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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

WARREN HAROLD ABBOTT
and
KEVIN THOMAS KEMPTON

Before: Deeny LJ and McBride J

DEENY LJ (delivering the judgment of court)

[1] We have considered these appeals and we believe it is in the interests of justice to dispose of them today, so I will deliver the judgment of the court on both the issues that we have to deal with. Lord Justice Treacy is unable to be with us. The court has before it today two appeals by two men tried together in relation to complaints of sexual abuse made against them. We may make reference to the complainant M at some stages in these remarks. The appellant, Warren Harold Abbott, was convicted by His Honour Judge Fowler QC and a jury on 18 May of two counts of the rape of M on 31 August 1994 and some day in November 1994 when she was a young girl of 13. He was also convicted of two counts of attempted buggery of M in October 1994 and May 1994 and one indecent assault in November 1994. He was sentenced by the judge to a custody probation order, which was the sentencing regime prevailing at the time of the offences, consisting of 5 years' custody and one year on probation. On the fifth count he was given a 3 year sentence but that was to run concurrent with the other sentences. It is right to observe that the papers disclosed that neither man has had a record before or since these events of other sexual offences.

[2] His co-accused and co-appellant, Kevin Kempton, was convicted of one count of attempted rape in December 1994 or January 1995, with two counts of indecent assault and one of false imprisonment. He too received a custody probation order but for good reasons the judge felt it proper to distinguish between the men and his sentence was 1 year's custody and 2 years' probation. They were all to run

concurrently. As Crown Counsel has mentioned he had health issues as well as being convicted of lesser charges.

[3] At a review hearing this Court directed that skeleton arguments were to be furnished by the court and these were furnished by counsel for the appellants. Mr James Gallagher QC and Mr Desmond Fahy appeared for Warren Abbott; Mr Brian G McCartney QC and Mr Noel Dillon for Kempton. Mr John Orr QC led Mr Reid for the prosecution. All of these counsel appeared below though some of them entered the history of the matter later than others. One of the grounds relied on initially by Kempton and later Abbott was that contrary to the decision of this court in *R v Judge* [2017] NICA 22, endorsing earlier authorities from the English Court of Appeal, the judge at the trial in his charge had failed to warn the jury that evidence of earlier complaint to two witnesses recalled by the Crown was not independent supportive evidence of the truth of the allegations. Very regrettably none of the counsel listening to the charge noted this omission on the part of the learned trial judge. It is the duty of counsel for the defence and the prosecution to requisition a judge at the end of his charge on any omissions on his part. A Crown Court judge dealing with a heavy list may well inadvertently omit some matters and is entitled to the assistance of counsel. The Judicial Bench Book is available online and any counsel appearing in a case like this should be alert to the directions that should properly be given by the court and should notice and draw to the court's attention any omission from those directions. It is commonplace and a healthy practice for the court to actually discuss directions with counsel now but whether or not that took place, and there seems to have been some discussion here, counsel should listen carefully to the charge and note any omission.

[4] Now in this case the court did not receive a skeleton argument from the prosecution in response to those from the defence. Following a reminder from the Court office the office did receive an email on behalf of the PPS on 16 November indicating that having considered the matter and leave given by Mr Justice Colton to the two appellants the prosecution now considered that the verdicts were unsafe in the light of the omitted directions. At the listed hearing on 20 November this court pointed out that such an omission, although important, was not always necessarily fatal. This Court has said that on several occasions including, most recently, *R v RH* [2018] NICA 34 in July 2018, but it is to be found in the earlier judgments of the court also. We therefore directed the prosecution to respond to the other grounds advanced on behalf of the appellants. This was done and we received further submissions from the appellants' counsel in response to the prosecution submissions.

[5] Having considered these and applied the test set out in *R v Pollock* [2004] NICA 34 we are satisfied that the convictions are unsafe and must be quashed. In the circumstances regarding a retrial to which I will turn in a moment it is neither necessary to hear further oral argument nor to make final rulings on all the grounds. But for the assistance of the Crown Court judges and the profession we will say a word about some of the other grounds advanced on behalf of the appellants.

[6] At the trial it emerged that there was a contemporaneous general medical practitioner's note recording that this young girl in March 1995 i.e. just a couple of months after the alleged offences, came into the doctor seeking a morning after pill following consensual intercourse with her boyfriend. Furthermore, it would have been the evidence, if he had been permitted to give it, of the first appellant that a male called Dallas had told Kempton that he was having sexual relations with this young girl at the time. Dallas is now deceased. But the defendant's application to adduce both these matters was denied by the judge and the jury did not have their attention drawn to either of these two very relevant pieces of evidence. One depended on the honesty of both Dallas and Abbott but the other was a careful note made by a general medical practitioner close to the time of these events. Particularly in the context of an historic sex abuse case where defendants were facing allegations relating to matters in this case some 20 years before we consider that the learned trial judge was plainly wrong to do so and misdirected himself on the statutory provisions.

