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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

QD

_____

Before: Morgan LCJ, Stephens LJ and Treacy LJ

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STEPHENS LJ (giving the judgment of the court)

Introduction and reporting restriction

[1] On 28 September 2018 the appellant, who we anonymise as QD, was convicted at Newry Crown Court on one count of sexual assault on a child under 13, contrary to Article 14 of the Sexual Offences (Northern Ireland) Order 2008. He was sentenced to five months in prison. The child who was the victim of the offence, then aged 2 years and 7 months, was QD's son, whom we shall call Jack, though that is not his real name. We shall anonymise the mother of the child by the cipher MC. At the time of the offence QD and MC were living apart and Jack resided with his mother, MC. On the night in question the appellant, QD, had been babysitting Jack whilst MC worked. Upon her return from work MC stated that an account was given to her by Jack which was his description of a sexual assault on him and that the sexual assault had been committed by the appellant, QD. At the trial the hearsay account given by Jack to his mother, MC, was admitted in evidence under the res gestae exception preserved by Article 22 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order") to the rule against hearsay evidence or alternatively under Article 18(1)(d) of that Order on the basis that the court was satisfied that it was in the interests of justice for it to be admissible. The grounds of this appeal against conviction, which is brought with the leave of the single judge, Horner J, primarily relate to the admission of this hearsay evidence and to the directions given by the trial judge in relation to it in his charge to the jury.

[2] In this judgment so that the child's identity should be protected, as the Sexual Offences (Amendment) Act 1992 requires, we have not given his real name.

Furthermore, we have anonymised the names of the appellant and of the mother and we will not give the names of any of the other individuals referred to at the trial. We draw the attention of anyone hearing or reading this judgment to the prohibition on identifying the victim of a sexual offence of this kind.

[3] At trial and in this court Mr Greene QC and Mr Kevin Magill appeared for the appellant and Mr Mateer QC and Ms Fiona O'Kane for the prosecution.

The indictment and the outcome of the trial

[4] The indictment initially included three counts.

a) Count one of rape of a child under 13 contrary to Article 12(1) of the Sexual Offences (Northern Ireland) Order 2008. The particulars being that QD, with his penis, intentionally penetrated Jack's anus.

b) Count two of sexual assault of a child under 13 contrary to Article 14 of the Sexual offences (Northern Ireland) Order 2008. The particulars being that QD intentionally sexually touched Jack with the evidence being that at the end of May 2011 QD and Jack played with their penises and that QD ejaculated over Jack.

c) Count three of possessing an indecent photograph or pseudo-photograph of a child contrary to Article 15(1) of the Criminal Justice (Evidence, etc.) (Northern Ireland) Order 1988. The particulars being that QD had an indecent photograph or pseudo-photograph of a child in his possession with the evidence being that MC found the image on QD's computer in 2008.

[5] During the course of the trial the indictment was amended to add a fourth count asserting that the rape occurred in Tenerife.

[6] The judge withdrew the first and fourth counts from the jury. QD was convicted on count two and found not guilty on count three.

The factual background and the evidence at trial

[7] QD was brought up in Northern Ireland.

[8] MC is a Polish national and was brought up in Poland.

[9] In December 2005 QD first met MC who was then visiting Northern Ireland as she has Polish friends here. She wished to and in or about August 2006 did move from Poland to Northern Ireland coming to live in QD's house. An intimate relationship developed between them so that they became partners but in 2007 they separated on a number of occasions. In 2008 they met again at a party, slept together and their son was conceived. After it became clear that MC was pregnant they lived together as partners for a period of approximately 5 months separating in or about August 2008. At trial it was suggested to MC by Mr Greene that this separation was

because she had found out that QD had been "cheating with … other women" and having "affairs behind her back" with the subtext being that she was motivated by malice to get her own back by lying in the evidence that she was giving. QD in his evidence described this in different terms saying that MC was prepared not to make a fuss about his affairs so long as he came home to her and that as far as he was concerned she did not seem to show any grudge or unhappiness or animosity towards him because of these other relationships. He stated in his evidence that this was more like an open relationship. He could proffer no explanation as to why she would lie about his activities.

[10] Jack was born in October 2008.

[11] In 2010 MC moved to a different part of Northern Ireland.

[12] The sexual assault by QD on Jack is alleged to have occurred in Northern Ireland at the end of May 2011. No report was made to the police by MC at that time. Her explanation was that she was frightened of QD and afraid to make a complaint. As can be seen from the indictment the sexual assault involving Jack was not the only offence with which QD was charged there being initially three counts on the indictment with a fourth being added during the trial. In order to understand the issues in this appeal including when and how the allegations in relation to the sexual assault on Jack came to be reported to the police it is necessary to not only set out the background to the offence in relation to which QD was convicted but also to set out the factual background in relation to allegations made by another partner of QD whom we shall anonymise by the cipher AP. The evidence was that MC and AP had never been in contact with each other.

