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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

ZK

_____

Before: Stephens LJ, Treacy LJ and Colton J

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STEPHENS LJ (delivering the judgment of the court)

Introduction, anonymization and reporting restriction

[1] This is the appeal (with leave of the single judge) of ZK ("the appellant") who on 22 February 2017 was convicted in the Crown Court at Downpatrick before the learned trial judge, HH Judge Grant ("the judge") and a jury of the rape of the complainant, AB in May 2002. The jury's verdict was unanimous. The appellant was sentenced on 5 May 2017 to 5 years imprisonment to be served on a consecutive basis to a sentence imposed on 5 September 2014 by HH Judge Miller following the appellant's conviction on 24 June 2014 after trial on four counts of indecent assault and two counts of rape in which the victim was his niece ("CT"). Those offences were committed between 1989 and 2005. The sentence imposed by HHJ Miller was one of 16 years imprisonment (8 years in custody and 8 years on licence).

[2] As complainants both AB and CT are entitled to anonymity under section 1 of the Sexual Offences (Amendment) Act 1992 as amended by section 48 of and Schedule 2 to the Youth Justice and Criminal Evidence Act 1999. CT, is related to the appellant and so if the appellant is identified then that would be information likely to lead members of the public to identify CT. As a consequence we have not only anonymised the names of AB and of CT but we have also anonymised the name of the appellant, using cyphers not their initials. No matter relating to the complainants AB or CT shall, during their lifetimes, be included in any publication if it is likely to lead members of the public to identify either of them. The same anonymity and reporting restriction applies to other complainants in relation to

whom the appellant provided a pre-prepared statement to the police when being interviewed in relation to the incident involving AB.

[3] Mr Greene QC and Mr Toal appeared on behalf of the appellant both at the trial and on appeal. Mr Weir QC and Mr Magee appeared on behalf of the prosecution both at the trial and on appeal.

Factual background in relation to the complaint by AB

[4] On 20 November 2013 AB telephoned the police to report an "historic sexual matter against (ZK)." She stated that she now wishes "to make a statement ref the matter which occurred back in **November 1999**" (emphasis added). No other details were discussed or recorded but the police officer who had been contacted by AB requested "appropriate police" to make contact. We note that if the historic sexual matter occurred in November 1999 then the report by AB in 2013 was being made some 14 years later. We also note that AB was 27 years old when she first contacted the police and if the sexual matter occurred in November 1999 then she would have been 13 years and 10 months at the time.

[5] AB's report was passed to Detective Constable Lynas ("DC Lynas") who by telephone explained to AB that there were different ways to record her evidence and arranged a meeting with AB which took place on 3 December 2013. At the meeting DC Lynas took an initial account from AB. DC Lynas then prepared a typed draft witness statement ("the first draft"). We summarise some of the contents of the first draft. AB stated that the events the subject of the complaint occurred in **the year 2000** and that AB thought it was **August or September** time. We note that the year had changed from 1999 to 2000 and that the month had changed from November to August or September. In the first draft AB states that she was 13 in August/September 2000. In fact she would have been 14 years and some 7 months. In the first draft AB stated that she "feared the control that (ZK) had over people." AB then described in detail a night out with her female friend in a local bar, how ZK had also been in the bar though they did not converse and were not in each other's company. She also described how after closing time she and her female friend had left the bar and how ZK and a male friend of his were waiting for them. She described talking to ZK and how "he realised that (AB) was the younger sister" of her brother who AB believed ZK had "put out" of their town. AB described how her brother had borrowed money from loan sharks and got into debt with them. She explained that he was in hiding and how her father was paying the loan sharks back. AB then went on to describe how ZK started to say things like he would allow her brother back into the town, that her brother would be fine and that they should go and talk about it at his friend's house. She described how they all walked to a house and as they were walking to the house ZK had made it clear that AB's brother would be fine if AB came to the house. AB then described the house identifying people who were in it and stating that it had not been looked after and that there were drink bottles lying about. AB then described how ZK took her straight down the hall to a

bedroom. It had a single bed in the corner. She explained that she had never had sex before so she did not know how to act, what to do and she did not know what would happen. ZK did not say it in so many words but she knew he was saying that if she had sex with him her brother would be fine. She described how he told her to lie on the bed which she did and that he took her trousers off together with her underwear and her top. She also stated that he pulled down his jeans and he lay on top of her and tried to push his penis into her vagina. She said it was sore and he kept trying and she kept saying it was sore. He tried a number of times to penetrate her and he kept trying again until he did penetrate her. She remembered that she was bleeding afterwards from her vagina. Afterwards he just got up and left the room. At the time AB thought she was doing the right thing to help her brother out. She stated that ZK never asked her age but that he knew that her brother was 15 to 16 years old and that she was definitely younger than him. AB stated that she told her friend straight away and also talked to her about it the following day as well. Then later on the following day she went to her own GP identifying him by name and address to ask for the morning after pill as ZK had not used any protection.