[7] We also pay particular attention to the new ground advanced on behalf of the appellants. M's husband gave evidence of her complaining of these matters to him in 2001. But medical records were seen by Dr Denise McCartan, Consultant Psychologist, for a pre-sentence report, a copy of which was served on the appellant's advisers after the convictions. Her report noted that on 10 June 2014 M said she had "only just disclosed a history of sexual abuse to her husband". This note was inconsistent with M's ABE interview and her evidence and it ought to have been drawn to the defence's attention. It appears to have been overlooked. We were informed without apparent dispute that the records were in the possession of the police as well as of the trial judge but not of prosecuting counsel.

[8] It is also right to say that the appellants' counsel in their written arguments have raised other interesting issues. We advert in particular to Article 24(7)(d) of the Criminal Justice Evidence (Northern Ireland) Order 2004. The requirement that to be admissible evidence of a complaint "was made as soon as could reasonably be expected after the alleged conduct" is an important one and Mr Gallagher was right to emphasise its importance to us in his written submissions. We note that the case was further complicated for the jury by allegations of sexual abuse by a relative of them and by another similar matter relating to family members but this information was put before the jury. We note also the submissions aver that there were some marked inconsistencies in what was said between one occasion and another.

[9] Taking all these matters into account, while the omission by the learned trial judge to give the necessary direction about complaints was not necessarily fatal in itself, when combined with these other grounds raised by appellants' counsel we consider that the convictions are unsafe and must be quashed and we do so.

[10] We then have to turn to the issue of retrial which was foreshadowed by the court when the matter was previously discussed on 20 November. Mr Orr and Mr

Reid in their subsequent submission to us address this and we heard some further oral argument on it today. The relevant statutory provision is Section 61 of the Criminal Appeal (Northern Ireland) Act 1980 under the rubric 'Power to order Retrial'. This provision reads:

> "(1) Where an appeal against conviction is allowed by the Court of Appeal under section 2 of this Act and it appears to the Court that the interests of justice so require, the Court, upon quashing the conviction and any sentence passed thereon, may order the appellant to be retried."

[11] It can be seen therefore that the use of the language 'may order' leaves a discretion with the court but it is a discretion to be exercised if it appears to the court that the interests of justice require a retrial. The matter is discussed at some length by Mr Valentine in his Criminal Procedure in Northern Ireland (2nd Edition) at paragraphs 15.74 to 15.78 with citation of authorities. Paragraph 15.74 reads:

> "The factors in deciding whether to order a new trial are the same in jury and non-jury trials. The decision is made in the interests of justice: that an innocent accused should be acquitted; that a guilty person should not escape due to a defect in his trial. The decision whether to order a retrial involves a judgment of the public interest and the interests of the appellants. The court considers the public interest in pursuing persons reasonably suspected of serious crime, avoiding oppression and unfairness to the appellant, and the interests of the defendant, including the lapse of time and the punishment he has already suffered under the first conviction. Each case turns on its own facts, a retrial may be ordered where an appeal succeeds on the ground of misdirection or irregularity, evidence improperly admitted, ambiguous verdict or separation of the jury after retirement."

[12] The other paragraphs helpfully set out other factors including a decision of the Court of Appeal in this jurisdiction in *R v Skates* [1996] NIJB 27 at 33 where the court declined to order a retrial because it would be unfairly onerous on the girl who would have to testify again. In this case Mr Orr has informed the court that the complainant is willing to give evidence again and so that point does not really arise. One of the cases cited by Mr Valentine in his book is a previous decision of this court in *R v McCormick* [2000] NI 189 and it is not necessary to go into the matter at length except to say that it was again a rape trial where the appellant had been convicted and sentenced to 6 years' imprisonment and the conviction was quashed due principally to defects in the charge of the trial judge. Lord Justice Nicholson

delivering the judgment of the court addressed the issue of retrial at page 195 to this effect:

> "In Northern Ireland the issue of whether there should be a retrial is dealt with on its merits and we consider that the approach of the English Court of Appeal in *R v Graham* and others is the proper approach and that counsel should be heard before a decision as to retrial is made. The alleged offence occurred on 3 December 1997. The trial was completed on 14 January 1998."