[13] In 2015 both QD and AP lived together as partners in England. On 8 July 2015 AP made a report to the police in England that on 7 July 2015 QD using her laptop had shown her pornography involving young children and had disclosed sexual offences which he had committed. The pornography included a series of thumbnails of video content and AP noticed a young girl who looked around 4 years old who had a penis in her mouth as if performing oral sex on a male who was clearly an adult. In her statement to the police AP described how having shown her these images he had said "these are your choices" and how he had asked her if she would have a child with him so that they could have an "open" family which she understood to mean that he was referring to starting a family where he would be able to sexually abuse their child. She stated that she asked QD whether he had ever acted on any of this and after initially denying physically abusing any children he stated that he had to be honest with her. She stated that he then disclosed to her that he had been with his son when he was 3 years old. She then recounted how she had asked him to clarify what he meant and he told her that he had had sex with his 3 year old son before his mother took him back to Poland.

[14] This report by AP to the police in England led to the PSNI contacting MC who then made a statement on 17 September 2015.

[15] The evidence of AP that QD had disclosed having sex with his three year old son, despite the lack of definition of what was meant by having sex, was the basis of the first count on the indictment alleging that QD had raped Jack with the prosecution asserting that the rape had occurred in Northern Ireland. However, when AP came to give evidence she stated that she had been told by QD that his having sex with his son occurred whilst he had been on holiday with Jack which meant that if it occurred it could only have occurred in Tenerife. This led the prosecution to apply to amend the indictment to include a fourth count with particulars that the offence of rape had occurred in Tenerife. The judge acceded to this application.

[16] We return to summarise the factual background to the offence on which QD was convicted.

[17] QD had been named on Jack's birth certificate and accordingly MC who wished to secure a passport for him so that she and Jack could visit her family in Poland, required QD's co-operation which had only been partially forthcoming. MC gave evidence that in order to secure QD's co-operation she suggested that all three of them went on a holiday to Tenerife in early May 2011. This meant that a passport had to be and was obtained for Jack.

[18] MC worked a 4 hour shift in a local restaurant and after their return from the holiday in Tenerife she gave evidence that at the end of May 2011, having been let down by her usual babysitter, she needed someone to babysit Jack whilst she was at work. She stated that on one occasion QD, who lives some 28 miles away, babysat between approximately 4.00 pm and 8.30 pm at the end of May 2011 so that QD and Jack were alone together in MC's flat. She stated that when she left Jack was in his normal clothes and that she asked QD because it was evening time to bath Jack and put him into his pyjamas. She also stated that on her return to her flat QD left in a rush. Her evidence was that:

> "I come back from the work, and I saw QD was very nervous, and he just ran from my apartment with no - with no goodbye. I saw he was - he was really nervous. So he - he take off."

She gave evidence that approximately 15 minutes after QD had left she was looking after Jack who was in his pyjamas happy and bouncing up and down on the bed. She asked him a number of questions in Polish and he replied in Polish. MC described this conversation a number of times in her evidence. Initially she stated:

> "I see (Jack), my son, jumping on the bed in his pyjama. I was asking (Jack) if he had a good time with (QD). (Jack)

> say yes, he was - he was happy. I ask him what he was doing with (QD), and he said he was playing with penis, in his language, and that (QD) played with his penis, and (QD) pour milk on him. I didn't understand what he mean by pouring milk on him. I say what milk, and he say from his penis."

MC also stated through an interpreter that she was told by Jack:

> "(QD) played with - he played with my siusiak, which can be translated into willie, and - and they played with their willies together, and (QD) poured milk on him, and I didn't understand what he meant by milk, and so I asked him. And (Jack) said QD had milk in his willie."

The judge at the end of the cross examination and re-examination of MC took care that the conversation which she stated had been in Polish should be recounted by her in Polish to the court and then interpreted. The conversation as interpreted was as follows:

> "When I returned home (Jack) was very happy. I ask him what had been like with (QD), you know, what did they do. Because (QD) ran out the house very quickly, I wanted to find out what had happened from him. (Jack) told me he had been playing with him. I asked what did you do. (Jack) told me he had been playing with (QD's) siusiak. Siusiak is a very popular way of describing or referring to penis, and it's sort of vocabulary we use with children, something like "willie" or "peepee." So I ask him what, why, how, he replied that they had been playing with their own siusiaks, willies. And then he said, "You know what, (QD) poured some milk over me". So I ask him "What milk, where did you get it", and then (Jack) told me that (QD) had had some milk in his siusiak, willie."