[6] The first draft was not signed by AB. It was disclosed and used by Mr Greene at the trial to cross-examine AB.

[7] On 11 December 2013 there was a further meeting between DC Lynas and AB during which AB read over the first draft and made a number of manuscript amendments to it. We will refer to that document containing the manuscript amendments as "the second draft."

[8] The second draft added in detail such as that ZK and his brother had collected money from her home every Friday and the reason that they were collecting the money was that her brother was in debt to loan sharks. AB deleted the sentence in the first draft that "in the house (ZK) was kissing me and telling me (her brother) would be fine."

[9] The second draft was not signed by AB. It was disclosed and used by Mr Greene at the trial to cross-examine AB.

[10] On 16 December 2013 DC Lynas made an entry in the police "Occurrence Enquiry Log Report" ("OEL") that "offence should be recorded as (unlawful carnal knowledge) on a child (under) 14 – indictable."

[11] On 4 March 2015, following a delay which AB attributed to not having the strength at the material time to pursue the complaint, she attended the police station and considered the typed up version of the second draft. Again manuscript amendments were made to that document. We will refer to the document as amended as "the third draft." The changes included changing the date when the incident occurred to approximately 2001/2002 though it remained as August or September. AB's age in one part of the third draft was not amended remaining as

13. In another part of the third draft it was amended to 14-15 years old. We note that in 2001/2002 she would have been 15 or 16 years old. AB also added in to her description of the sexual intercourse that "I told him to stop" and that "I remembered this after talking to police and it became clearer after counselling." The visit to the GP was amended from later on the day following the incident to "on the Monday" following the incident.

[12] The third draft was disclosed and used by Mr Greene at the trial to cross-examine AB.

[13] On 4 March 2015 the third draft with the handwritten amendments was typed up and then signed by AB becoming her statement of evidence ("AB's first statement").

[14] In one part of AB's first statement it was still asserted that the she was 13 years old at the time of the incident. On 19 May 2015 AB signed a second statement ("AB's second statement") asserting that at the time of the incident she would have been 15 - 16 years old and that her brother would have been 18 - 19 years old. The month of the incident remained August or September and the year of the incident remained 2001/2002.

[15] The first draft contained AB's assertion that on the day after the incident she attended her GP for the morning after pill. The day upon which she attended her GP then changed to the Monday after the incident. The police obtained the GP's notes and records which contained an entry dated 7 May 2002 which included a note in relation to AB that "post coital contraception needed. (Sexual intercourse) 2½ days ago." Monday 6 May 2002 was a bank holiday and 7 May 2002 was a Tuesday. This note was then shown to AB who on 6 September 2016 signed a further statement ("AB's third statement") in which she stated that she had seen the medical record for May 2002 and that in May 2002 she would have been 16 years and 4 months old. She stated that she recalled going to the GP and that she had never before received the morning after pill. She stated that she knew this related to the first time she had sex ever and the first time she had had intercourse was with ZK. She stated that prior to that she was a virgin. As a result of AB's third statement the prosecution asserted that the incident occurred approximately 2½ days prior to 7 May 2002 and that at that time AB was 16 years and 4 months old.

