pollock* [2004] NICA 34, Kerr LCJ set out the following principles to be applied by the Court of Appeal when considering appeals against conviction:

> "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."

[36] Having regard to what we have said above and applying the principles in *Pollock* we do not consider that the verdict is unsafe, nor do we entertain any unease, much less a significant sense of unease about the correctness of the verdict. Accordingly, the appeal against conviction is dismissed.