[19] MC also gave evidence that in her view Jack did not understand that there was something wrong with what he had described to her as having occurred.

[20] MC stated that after this account had been given to her she stripped off Jack's pyjamas in order to check whether there were any physical injuries including checking his anus. She stated that she found no injuries.

[21] MC's evidence was that she was shocked by what she had been told by Jack so she waited for a further 15 minutes thinking the matter through before telephoning the appellant whom she could see on the CCTV was still at the entrance

of the block of flats smoking a cigarette. MC stated that she asked QD why he had run so fast out of the flat when she returned and that he replied that he was in a rush, though as she pointed out, he was still outside the flat. MC then gave evidence that she told QD that she had been speaking with Jack and that she asked QD to please tell her that what Jack had said was not true. She recounted how QD had asked her what Jack had told her and she told QD in English what Jack had said. She gave evidence that he initially denied it but then replied

> "But you knew it who I was, I am, and that's not going to change. If you accept me who I am, we can be a family, we can be together."

MC then repeated this evidence using the interpreter. That account given through the interpreter was

> "You knew who I was, it was not going to change, and if you accept that we would be together."

[22] MC stated that the reference by QD to her knowing who he is was a reference to events that had occurred in 2008 when she was pregnant with Jack. She described how when QD was not in the house she found on the browse history section of his computer pornographic sites involving children. She stated that she remembered a movie, involving a very old man having sex with a girl who was at the most five years old though could have been younger. She stated that she challenged QD about these images and initially he said that they could be attributed to his brother's use of the computer. However she went on to recount that on being pressed he admitted that he had been watching the images explaining to her that normal sex did nothing for him.

[23] In cross examination of MC at trial it was suggested to her that she had lied and that those lies had included lying about the conversation between her and Jack and lying about the pornography found on the computer in 2008. An inconsistency was put to MC in that there was a record that she had said upon her return from work that she had found Jack lying on the bed naked rather than in his pyjamas. There was no attempt to suggest that Jack did not understand the simple, open, non leading questions put to him by MC or that he did not understand the answers to them.

[24] The evidence of QD at trial was that no incident took place at all. He stated that he came to babysit. In his evidence he did not contest that he was alone with Jack in MC's flat though he stated that he did not bathe Jack or change him into his pyjamas. He gave evidence that Jack was still in his day clothes when MC returned to her flat. He stated that he did not leave the flat that evening but rather slept the night with MC in her flat. Accordingly he said that he did not stand outside the flat and no conversation took place in which it was suggested by MC to him that any

disclosure had been made by Jack. QD stated that he slept with MC that night leaving the next day and that he continued to see MC and Jack until November 2011.

The application to admit the hearsay evidence of MC and the trial judge's ruling

[25] At the date of trial and for some time before it Jack had no recollection of any of the events that occurred at the end of May 2011 so he could not give any direct evidence.

[26] The prosecution applied to the trial judge to admit the hearsay evidence of MC as res gestae under Article 22(1)(4) of the 2004 Order or in the alternative under Article 18(1)(d) of that Order as being "in the interests of justice for it to be admissible." The judge considered that this was a statement purportedly made by Jack "immediately" after an offence may have taken place. The judge also considered that Jack was then of an age where it was highly unlikely that he would have been in a position to invent or collude in any way with an allegation relating to an assault of this nature. Indeed that it was highly unlikely that Jack would have understood exactly what was going on and would only have been in a position to report factually what had happened. The judge also noted that MC could be cross-examined and he did not consider that the hearsay evidence was the sole evidence against QD but rather that it was supported by the admission made to MC by QD and that it was also supported by the purported admission by QD to AP. The judge ruled that the hearsay statement of MC was admissible both as res gestae and "in the interests of justice" and he did not exclude that evidence under either Article 30 of the 2004 Order or Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE").

The prosecution's bad character application

[27] On 19 June 2017 the prosecution gave notice of its intention to adduce evidence of QD's bad character so that for instance the evidence of AP could support the evidence of MC on counts two and three on the basis that QD had as a propensity an interest in sexual acts involving young children and a propensity to possess child pornography. In the event an application to permit the evidence to be admitted as bad character evidence was not moved before the trial judge. It appears to us that there were strong grounds upon which such an application could have been made as evidential support for an abnormal interest in children. AP and MC were not known to each other and yet there were striking similarities between their evidence with, if their accounts were accepted, attempts by QD to corrupt both of them so that he could indulge a propensity not only for possessing child pornography involving visualising children's involvement in sex but also for committing sexual acts involving young children. No explanation was given to us as to why that application was not moved. In the event far from the evidence of AP being used as bad character evidence on counts two and three the judge ruled that her evidence should be completely ignored by the jury in relation to those counts.