[16] It can be seen that there were variations in the accounts given by AB between 20 November 2013 when she first contacted the police and 6 September 2016 when she signed the third statement. First there were variations as to the date of the incident. In her first report to the police the date is given as November 1999, which changed to August or September 2000, then to August or September 2001/2002 before becoming May 2002. Second there was a variation as to her age at the time of the incident which was initially given as 13, then 14-15, then 15–16 and finally 16 years and 4 months. Third there was a variation in the age of her brother which

was initially given as 15-16 but becomes 18-19. Fourth there was a variation as to when she attended her GP. Initially this was later on the following day, then on the Monday following the incident and finally on Tuesday 7 May 2002. Fifth there was a variation in that the first draft described the hold that ZK had over AB so that her free will was overborne by his reputation, character and abuse of power and that while he did not say it in so many words she knew that he was saying that if she had sex with him her brother would be fine. The first draft did not contain any assertion that she told him to stop. That assertion first appeared on 4 March 2015 in the third draft. Given these variations and the evolution of the allegation that she told him to stop there was an issue as to the credibility and in particular the reliability of AB's evidence.

ZK's police interview

[17] On 6 May 2015 ZK was interviewed by DC Lynas and Constable Bowman under caution in the presence of his solicitor. At the start of the interview ZK's solicitor read ZK's pre-prepared statement which was in the following terms:

> "I (ZK) *having consulted with my solicitor* and *been made aware of the allegations against me* wish to adopt the following statement as *my account* at interview.
>
> I would like to categorically deny the allegations being made against me. I have never been involved in any sexual offences regarding (LQ), (IN) or (AB). These allegations are untrue and *I fully deny any involvement in these allegations.*" (emphasis added).

It should be explained that the references to "LQ" and "IN" were references to other complainants in relation to other suspected sexual offences.

[18] Mr Greene submitted that the pre-prepared statement although not containing any positive case that there had been consensual sexual contact between ZK and AB, was ambiguous. We consider that its meaning was clear. ZK's assertion that he had never been involved in any sexual offences regarding LK, IN and AB left open the meaning that sexual contact had occurred with them but that the nature of the sexual contact did not amount to a sexual offence. However ZK having been made aware of the allegations against him and having consulted with his solicitor went on to give as his account a denial of "any involvement in these allegations." That denial included a denial of any sexual contact with AB so that it is apparent from the pre-prepared statement that not only was ZK asserting that no sexual offences had occurred but he was also denying that he had any involvement with or sexual contact with AB or LQ or IN. That was not the appellant's case in his defence statement nor was it the case put on ZK's behalf to AB at trial. In his defence statement and at trial through counsel's cross examination of AB he made the case

that sexual intercourse had occurred but with AB's consent. We consider that the pre-prepared statement was not only inaccurate but was also untruthful. In the event, as the appellant did not give evidence, the untruthful pre-prepared statement was the only evidence on behalf of the appellant at the trial.

[19] On 6 May 2015 after the pre-prepared statement was read by his solicitor ZK made no reply to all questions including to the question as to whether he ever had sexual intercourse with AB.

[20] In summary the pre-prepared statement did not contain any assertion that there had been sexual contact with AB but with her consent. This was the case that ZK made during cross examination of AB at trial never having made that case to the police and having refused to answer all other questions during the police interview.

The proceedings at trial

[21] The indictment dated 27 May 2016 contained a single count of rape contrary to common law. ZK was arraigned pleading not guilty.

[22] ZK's defence statement dated 20 January 2017 amongst other matters stated that ZK took issue "with the allegation that (AB) did not consent to sexual activity with the accused. Further, the accused denies that penetration took place, but it is accepted that the accused attempted unsuccessfully to penetrate AB with her consent."

[23] At trial AB gave evidence essentially in accordance with her first statement as amended by her second and third statements. She explained how at the time of incident her brother had been issued a death threat by ZK and that ZK was known in their area as a loan shark. That her brother feared for his life and that ZK and his brother had been collecting money from AB's father. She explained how she met ZK on the night of the incident and that she told him that her brother was so scared because of the situation he could no longer reside in the area. That ZK replied that if they discussed this it would be fine and her brother would be fine. He suggested that they would discuss it at a particular house. She felt that she could not rebuff him and they went to the house. But as soon as they entered the house ZK brought her into a bedroom saying come in here we will talk about things, talk about your brother. He then proceeded to kiss her and told her to lie on the bed. He took off her trousers and sexual intercourse took place eventually with full penetration. She told him that it was sore and she felt that she was tight. She told him to stop but he persisted for 10 minutes after she told him this. She gave evidence that she was a virgin at the time and that she had blood in her pants afterwards which was not menstrual.