I pause there to say that date is an error typographical or otherwise and that the trial was in 1999. To return to the judgment:

> "We consider that the jury must have totally rejected the evidence of the appellant on the crucial issue of consent and that the public interest is served by the retrial of the appellant who is reasonably suspected on the available evidence of the grave crime of rape. We are of the view that the prosecution can be conducted without unfairness to or oppression of the appellant. The time which has passed since the alleged offences is less than two years. The appellant was in custody for about 10 months since January 1999 until his release on bail on application by Mr Harvey at the close of the hearing of the appeal. If convicted in a retrial he will face a lengthy period of imprisonment having regard to the guidelines set by this court in *McQueen and McDonald* [1989] NI 37."

[13] Those guidelines have been superseded by later guidelines. But it can be seen therefore that the factor in the court's mind was that only a short period of time had passed from the date of the offences.

[14] We therefore turn to consider these factors. It seems to us that there are two factors in favour of a retrial. Firstly, these men have only had one actual set of verdicts from a jury. A first retrial is common in this jurisdiction, almost one might say normal; a second is unusual or even very unusual. Secondly, the grounds for quashing the convictions here, as Mr Orr has properly said, do not reflect on the prosecution witnesses. They do not reflect badly on them. There are said by the appellants to be certain inconsistencies certainly but it is not that there is any exposure of wrongdoing and we take this opportunity to say that the convictions are being quashed because of an unfortunate omission of a necessary direction in the charge and certain other matters, in particular, the decision of the trial judge not to allow the appellants to deploy relevant evidence at the trial. Thirdly, as I have mentioned, [there was] an error in disclosure. All these matters could be remedied at a second trial.

[15] So those are the factors in favour of a retrial but against those there are a range of other important matters which it is our duty to take into account. As has been adverted to here this case or cases had an unfortunate history. Mr Gallagher says that they were repeatedly on standby and that some 58 days in all were set aside for them culminating in a trial of some 3 weeks. The case appears to have been returned for trial in September 2016 but was not tried in that term. There was an abortive listing that had to be adjourned because one of the defendants was ill. There was a trial which began and ran for 10 days in May 2017 and the jury then had to be discharged. There was a third attempt in November 2017 commencing on the 24th where the case ran for a further 3 days and then again the jury had to be discharged. The ultimate trial which led to the verdicts which we are quashing ran from 26 April to 18 May of this year. So that one can see that, although strictly speaking this would only be a second trial of these men, in the sense only the second time a jury would be asked to deliver a verdict, they had been before the court on a number of occasions which is implicitly potential of oppression of the appellants and potentially unfair to them. Furthermore, bearing in mind the decision of this court in *R v McCormick* it is now 24 years from the events and the alleged offences against these men. That is a striking contrast with *McCormick* where it was only two years. That very period of delay creates a risk of unfairness. The courts have recognised this. The legislature has recognised it in another way at Article 6 (4) of the Criminal Justice Evidence (Northern Ireland) Order 2004.

[16] So that is a factor which we must take into account against ordering a retrial. In this case the appellant, Kevin Thomas Kempton, has served the custodial element of his sentence and is now on probation. It would be worse than futile to retry him as no further sentence in custody could properly be imposed upon him. Therefore the complainant would be put to the stress of a trial, as he would be, and the public to the cost of such a trial, other witnesses would be put through the rigors of dealing with the trial and it is really unarguable, as I think Mr Orr ultimately accepted, that he should not be retried. In theory one could proceed to try the appellant, Warren Harold Abbott without Kempton there but, as Mr Gallagher pointed out, there is a potential there to confuse the jury. Although the individual counts on the indictment were not joint charges there was certainly a measure of joint enterprise because Kempton was alleged to be present when Abbott was committing an offence, alleged to be actually in the room although he was not ultimately convicted of false imprisonment. A jury would be inevitably drawn to speculating why Kempton was not before them if Abbott was being tried again. They would have to be told the whole saga of these appeals or they would have to be left in ignorance to speculate. Either course would be likely to confuse them.

[17] Furthermore, we take into account and on the authorities [cited in Valentine (2010)] that is a relevant consideration, that Mr Abbott himself has been in custody since May of this year which is equivalent roughly to a sentence of one year's imprisonment, given the view of the legislature that there should be automatic

remission of sentences, so that if he was guilty of any of these offences he has suffered some penalty.

[18] Having considered this matter carefully the court is of the view that the factors against a retrial clearly outweigh those in favour. We do not consider that the interests of justice require a retrial of either of these men. The convictions are quashed and Mr Abbott is entitled to be released forthwith.