The application to sever count one from the indictment and the trial judge's ruling

[28] The application to the trial judge to sever count one was tentatively advanced on the basis that although the offences were properly joined in the indictment, QD would be prejudiced and embarrassed in his defence of Counts 2 and 3 by the inclusion of such an outrageous offence as the rape of a child. The judge identified the issue as being whether the court could properly deal with any potential prejudice by way of direction ruling that in the exercise of discretion that he had no doubt that this could be done. The judge declined to sever count one.

The withdrawal of counts one and four from the jury, the application to discharge the jury and the trial judge's ruling

[29] At the close of the prosecution case an application was made by the defence for a direction. The judge acceded to that application in relation to Counts 1 and 4. We were not informed of the precise reasons but assume that it was on the basis of the lack of particularity in the disclosure allegedly made by QD to AP when considered in combination with the evidence of MC who had also been on the holiday in Tenerife and who stated that there was no occasion during that holiday when QD and Jack were alone together.

[30] After that ruling an application was made on behalf of QD to discharge the jury on the basis that they would not be able to discharge their duty faithfully, having heard evidence from AP on counts no longer before them.

Grounds of appeal

[31] The grounds of appeal can be broken down under a number of headings as follows:-

(a) **Hearsay evidence of MC**. The grounds contend that

i. the judge erred in admitting the hearsay evidence of MC either as res gestae or in the interests of justice. In particular that the judge failed to give any or adequate consideration to Jack's competence to give evidence within the meaning of Article 31 of the Criminal Evidence (Northern Ireland) Order 1999 and ought to have excluded the evidence under Article 30 of the 2004 Order or Article 76 of PACE; and

ii. the judge having permitted the hearsay evidence to be admitted failed to direct the jury properly on how they should approach it. In particular it is suggested that the jury ought to have been directed that they should exercise caution in evaluating the significance of what the witness reported her son saying and that they were required to assess the reliability of the utterances from the original statement maker, the child Jack and to evaluate the potential difficulties inherent in placing reliance on the utterances of a 2 year and 7 month old child. It is also

suggested that the jury may have been inadvertently left with the impression that if they accepted the mother's account of what her son had said they should go on to convict QD without scrutinising Jack who was the maker of the statement.

(b) **Counts 1 and 4 and the evidence of AP**. The grounds contend that

i. **Severance.** The judge erred in not severing count 1 from the indictment before the opening of the evidence;

ii. **Discharge of the jury.** The judge erred in not granting the defence application to discharge the Jury, after he had withdrawn Counts 1 and 4 from the jury.

iii. **Directions.** The judge failed to adequately direct the Jury in respect of the evidence of AP, that it should form no part whatsoever in their consideration of verdicts on Counts 2 and 3. In particular that there should have been but was not a robust direction to the jury to ignore the evidence of AP in its entirety. Further, it is suggested that the jury demonstrated by their questions that they had not followed the limited direction that had been provided and had instead actually evaluated the evidence of AP and that the judge's direction to the jury in response to their questions failed to deliver the robust direction required against that evidence being considered but instead may have inadvertently created the impression that legal technicalities lay at the heart of why they were steered away from such evidence.

Discussion

(a) The admission of the hearsay evidence

[32] Article 22 of the 2004 Order preserves certain common law rules in relation to hearsay one of which is the rule in relation to res gestae. In so far as relevant to this case that Article preserves res gestae in any criminal proceedings if "the statement was made by a person *so emotionally overpowered* by an event that the *possibility of concoction or distortion* can be disregarded" (emphasis added). The principles in relation to res gestae were considered by Lord Ackner in the House of Lords in *R v Andrews* [1987] AC 281 which decision clarified the law by approving the test for admissibility adopted by the Privy Council in *Ratten v The Queen* [1972] AC 378. Lord Ackner summarized the position which confronts a trial judge when faced in a criminal case with an application under the res gestae doctrine to admit evidence of statements, with a view to establishing the truth of some fact thus narrated. He said (at page 300) that the "primary question which the judge must ask himself is – can the possibility of concoction or distortion be disregarded?" Applying that primary question to the facts of this case the possibility of concoction could be disregarded by virtue of the innocence of Jack rather than by any close and intimate connection

between the exciting events in issue and the making of the statement. The theory that the spontaneity of the utterance is some guarantee against concoction does not sit easily with a consideration of the evidence of a child as young as Jack as it is his innocence rather than the events which leads to a disregard of concoction. The same applies to distortion in that a child as young as Jack is disinterested having no desire to distort. In addition on the facts of this case an assessment as to whether to disregard the possibility of distortion depends on an assessment of the simple, open nature of the questions asked by MC and of the simple replies made by Jack with both questions and answers taking place within a short period of the events having occurred.