[24] AB was cross-examined by Mr Greene. There was no dispute in relation to her account that she and her friend had been in the pub, that ZK and his friend had

also been in the pub, that she and her friend and ZK and his friend met outside the pub after closing time, that he was perceived by her to be a person who was a loan shark who had threatened her brother so that her brother could no longer live in his home town, that they were in the company of two individuals who were named, that they went to the house of ZK's friend, that the house was in the condition that AB described, that the people she described were the people in the house, that she was taken to a bedroom and that sexual intercourse took place. While use was made of the variations in the dates of the incident given by AB there was no challenge to or dispute as to the sexual contact in fact having taken place in May 2002. The only issue of importance that remained was the issue of consent which depended on the credibility and reliability of AB's evidence.

[25] AB made no concessions during her cross examination in relation to the issue of consent. The appellant did not give evidence. The only evidence from the appellant was the pre-prepared statement which was not only inaccurate but also untrue.

Aspects of the conduct of the trial and the grounds of appeal

[26] In order to understand the various grounds of appeal it is necessary to set out some of the evidence which was admitted and the evidence that was excluded by the judge together with parts of the judge's charge. We deal with these matters in the same order as in the grounds of appeal under the headings of (a) bad character; (b) steady relationship; (c) AB's sexual behaviour prior to the incident; (d) the occurrence entry log; (e) bias; (f) adverse inference from silence; and (g) unbalanced charge.

(a) Bad character

[27] The prosecution applied under Article 6(1)(d) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 to admit evidence of ZK's bad character on the basis that it was relevant to an important matter in issue between ZK and the prosecution namely the question whether ZK had a propensity to commit offences of the kind with which he was charged, see Article 8(1)(b). In the event the following evidence was admitted by the judge by consent namely:-

> "1. On 24 June 2014 the defendant was convicted of two counts of indecent assault and one count of rape.
>
> 2. The defendant is the uncle of CT; he is 10 years her senior.
>
> 3. When CT was in her mid-teens, the defendant picked her up in a sports car; he was angry and she

> was frightened of him so she entered the car. The accused drove her to a secluded spot near to Redburn Cemetery, Holywood. There the accused forced his penis into CT's hand; he then forced her to masturbate him.
>
> 4. When CT was aged 18 or 19, the defendant required her to attend a house where he met her. There he forced CT to perform oral sex on him.
>
> 5. When CT was aged 24, the defendant arrived unexpectedly at her home. Having done so, the defendant proceeded to vaginally rape CT."

[28] That account of the bad character evidence was read out to the jury by DC Lynas when she gave evidence.

[29] The bad character evidence did not contain any reference to the convictions being after a contested trial.

[30] The judge in his charge amongst other matters set out the details of the appellant's bad character. He stated that

> "on the 24th of June 2014 in this courthouse in Downpatrick Courthouse the defendant was convicted following a trial before a jury much like yourselves of two counts of indecent assault and one count of rape."

The judge then described the contents of the agreed evidence of bad character but went on to state that the appellant "was found guilty by a jury" with the jury having "heard all of the evidence in relation to those offences." The judge repeated that the jury had convicted the appellant and elaborated that given CT's age in order to convict the appellant on the count of rape and one of the counts of indecent assault the jury had to be satisfied that CT did not consent to such sexual contact or sexual intercourse and that the appellant did not believe that she was so consenting or was reckless as to her consent and carried on regardless. The judge described this as being the "same issue that arises in this case." The judge then described the prosecution contention as being that these previous convictions demonstrate

> "a propensity, or, to put it another way a tendency on the part of the defendant to commit offences of the type with which he is now charged, to engage in sexual activity with young females against their will in circumstances where he can exercise control over

> them and knows that they are not consenting to sexual activity or intercourse, or is reckless as to whether they consent."

[31] It is accepted that this bad character evidence was properly admitted at the trial. The grounds of appeal in summary form are that the judge in his charge informed the jury that the applicant had been convicted after a contested trial directing the jury that the same issue of consent arose in the previous trial as arose in the present case and that the judge therefore introduced the issue of untruthfulness in that the previous jury must have disbelieved ZK's evidence to the extent that it did not even raise a reasonable doubt in relation to the issue of consent. That the impact was that ZK had brazened it out before and that the previous jury must have disbelieved him.