[33] Lord Ackner developed the primary question by stating that to answer it "the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that *the event was so unusual or startling or dramatic* as to *dominate the thoughts of the victim*, so *that his utterance was an instinctive reaction to that event*, thus giving no real opportunity for *reasoned reflection*. In such a situation the judge would be entitled to conclude that *the involvement or the pressure of the event* would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity" (emphasis added). The facts of this case are that Jack did not appreciate what had occurred so that he did not know that it was unusual. Far from being startled he was happy jumping on his bed and there is no sense of him finding it dramatic as opposed to novel or something not previously experienced. We do not consider that on the evidence his thoughts were dominated in the sense of perceiving something unusual and seeking an explanation. The concept of reasoned reflection could not be applicable given his age and innocence. We emphasize that there can be situations in which the hearsay evidence of a young child should be admitted as res gestae but on the facts of this case we do not consider that the judge was correct to rule that Jack was emotionally overpowered by what had occurred. We conclude that the hearsay evidence ought not to have been admitted as res gestae.

[34] Article 18(1)(d) of the 2004 Order permits the admission in criminal proceedings of a statement not made in oral evidence in the proceedings as evidence of any matter stated if, as far as this case is concerned, the court is satisfied that it is in the interests of justice for it to be admissible. Article 18(2) provides that in deciding whether such a statement should be admitted in the interests of justice, "the court must have regard to the following factors (and to any others it considers relevant)— (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case; (b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a); (c) how important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole; (d) the circumstances in which the statement was made; (e) *how*

reliable the maker of the statement appears to be; (f) how reliable the evidence of the making of the statement appears to be; (g) whether oral evidence of the matter stated can be given and, if not, why it cannot; (h) the amount of difficulty involved in challenging the statement; (i) the extent to which that difficulty would be likely to prejudice the party facing it" (emphasis added).

[35] In considering factors in Article 18(2)(e) and (f) it is not permissible to reason that the jury may assess matters relating to reliability: the judge is specifically required to make an assessment.

[36] Article 27 of the 2004 Order provides that certain hearsay statements are inadmissible if they were made by a person who did not have the required capability at the time when he made the statement. Article 27 does not apply to the interests of justice gateway under Article 18(1)(d) however it can be seen from that part of Article 18(2)(e) which we have emphasised that a factor which is required to be considered by the judge is how reliable the maker of the statement appears to be. We consider that the maker of a statement would not be reliable if it appeared to the court that he was a person who was unable to (a) understand questions put to him which are part of the hearsay evidence or (b) if he was unable to give answers to those questions which could be understood.

[37] Article 18(2) directs the court to have regard to the factors (a) – (i) and to any others it considers relevant. However, this does not mean that a judge is bound to reach a conclusion on all of them or that a proper investigation of all nine factors is required which would be a lengthy process. All that is required is the exercise of judgement in the light of the factors specifically identified, together with any others considered by the judge to be relevant.

[38] An exercise of judgement at trial in relation to the Article 18(2) factors will be interfered with on appeal only if it has involved the application of incorrect principles or is outside the band of legitimate discretionary judgment.

[39] Even if the hearsay evidence is admissible falling within a gateway in the 2004 Order Article 30 of that Order provides for the court's general discretion to exclude the evidence. That Article provides that in criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if— (a) the statement was made otherwise than in oral evidence in the proceedings, and (b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result *in undue waste of time*, substantially outweighs the case for admitting it, taking account of the value of the evidence (emphasis added). The words in emphasis are a specific reference to the possibility that the hearsay evidence may be held inadmissible because it may generate undue waste of time upon satellite issues. But we consider, though the matter was not specifically argued before us, that the jurisdiction provided by Article 30 is not on its face limited to such a case; it explicitly extends to an assessment of the value of the evidence.

Furthermore, the Article appears under a side heading which, although not part of the enacted terms of the legislation, suggests a general discretion, and such appears to have been assumed to be its effect, albeit without detailed argument to the contrary, in *R v Gyima* [2007] Crim LR 890, *R v Atkinson* [2011] EWCA Crim 1746 and *R v Riat & others* [2013] 1 WLR 2592.

[40] Another exclusionary power is contained in Article 76 of PACE which provides that in "any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

[41] If the hearsay evidence is admitted under Article 18(1)(d) of the 2004 Order and not excluded under Article 30 of that Order or under Article 76 of PACE then Article 29 of the 2004 Order enables the judge after the close of the case for the prosecution to, for instance, direct the jury to acquit the defendant. In so far as relevant to this case Article 29 provides that if "… the court is satisfied at any time after the close of the case for the prosecution that (a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and (b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe, the court must either direct the jury to acquit the defendant of the offence …." In *R v Riat & others* it was stated that the English equivalent of Article 29 was a critical part of the apparatus provided for the management of hearsay evidence. Reference was made to the contrast between an application for a direction in a non-hearsay case, subject to the test in *R v Galbraith* [1981] 1 WLR 1039 and the rule for hearsay cases. The contrast for the reasons set out in *R v Riat & others* is that the judge in a hearsay case is required by Article 29 to look to see whether the hearsay evidence is so unconvincing that any conviction would be unsafe. That means looking at its strengths and weaknesses, at the tools available to the jury for testing it, and at its importance to the case as a whole. In *R v Riat & others* it was also stated that the issues under Article 29 may be confronted either at the end of the prosecution case or at any time thereafter. Hughes LJ stated in that case that whether Article 29 arises, and, if it does, when, must depend on the circumstances of each individual trial. He also stated that counsel and the judge should keep the Article 29 question under review throughout the trial. However, for the reasons explained in *R v Riat & others,* with which we agree, an application under Article 29 may often best be dealt with at the end of all the evidence.

[42] That is the statutory framework in relation to the interests of justice gateway under Article 18(1)(d) of the 2004 Order and the statutory provisions associated with that gateway.

[43] The equivalent provisions in England to those contained in the 2004 Order and PACE were considered in *R v Riat & others* in which it was stated that the "true position is that in working through the statutory framework in a hearsay case …, the court is concerned at several stages with both (i) the extent of risk of unreliability and (ii) the extent to which the reliability of the evidence can safely be tested and assessed." Factors bearing on that analysis include the disinterest of the maker of the statement which may reduce the risk of deliberate untruth; independent dovetailing evidence which may reduce the risk both of deliberate untruth and of innocent mistake; the availability of good testing material (admissible under Article 28) concerning the reliability of the witness which may show that the evidence can properly be tested and assessed; and the presence of independent supporting evidence which may have the same effect.

[44] One of the cases under appeal in *R v Riat & others* was the case of *R v Clare*. We consider that the facts of that case have some similarities to the facts of this case.

[45] In *R v Clare* the defendant was charged with a single offence of sexual assault of a child of three and a half. The description of the facts contained in the judgment is as follows

> "64. … On a summer's day (the defendant) was a visitor at the home of the child's family. He had been drinking for some of the day. There was a tent in the garden, and in the early evening he was in it with the little girl. She was wearing just a T-shirt and knickers. She came in and out of the house from time to time. Once she said to her mother that the defendant had kissed her. The mother thought nothing of that. A little later the child returned with, according to the mother, a quite different demeanour, and hid behind the door. When the mother asked what was wrong, the child asked for some cream on her private parts because she was sore. As she pulled down her knickers to show the mother, she said that the defendant, whose family name she used, had "licked me". By the time the mother had decided what to do, and had called the police, the defendant had left without saying anything by way of farewell.
>
> 65. There were attempts at medical examination that evening and again the next day which were obstructed by the child hiding behind her mother and refusing to co-operate. There were some scratches and bruises on the legs, but the complaint was not of anything which would have caused them. There was some redness of the

private parts, but not such as could provide any evidence one way or the other whether the complaint was true. The child's reaction was such that the police officers concluded that there was no point in attempting even an assessment of whether an ABE interview would be possible. The child was, it follows, never a potential witness. The only evidence of what she had said in the very few words of complaint, was what her mother recounted.

66. The defendant was arrested the same evening and interviewed next day. In the course of arrest, he told one of the officers not to look at him as if he were a paedophile. According to the officers they had not said anything to suggest any inquiry into indecency with a child. At trial the defendant asserted that he had been told that he was under arrest for assault on a minor, but this was not the evidence of the police, nor had he suggested this when the topic was raised in interview.

67. In interview the defendant said that it was possible that DNA would be found on the girl's knickers. He gave an explanation. According to him, he had been lying on his side in the tent reading, when the child arrived pursued by a wasp. She came up to the side of his face and he saw that there was a sticky sweet on her knickers. In an effort both to swat the wasp and remove the sweet, he caused her to stumble into him so that his face was pressed up against her groin. This explanation he repeated at trial.

68. In the event, there was no scientific evidence of matchable DNA on the knickers. There was both a full female profile and a contribution from a male. The knickers gave a positive reaction to a chemical test for saliva, but the same result might have been attributable to urine; it was not possible to say that there was saliva present."