(b) Steady relationship

[32] At trial Mr Greene applied to the judge to be permitted to cross-examine AB on whether she was in a "steady relationship" at the time of the incident. This line of cross examination would have been based on the contents of the GP's record dated 7 May 2002 which stated:-

> "Post coital contraception needed. SI 2½ days ago. Mid cycle. Re Levonelle 2 IOP. Also need contraception – stable relationship. … advised re condoms also."

At trial Mr Greene submitted that the reasons why he should be permitted to cross-examine AB in relation to the stable relationship was that it would have been a powerful reference point for such a young person from which to be able to recall such a traumatic event with more accuracy in terms of time and detail. This application was made in the context of AB having given various dates for the incident ranging from November 1999 to May 2002 with a consequential variation in her age from 13 years to 16 years 4 months. Mr Greene also submitted that asking questions about a stable relationship did not require the leave of the court under Article 28 of the Criminal Evidence (Northern Ireland) Order 1999 ("the 1999 Order") as it did not amount to any sexual behaviour of AB within that article. He submitted that the only test as to admissibility was the test of relevance.

[33] At trial Mr Greene further submitted that the only purpose of the question in relation to a stable relationship would be "well wouldn't you then having been raped had a much more feel for when this happened because there is a divergence in dates and uncertainty in dates. That was the only purpose." The judge enquired as to what question Mr Greene was proposing to ask about the stable relationship and received the reply "whether she was simply in a stable relationship." Mr Greene

also stated that he doubted very much whether it would be required to place the GP record before the jury.

[34] The judge gave a combined ruling in relation to this application and in relation to the application in relation to AB's sexual behaviour prior to the incident. We give details of that ruling in the next part of this judgment. In the event he refused to permit any cross examination as to whether AB was in a "steady relationship" at the time of the incident.

[35] The ground of appeal is that the judge erred by preventing the defence from cross-examining AB on whether she was in a steady relationship at the time of the incident.

(c) AB's sexual behaviour prior to the incident

[36] At trial Mr Greene applied to the judge to be permitted to cross-examine AB on whether she was in a sexual relationship at the time of the incident. The application ought to have but did not set out with care and precision the exact questions that Mr Greene sought permission to ask. The evidence was stated to be admissible in order to challenge AB's assertion that she was a virgin at the time of the incident in May 2002. The evidential basis for this line of cross examination was the content of the GP's note dated 7 May 2002 which juxtaposed the need for contraception with a stable relationship. Mr Greene submitted that the GP's note infers that "she was in a sexual relationship with her boyfriend where in fact her evidence has been that she was a virgin." Mr Greene further stated that the issue raised was whether AB "has told the truth about being a virgin."

[37] The evidence that AB was a virgin was introduced by the prosecution. It was explanatory evidence as to why AB was sore on penetration and to establish that she was not only naïve due to her youth so as to be susceptible to ZK's pressure but she was in addition sexually naive so that as she never had sex before she did not know how to react, what to do and did not know what would happen. For instance she stated in evidence that

> "(ZK's) intent was to manipulate me into this bedroom. He wouldn't have appeared angry or anything because he wanted to get me into the bedroom because he knew what he was going to do, I didn't know what was going to happen because I had never had sex before so I had never even been in the position before to know what was going to happen or whether there was a bed there or anything, sorry but I …"

She also gave evidence that:

> "He was bringing me in to talk about (my brother). I didn't know what was going to happen as I said on Wednesday. I had no idea. I was naïve. He was, he knew that I was scared for (my brother) and I can't say anything …"

These themes were repeated on a number of occasions in the evidence of AB.

[38] In summary the judge in his ex tempore ruling held that there was nothing in that entry that says that the complainant has been "enjoying any sort of intimate relationship of any sort with any individual or that she has used contraception in the past as a form of protection against potential pregnancy." There was "no indication that she has engaged in any previous sexual activity of any sort" and there was nothing that "would in any way lead one to the conclusion that she lost her virginity on some other occasion." He then questioned the purpose for introducing evidence that AB enjoyed a stable relationship and answered by stating that it was "to raise in the mind of the jury that when she says she was a virgin at the material time this is not the truth." The judge envisaged that any enquiry about her virginity would lead to questions relating to many friendships over many years which would be based on pure speculation and nothing else. He considered that "an inquiry in relation to that is wholly inappropriate" as not being relevant. The judge went on to consider the provisions of Article 28(5) of the 1999 Order holding that the prosecution had introduced evidence that AB was a virgin but stated that he was "certainly satisfied a refusal of leave would not result, is not a risk that the refusal of leave would render unsafely a conclusion on the part of the jury if they concluded that she did not have previous sexual experience which is the evidence that has been given." The judge refused the application to cross examine as to whether AB was in a sexual relationship or in a steady relationship at the time of the incident.

[39] The effect of the ruling was that the appellant was not able to nor did he challenge the evidence that the appellant was a virgin. It was not and could not be contradicted.

[40] Despite having made the ruling preventing the appellant from challenging the evidence that AB was a virgin, a ruling about which the jury would have been unaware, the judge in his charge stated that the evidence of her virginity had not been challenged or contradicted and he brought that evidence to the attention of the jury both in relation to the central issue of consent and the issue of delay on the part of AB in making a complaint to the police.

[41] In relation to the issue of consent the judge stated that the evidence of AB was that she did not consent, he described her evidence as to the pressures on her and how she had told ZK to stop and he had ignored her. However, the judge then went on to raise the issue of AB's virginity in relation to the issue of consent as follows:

> "*The complainant has told you that at the material time she was a virgin, with no sexual experience at all. There is nothing to challenge or contradict that evidence.* You have also heard that this individual threatened and did damage to members of her family, putting them and her in fear. She was half the age of the defendant and you are entitled to ask yourself why would this child (because she was a child at the time) voluntarily or willingly want to, or consent to sexual intercourse with the defendant. You may also feel that it is appropriate to go further and ask yourself the question *why such a young woman, with no sexual experience would willingly be prepared to give up her virginity to someone such as the defendant in the rough circumstances, in a party house, as she has described it*" (emphasis added).

[42] In relation to the issue of delay one of the explanations provided by the judge in his charge to the jury for delay on the part of AB was that

> "she has told you that she was inexperienced, *she was still a virgin at the time and you may feel, quite innocent*. She told you that it took her long time to realise that what the defendant did to her was wrong and where the crime was" (emphasis added).

[43] The grounds of appeal are that under Article 28(5) of the 1999 Order the appellant should have been able to rebut AB's assertion she was a virgin at the time of the incident. The appellant also contends that having prevented defence questions which could have undermined the AB's assertion as to her virginity the judge unfairly commented on her virginity in a way that elevated it to a significant issue in the case and a benchmark with which to assess her account that there was a lack of consent which was the central issue in the case.

(d) The occurrence entry log book

[44] At trial Mr Greene applied to the judge to be permitted to cross-examine DC Lynas on the entry in the OEL made by her on 16 December 2013 that the "offence should be recorded as UCK (unlawful carnal knowledge) on a child U14 (under 14) – indictable." Mr Greene contended that this was opinion evidence and admissible as the police officer was an expert. The judge held that this was an opinion expressed by a police officer. He went on to state that the general rule is that while evidence of facts is admissible evidence of opinion is not and whilst to this general rule there are necessary exceptions a police officer is not a legal expert on whether the facts

recounted to her amounted to rape or to unlawful carnal knowledge. He also held that a police officer would not be entitled to give evidence that certain facts amounted to the crime of rape or the crime of unlawful carnal knowledge. On that basis the judge ruled that it would not be appropriate to admit the evidence in the OEL.

[45] The ground of appeal is that the judge erred by preventing the defence from cross examining AB and or the police officer on issues arising from the OEL

(e) Bias

[46] The ground of appeal is that the judge erred by continuing the trial in circumstances where he should have recused himself on the basis of perceived bias.

(f) Adverse inference from silence

[47] The ground of appeal is that the judge erred by effectively inviting the jury to draw an adverse inference from silence at the police interview in circumstances where the judge had ruled that no such inference would be appropriate.

[48] Mr Greene informed the court that he was not proceeding with this ground of appeal.

(g) Unbalanced charge

[49] The ground of appeal is that the judge erred by delivering an unbalanced charge that favoured the prosecution case. During the course of his submissions and in order to sustain this ground Mr Greene relied on the matters arising in the other grounds.

Discussion

(a) Bad character

[50] Morgan LCJ in giving the judgment of this court in *R v LH* [2017] NICA 67 reviewed the authorities in relation to bad character evidence and at paragraph [20] set out the observations which could be made from that review. Those observations included:

> "…
>
> (iv) Any conviction for a criminal offence is likely to reflect on the credibility of the defendant (see *R v Singh* [2007] EWCA Crim 2140).