[46] In *R v Clare* the child's account to her mother that the defendant had licked her was admitted in evidence by the trial judge. On appeal the court considered that if the girl's statement to the mother had stood alone, it would have been wrong to admit it, and (if it had been admitted) wrong to allow the case to go to the jury. Hughes LJ stated that "children of three and a half vary a good deal. The jury could

have had no opportunity to assess her. Nor could she have been asked any questions at all; even though at her age there would have been limitations on what could properly be asked as well as on what she could be expected to remember, there would have been some which might have helped assess her evidence ….” Hughes LJ went on to state that “the girl's statement to the mother, however, did not stand alone. It was powerfully supported by (i) the defendant leaving the house without a word, (ii) the remark to the officers about paedophiles and the late appearance of the asserted justification for it, and (iii) the remarkable story of the wasp and the sweet (not found in the tent as he said it would be) which the jury was plainly entitled, having heard him explain it, to reject as absurd. Hughes LJ stated that given this additional material, there was sufficient support for the girl's statement to the mother which was also spontaneous, unprompted and made originally not by way of complaint but simply by way of request for cream. He also stated that there was sufficient means to test and assess what she had said. The appeal in *R v Clare* was dismissed.

[47] In this case the hearsay evidence was not spontaneous or unprompted but it can be seen that it was in reply to simple, open, non-leading questions from MC. We agree that there was no opportunity for the jury to assess Jack or to see Jack responding to any questions. However, there was no issue at trial in relation to Jack’s ability to understand the questions put to him by his mother and there was no suggestion that his mother misunderstood the replies given by him or that Jack was confused in relation to the nature of his replies. The judge proceeded on the basis that the possibility of concoction or distortion by Jack could be disregarded given his age and innocence. There was no challenge to that part of the judge’s ruling in this court or indeed at trial. The possibility of concoction or distortion by MC could be tested by cross examination and in that respect we are satisfied that there was sufficient means to test and assess what MC said had occurred. Furthermore the hearsay evidence did not stand alone. It was supported by (i) the evidence of MC that QD was nervous leaving the flat in a rush as soon as she returned and (ii) by the evidence of MC as to the admission made by QD when the account given by Jack was put to him that evening by telephone. We consider that evidence if accepted was powerful supporting evidence. The judge appreciated that this supporting evidence came from the same witness who was recounting the hearsay evidence but we agree that given this additional material, there was, sufficient support for the Jack's statement to MC for it to be admissible under Article 18(1)(d) of the 2004 Order and for it not to be excluded under Article 30 of that Order or under Article 76 of PACE.

[48] We note that there was no application on behalf of the appellant at the conclusion of all the evidence under Article 29 of the 2004 Order. If there had been then the only matter which had changed since the judge’s initial ruling in relation to the hearsay evidence was that there was no longer support for that evidence from

the evidence of AP. This lack of support was brought about because the prosecution had not pursued the bad character application and the judge had ruled that the evidence of AP could not be used in support of counts two and three. No explanation has been provided for not bringing the bad character application. The judge's ruling was if anything generous to QD. In any event we consider that there was sufficient support for the hearsay evidence in the other respects which we have identified.

[49] We consider that the hearsay evidence was correctly admitted and we dismiss that ground of appeal.

(b) The directions in relation to the hearsay evidence

[50] In *R v Horncastle* [2010] AC 373 the Supreme Court listed as one of the "principal safeguards designed to protect a defendant against unfair prejudice as a result of the admission of hearsay evidence" the requirement for the judge to direct the jury on the dangers of relying on hearsay evidence. We emphasise that the terms of the direction in relation to hearsay evidence should be discussed with counsel prior to closing submissions. Furthermore that it is the obligation of counsel to request such a discussion setting out precisely the suggested terms of the judge's direction.

[51] In *Grant v The State* [2007] 1 AC 1 Lord Bingham giving the judgment of the Privy Council in relation to a statutory scheme similar to 2004 Order stated at paragraph 21(4) -

> "(4) *The trial judge must give the jury a careful direction on the correct approach to hearsay evidence*. The importance of such a direction has often been highlighted: see, for example, *Scott v. The Queen* [1989] AC 1242, 1259 and *Henriques v The Queen* [1991] 1 WLR 242, 247. It is not correct to say that a statement admitted under section 31D is not evidence, since it is. *It is necessary to remind the jury, however obvious it may be to them, that such a statement has not been verified on oath nor the author tested by cross-examination*. But the direction should not stop there: *the judge should point out the potential risk of relying on a statement by a person whom the jury have not been able to assess and who has not been tested by cross-examination, and should invite the jury to scrutinise the evidence with particular care.* It is proper, but not perhaps very helpful, to direct the jury to give the statement such weight as they think fit: presented with an apparently plausible statement, undented by cross-examination, by an author whose reliability and honesty the jury have no extraneous

> reason to doubt, the jury may well be inclined to give it greater weight than the oral evidence they have heard. *It is desirable to direct the jury to consider the statement in the context of all the other evidence,* but again the direction should not stop there. *If there are discrepancies between the statement and the oral evidence of other witnesses, the judge (and not only defence counsel) should direct the jury's attention specifically to them. It does not of course follow that the omission of some of these directions will necessarily render a trial unfair, but because the judge's directions are a valuable safeguard of the defendant's interests, it may*" (emphasis added).