(v) Where evidence of convictions is introduced through another gateway the evidence may be used for any other relevant purpose (see *R v Highton* [2005] 1 WLR 3472).

(vi) It is the responsibility of the court to explain to the jury the purposes for which such evidence can be used.

(vii) Where evidence of bad character has been admitted to show a propensity to commit offences of the type charged the court should consider whether a direction on untruthfulness or credibility would distract the jury from the issues in the case or appear to give an unfair enhanced importance to the bad character evidence."

[51] In this case the bad character evidence was introduced on the basis of a propensity to commit offences of the type charged. The evidence having been admitted on that basis it was likely to reflect on the credibility of the appellant as he was a convicted rapist, see *R v Singh*. As this court has stated on a number of occasions prior to speeches it is necessary to consider with counsel the nature of the direction to the jury in relation to bad character which in this case would have included consideration as to whether a direction as to untruthfulness or credibility would distract the jury from the issues in the case or appear to give an unfair enhanced importance to the bad character evidence. As far as we are aware no such consideration was given.

[52] The complaint by the appellant was that the trial judge in effect put before the jury the proposition that the appellant had contested the charge giving a false account. The agreed evidence of bad character did not state whether the appellant had pleaded guilty or whether he had contested the charges. In fact he had pleaded not guilty and indeed his account at that earlier trial was considered by the jury to be false not even raising a reasonable doubt. We consider that the judge ought not to have informed the jury that the previous convictions were after a contested trial as that was not part of the agreed document and that this was a misdirection. However, we do not consider that this misdirection on its own renders the conviction unsafe.

(b) Steady relationship

[53] Mr Greene submitted that the purpose of asking questions as to a steady relationship was to provide a reference point for AB from which she would be able to accurately recollect the date of the incident.

[54] We make the following points:

(a) We accept that a steady relationship could have been a potential reference point but we consider that there would have been many

other reference points in AB's life from which she could have identified the date of the incident and about which she could have been asked questions. The evidence was not necessary in order to establish the date of the incident.

(b) A steady relationship need not be one involving any sexual behaviour but in the context of the GP's note of 7 May 2002 there is a clear implication that AB was contemplating or that she had had a sexual relationship within that steady relationship. Therefore, using a steady relationship as a reference point ran the unnecessary risk of introducing evidence as to the sexual behaviour of AB.

(c) There were variations as to the date of the incident in AB's draft statements and statements but in the event she identified the date as May 2002. ZK accepted that sexual contact had occurred but in the event there was a total absence of any suggestion to AB that the incident occurred on any date other than May 2002. Not only would questions as to a steady relationship have been unnecessary as a reference point but also there was no issue as to the May 2002 date.

[55] We dismiss this ground of appeal.

(c) Sexual behaviour

[56] It is necessary to identify the extent of the application which was being made to the judge which was to cross-examine AB as to the specific instances of her alleged sexual behaviour prior to 7 May 2002 in the steady relationship which was recorded by her GP as giving to rise to a need for contraception. It was only if and to the extent that AB did not agree in cross-examination that she was in a steady relationship or was contemplating sexual behaviour that gave rise to the need for contraception that Mr Green was seeking to adduce the GP's note in evidence. The application was not for a wide-ranging permission to cross-examine as to the nature of all previous relationships or as to sexual behaviour in any other relationship.

[57] The restrictions imposed by Articles 28 - 30 of the 1999 Order required ZK to apply for leave both to adduce evidence and to cross-examine AB about any sexual behaviour. The House of Lords in *R v A* [2001] 3 All ER 1 has given detailed consideration to sections 41 - 43 of the Youth Justice and Criminal Evidence Act 1999 which is the equivalent provision in England and Wales. In *R v WC* [2004] NICC 3 Weir J summarised the relevant legal principles contained in Articles 28 - 30 of the 1999 Order in accordance with a judgment in *R v A*. We seek to follow *R v A* and we agree with the summary as set out by Weir J in *R v WC* and the application of those principles to the facts of that case.

[58] In this case, whilst it was not necessary to do so, the prosecution introduced evidence that AB was a virgin at the time of the incident. They did so to support the prosecution case that there was no consent to sexual intercourse and that there was an explanation for delay. On that basis the application to question or to adduce evidence fell within Article 28(5) (a) as the evidence or question related to evidence adduced by the prosecution that AB was a virgin. We consider that the evidence or questions would not have gone further than was necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of ZK so that Article 28(5)(b) also applied. In those circumstances the judge had a discretion under Article 29(2) to give leave but was required not to give leave unless satisfied that a refusal of leave might have the result of rendering unsafe a conclusion of the jury on any relevant issue. The relevant issues not only included whether AB was a virgin but also that issue impacted on the issues as to consent and delay given the reliance by the prosecution on that aspect of AB's evidence in relation to consent and as an explanation for delay. We consider that the judge ought to have been satisfied that a refusal of leave *might* have the result of rendering unsafe a conclusion of the jury in relation to each of those issues. We consider that as in *R v WC* carefully circumscribed questions ought to have been permitted by the judge.

[59] The failure to permit those questions was then significantly compounded by the judge's charge to the jury which unfairly stated that AB's virginity was not challenged or contradicted. Having refused leave to ask questions or adduce evidence challenging AB's virginity the judge should not have directed the jury that the evidence was not challenged and not contradicted. That was a misdirection to the jury and it related to amongst other matters the important issue of consent. In *R v Fraser Marr* (1990) 90 Cr. App. R. 154 the Court of Appeal stressed that observance of the accused's right to have his case presented fairly stating that "it is just in those cases where the cards seem to be stacked most heavily against the defendant that the judge should be most scrupulous to ensure that nothing untoward takes place which might exacerbate the defendant's difficulties." Lord Lane LCJ added

> "… however distasteful the offence, however repulsive the defendant, however laughable his defence, he is nevertheless entitled to have his case fairly presented to the jury both by counsel and by the judge."

We consider that there was conspicuous unfairness to the appellant in the way that the judge directed the jury that the assertion that AB was a virgin was not challenged and not contradicted and that this unfairness included unfairness in relation to the central issue of consent.

[60] We have given careful consideration as to whether the misdirection renders the verdict of the jury unsafe. The sole statutory test for the Court of Appeal is one of

safety of the convictions; see section 2 (1) of the Criminal Appeal (Northern Ireland) Act 1980 and *R v Pollock* [2004] NICA 34. There is no fixed rule or principle that a failure to give a direction or misdirection is necessarily or usually fatal. It must depend on the facts of the individual case; see *R v AB* [2015] NICA 70 at paragraph [22] and *R v Hunter* [2015] EWCA Crim. 631; [2016] 2 All ER 1021 at paragraphs [89] to [92]. In this case we are satisfied that the judge's direction was prejudicial to the appellant in relation to the central issue of consent which is to be seen in the context that there was an issue as to the reliability of AB for the reasons which we have given in paragraph [17]. We consider that the credibility and reliability of AB was of central and critical importance and by this significant degree of unfairness the judge endorsed AB's evidence in relation to this issue elevating it to the status of not being challenged and not being contradicted. Applying the principles set out *R v Pollock* at paragraph [32] we consider that the direction to the jury that the evidence of AB that she was a virgin that this evidence had not been challenged or contradicted gives rise to concerns about the safety of the conviction and accordingly we quash the conviction.

(d) OEL

[61] Mr Greene accepted that each and every one of AB's draft statements and of the AB's statements were available to him at trial, that they were used to cross-examine AB and that the jury had the facility to form their own view as to whether AB's first draft amounted only to unlawful carnal knowledge and that thereafter she had changed her case to one of rape. In short the information upon which the OEL was based was available to the appellant and was used by the appellant at trial.

[62] We consider that the judge cannot be faulted for excluding the opinion evidence of DC Lynas contained in the OEL. We dismiss this ground of appeal.

(e) Bias

[63] This ground was not pursued in the appellant's written submissions and we consider that to have been appropriate. A judge is required to make many rulings during the course of a trial and he is entitled to the assistance of counsel both in making those rulings and in having them implemented. We have given careful consideration to the manner in which the trial was conducted and dismiss this ground of appeal.

(f) Unbalanced charge

[64] We have held that there was conspicuous unfairness in one part of the judge's charge and that this requires the conviction to be quashed. There is no need to consider any of the other points raised by Mr Greene.

Conclusion

[65] We quash the conviction.

[66] We will allow time so that consideration can be given to the question of a retrial.