On the basis of those parts in *Grant v The State* to which we have added emphasis we consider that although the directions should be crafted for each particular case, the jury should ordinarily be directed by the judge to (a) scrutinize the evidence with particular care (b) to take into consideration that the statement was not made on oath (c) to consider the lack of opportunity to see the witness's statement tested under cross-examination and (d) to consider the lack of opportunity to observe the demeanour of the person making the statement. Furthermore where the credibility of the absent witness has been the subject of a challenge under Article 28, the jury need to be reminded of the challenge and of any discrepancy or weakness revealed.

[52] The judge directed the jury that the account given by Jack to MC was hearsay evidence carefully explaining what was meant by hearsay evidence. He emphasised that this description was "very important when you are dealing with a case to have that clear in your mind." He also emphasised that there was no direct evidence whatsoever of any sexual assault on Jack. He stated that Jack was the only person who could give the direct evidence but that he was not a witness. He told the jury that MC did not witness the assault and she would have no idea an assault took place if it was not for what Jack had told her. He directed the jury that they were determining the case on what MC says she was told by Jack, he told them that this part of his direction was "of fundamental importance." He told them of the handicap the defence faced through not having had opportunity to cross examine Jack and he illustrated the importance of that by stating that the defence was not in a position to cross-examine about the details, how it happened "so that the jury can assess, having heard the cross-examination from the source, that is the person who says that they were assaulted, how strong or otherwise they think the complaint is." He told them that in this case "you can't do that." He also told them that "You can't test it with the person who was assaulted." In relation to the evidence of MC the judge reminded the jury as to the inconsistency between her earlier account that Jack was naked when she returned from work and her evidence that he was in his pyjamas. The judge also directed the jury to bear in mind that children can

misunderstand what is happening when it comes to sexual things and that a child's description may be misleading.

[53] The direction did not remind the jury that Jack's statement was not made on oath but it did make clear that the jury were deprived of the opportunity of assessing Jack. It did not use the word demeanour though we consider that to have been implicit. We consider that the jury were under no misapprehension that they had to assess not only the reliability of the evidence of MC but also the reliability of the statements made by Jack. We do not consider that the jury were left with the impression that if they accepted MC's account of what Jack had said they should go on to convict QD without scrutinising Jack as the maker of the statement. We note that there was no requisition to the judge in relation to this aspect of his charge, for the significance of which see paragraph [20] of *R v BZ* [2017] NICA 2. The omission of a direction does not necessarily render a trial unfair or give rise to a concern as to the safety of a conviction. This was a short trial and given the comprehensive nature of all the directions given by the judge we do not entertain any concerns about the overall sufficiency of the directions and the safety of the conviction.

(c) Refusal to sever count one

[54] We propose to deal with this and the further grounds of appeal in short form. This court will interfere with the exercise of a discretion refusing to sever only if it can be shown that the judge took into account irrelevant considerations, or ignored relevant ones, or arrived at a manifestly unreasonable decision. We consider that it was well within the judge's discretion to refuse to sever count one. We dismiss this ground of appeal.

(d) Refusal to discharge the jury

[55] Following the grant of a direction on counts one and four the defence unsuccessfully applied for the jury to be discharged on the grounds that they would not be able to discharge their duty faithfully, having heard evidence from AP on counts no longer before the jury. The judge indicated that he had considered this aspect himself, and rejecting the application, indicated that the jury would be properly charged as to what they may take into account in support of the remaining charges. The judge then gave what we consider to be an emphatic direction that the jury were not to take into account the evidence of AP in relation to counts two and three and that "her evidence is not in the case." As we have indicated if the application for bad character evidence had been pursued successfully by the prosecution that was a direction which would not have been given. In any event we consider that given that clear direction the judge could not be faulted for not discharging the jury. We dismiss this ground of appeal.

(e) Directions in relation to the evidence of AP

[56] The initial direction to the jury was not as emphatic as the direction given to the jury in relation to the evidence of AP in answer to a question from the jury some 45 minutes after they started their deliberations. However, there was no requisition in relation to the initial direction and after the emphatic direction the jury continued to deliberate for three and a half hours or two and a half hours if one hour is taken off for lunch. We have no concerns about the sufficiency of the judge's directions in relation to AP and as we have explained those directions could have been overly generous to QD.

Conclusion

[57] We are satisfied that the conviction is safe and dismiss the appeal.